PROCEEDINGS

OF THE

AMERICAN BRANCH

OF THE

INTERNATIONAL LAW ASSOCIATION

2015-2019

http://ila-americanbranch.org

Louise Ellen Teitz, *Editor*
Russell Childree and Gifany Ten-Ten L. Tongohan, *Assistant Editors*
September 2020

TABLE OF CONTENTS

The American Branch gratefully acknowledges the assistance in the preparation of the Proceedings of Tatiana Maria Gomez, Roger Williams University School of Law Class of 2021; Tabitha Crawford, Membership Officer, American Branch of the International Law Association and Program Coordinator, Washington University School of Law; and Madaline George, Assistant Program Manager, American Branch of the International Law Association and Senior Fellow, Washington University School of Law.

I. THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

LEADERSHIP

(as of September 2020)

CHAIR OF THE EXECUTIVE COMMITTEE

David P. Stewart

PRESIDENT

Leila N. Sadat

VICE PRESIDENTS

Christina M. Cerna
Paul R. Dubinsky
Chiara Giorgetti
Philip M. Moremen
Michael P. Scharf

HONORARY VICE PRESIDENTS

Charles N. Brower
Valerie Epps
Edward Gordon
Gary N. Horlick
Cynthia Lichtenstein
John F. Murphy
James A.R. Nafziger
Ved P. Nanda
John E. Noyes
George K. Walker
Ruth G. Wedgwood

SECRETARY

M. Imad Khan

TREASURER

Houston Putnam Lowry

AT-LARGE MEMBERS OF THE BOARD OF DIRECTORS
(as of September 2020)

William Aceves
David Attanasio
Jack M. Beard
Andre K. Bjorklund
Amity Boye
James H. Boykin
Ronald A. Brand
Aaron X. Fellmeth
Martin Flaherty
Andrea Joy Harrison
Sherry Holbrook
Scott Horton
Larry D. Johnson
Gabor Rona
Steven Schneebaum
Milena Sterio
Louise Ellen Teitz
Nancy M. Thevenin
Jennifer Trahan
Peter K. Yu

CO-DIRECTORS OF STUDIES
Peter K. Yu
Jennifer Trahan

MEMBERSHIP OFFICER
Tabitha Crawford-Obialo

LEADERSHIP

(as of October 2014)

CHAIR OF THE EXECUTIVE COMMITTEE

John E. Noyes

PRESIDENT

Ruth Wedgwood

PRESIDENT ELECT

David P. Stewart

VICE PRESIDENTS

Catherine Amirfar
Paul R. Dubinsky
Gary N. Horlick
Philip M. Moremen
Leila N. Sadat

HONORARY VICE PRESIDENTS

Charles N. Brower
John Carey
Valerie Epps
Edward Gordon
P. Nicholas Kourides
Luke T. Lee
Cynthia Lichtenstein
John F. Murphy
James A.R. Nafziger
Ved P. Nanda
Alfred P. Rubin
Robert B. von Mehren

HONORARY SECRETARY

Amity R. Boye

HONORARY TREASURER

Houston Putnam Lowry

AT-LARGE MEMBERS OF THE BOARD OF DIRECTORS
(as of October 2014)

William Aceves
Catherina Amirfar
Roberto Aguirre Luzi
Kelly D. Askin
Andrea K. Bjorklund
Amity R. Boye
Ronald A. Brand
Christina M. Cerna
Paul R. Dubinsky
Aaron X. Fellmeth
Steven A. Hammond
Garry N. Horlick
Scott Horton
Larry D. Johnson
Karen A. Hudes Spergel
Philip M. Moremen
John E. Noyes
Houston Putnam Lowry
Anibal Sabater
Leila N. Sadat
Michael P. Scharf
David P. Stewart
Louise Ellen Teitz
Nancy Thevenin
Susan Tiefenbrun
Jennifer Trahan
Vincent Vitkowsky
George K. Walker
Ruth Wedgwood
Peter K. Yu

CO-DIRECTORS OF STUDIES
Andrea K. Bjorklund
Aaron X. Fellmeth

LEADERSHIP

(as of October 2016)

CHAIR OF THE EXECUTIVE COMMITTEE

Ruth Wedgwood

PRESIDENT

David P. Stewart

PRESIDENT ELECT

Leila N. Sadat

VICE PRESIDENTS

Christina M. Cerna
Paul R. Dubinsky
Philip M. Moremen
Anibal M. Sabater
Michael Scharf

HONORARY VICE PRESIDENTS

Charles N. Brower
John Carey
Valerie Epps
Edward Gordon
Gary N. Horlick
P. Nicholas Kourides
Cynthia Lichtenstein
John F. Murphy
James A.R. Nafziger
Ved Nanda
John E. Noyes
Susan W. Tiefenbrun
George K. Walker

HONORARY SECRETARY

Amity R. Boye

HONORARY TREASURER

Houston Putnam Lowry

AT-LARGE MEMBERS OF THE BOARD OF DIRECTORS
(as of October 2016)

William Aceves
Jack M. Beard
Andrea Bjorklund
James H. Boykin
Ronald A. Brand
Aaron X. Fellmeth
Chiara Giorgetti
Haider Hamoudi
Andrea Harrison
Sherry Holbrook
Scott Horton
Larry D. Johnson
Arnold N. Pronto
Gabor Rona
Steven M. Schneebaum
Milenia Sterio
Louise Ellen Teitz
Nancy Thevenin
Jennifer Trahan
Peter K. Yu

CO-DIRECTORS OF STUDIES
Chiara Giorgetti
Aaron X. Fellmeth

PATRONS

Charles N. Brower
Lee Buchheit
David D. Caron (deceased)
Christina M. Cerna
Edward Gordon
Anthony Larson
Cynthia C. Lichtenstein
Houston Putnam Lowry
Roberto J. Aguirre Luzi
John F. Murphy
James A. R. Nafziger
Ved Nanda
Andre Newburg
John E. Noyes
Aníbal M. Sabater
Charles D. Siegal (deceased)
Paul Stephan
David P. Stewart
Ruth Wedgwood

The American Branch is immensely grateful for the support of its Patrons. Patrons, who contribute at least $5,000.00 to the American Branch, become life members of the Branch.

ILA COMMITTEES AND STUDY GROUPS

ILA COMMITTEES
(as of September 2020)

COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW

Chair:	Mia Swart
Rapporteur:	Charles Jalloh
ABILA Member:	Leila N. Sadat

GLOBAL HEALTH LAW

Co-Chairs:	Frederick Abbott Brigit C. A. Toebes
Co-Rapporteurs:	Xavier Seuba Ellen t' Hoen
ABILA Members:	Frederick Abbott Ruth Atherton

HUMAN RIGHTS IN TIMES OF EMERGENCY

Co-Chairs:	Christina M. Cerna Stefan Kadelbach
Co-Rapporteurs:	Marie Joseph Ayissi Ioana Cismas Niels Peterson
ABILA Members:	Christina M. Cerna William Aceves Aaron X. Fellmeth

IMPLEMENTATION OF THE RIGHTS OF INDIGENOUS PEOPLES

Co-Chairs:	Dalee Dorough Willem van Genugten
Co-Rapporteurs:	Federico Lenzerini Timo Koivurova
ABILA Members:	Dalee Dorough Lorie Graham Siegfried Wiessner

INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW

Chair:	Toshiyuki Kono
Co-Rapporteurs:	Pedro A De Miguel Asensio Axel Metzger
ABILA Members:	Rochelle C. Dreyfuss Jane C. Ginsburg Marketa Trimble Peter K. Yu

INTERNATIONAL COMMERCIAL ARBITRATION

Chair:	Filip de Ly
Co-Rapporteurs:	Matthew Gearing Georgios Petrochilos
ABILA Members:	Charles N. Brower Philip O'Neill Louise Ellen Teitz Paul R. Dubinsky (alternate)

INTERNATIONAL LAW AND SEA LEVEL RISE

Chair:	Davor Vidas
Co-Rapporteurs:	Maxine Burkett David Freestone
ABILA Members:	Maxine Burkett Elizabeth Burleson Anita Halvorssen (alternate) Sean Murphy J. Ashley Roach

INTERNATIONAL MONETARY LAW

Chair:	William Blair
Vice-Chairs:	Antonio Sainz de Vicuña y Barroso Thomas Baxter, Jr.
Rapporteur:	David Gross
ABILA Members:	Thomas Baxter, Jr. Lee Buchheit James Freis David Gross Cynthia Lichtenstein Ernest Patrikis

INTERNATIONAL PROTECTION OF CONSUMERS

Chair:	Claudia Lima Marques
Rapporteur:	Dan Wei
ABILA Member:	James Nehf

INTERNATIONAL SECURITIES REGULATION

Chair: Ida Levine

Rapporteur: Paul Stevens

ABILA Members: Edward Fleischman
Cynthia Lichtenstein
Paul Stevens

NUCLEAR WEAPONS, NON PROLIFERATION & CONTEMPORARY INTERNATIONAL LAW

Chair: Jonathan L. Black-Branch

Rapporteur: Dieter Fleck

ABILA Member: Larry D. Johnson

PARTICIPATION IN GLOBAL CULTURAL HERITAGE GOVERNANCE

Chair: Andrzej Jakubowski

ABILA Members: James A.R. Nafziger
Alison Renteln

PROCEDURE OF INTERNATIONAL COURTS AND TRIBUNALS

Co-Chairs:	Shotaro Hamamoto Helene Ruiz Fabri Philippe Sands
Co-Rapporteurs:	Filippo Fontanelli Arman Sarvarian
ABILA Members:	Jeffrey Dunoff Chiara Giorgetti

PROTECTION OF PRIVACY IN PRIVATE INTERNATIONAL AND PROCEDURAL
LAW

Chair:	Burkhard Hess
Co-Rapporteurs:	Cristina M. Mariottini Jan von Hein
ABILA Members:	Cristina M. Mariottini David P. Stewart Louise Ellen Teitz

ROLE OF INTERNATIONAL LAW IN SUSTAINABLE NATURAL RESOURCE MANAGEMENT FOR DEVELOPMENT

Chair:	Nicolaas J. Schrijver
Rapporteur:	Marie-Claire Cordonier-Segger
ABILA Members:	Charles Marvin Ved Nanda

RULE OF LAW AND INTERNATIONAL INVESTMENT LAW

Chair: August Reinisch

Rapporteur: Andreas R. Ziegler

ABILA Member: Jose Alvarez

SPACE LAW

Chair: Maureen Williams

Rapporteur: Stephan Hobe

ABILA Members: Rafael Moro Aguilar
Matthew Schaefer
Frans von der Dunk

SUBMARINE CABLES AND PIPELINES UNDER INTERNATIONAL LAW

Chair: J. Ashley Roach

ABILA Members: Kent D. Bressie
Alice Colarossi
Leonard de Juvigny
Onni Irish

SUSTAINABLE DEVELOPMENT AND THE GREEN ECONOMY IN INTERNATIONAL TRADE LAW

Chair:	Mary Footer
Co-Rapporteurs:	Locknie Hsu Meredith Kolsky Lewis
ABILA Members:	Gary N. Horlick Amelia Porges Robin Morris Collin (alternate) Paolo Davide Farah (alternate)

USE OF FORCE: MILITARY ASSISTANCE ON REQUEST

Co-Chairs:	Claus Kress Vera Rusinova
Co-Rapporteurs:	James Green Tom Ruys
ABILA Members:	Jack M. Beard Mary Ellen O'Connell Jennifer Trahan

ILA STUDY GROUPS

BUSINESS AND HUMAN RIGHTS

Chair: Michael K. Addo

Co-Rapporteurs: Anthony Crockett
Rae Lindsay

ABILA Member: Beth Stephens

CYBERSECURITY, TERRORISM, AND INTERNATIONAL LAW

Chair: David Fidler

Co-Rapporteurs: Russell Buchan
Emily Crawford

ABILA Members: David Fidler
Kristen E Eichensehr
Mary Ellen O'Connell

DUE DILIGENCE IN INTERNATIONAL LAW

Chair: Duncan French

Rapporteur: Tim Stephens

ABILA Member: Zarizana Abdul Aziz

PREFERENTIAL TRADE AGREEMENTS

Co-Chairs:	Peter-Tobias Stoll Andreas R. Ziegler
Rapporteur:	Freya Baetens Christian Delpiano
ABILA Members:	Paolo Farah Gary N. Horlick Amelia Porges

PRINCIPLES ON THE ENGAGEMENT OF DOMESTIC COURTS WITH INTERNATIONAL LAW

Chair:	Andre Nollkaemper
Co-Rapporteurs:	Yuval Shany Antonios Tzanakopoulos
ABILA Members:	Curtis A. Bradley Ralf Michaels Anthea Roberts

SOCIALLY RESPONSIBLE INVESTMENTS

Chair:	Ida Levine
Rapporteur:	Myriam Senn
ABILA Member:	Barbara Woodward

SOVEREIGN INSOLVENCY

Chair: Philip Wood

Co-Rapporteurs: Brian Hunt
Michael Waibel

ABILA Members: Elizabeth L. Broomfield
Lee Buchheit
Sean Hagan
Cynthia Lichtenstein
Jeremiah Pam
Hal Scott

TEACHING OF INTERNATIONAL LAW (INTEREST GROUP)

Chair: John Gamble (ABILA Member)

THE USE OF DOMESTIC LAW PRINCIPLES FOR THE DEVELOPMENT OF INTERNATIONAL LAW

Chair: Maurice Mendelson

Rapporteur: Alejandro Leyda Carballo

ABILA Member: Arnold Pronto

THE CONDUCT OF HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW–CHALLENGES OF 21ST CENTURY WARFARE

Chair: T.D. Gill

Co-Rapporteurs: Robin Geiss
Robert Heinsch

ABILA Members: Geoffrey S. Corn
Michael Schmitt

II. INTERNATIONAL LAW WEEKENDS

INTERNATIONAL LAW WEEKEND 2014

International Law Weekend 2014 was held at the House of the Association of the Bar of the City of New York at 42 West 44th Street, New York City on October 23, 2014, and Fordham University School of Law on October 24 to 25, 2014. The theme of the Weekend was "International Law in a Time of Chaos." All panels were open without charge to members of the American Branch of the International Law Association, International Law Students Association, ABCNY, staff of the United Nations and Permanent Missions, and students due to the generosity of co-sponsoring organizations.

The Weekend examined how and why knowledge of international law is increasingly relevant and an important professional tool for virtually every lawyer. The Panels explored how international law principles and instruments are involved in domestic areas such as civil litigation, commercial transactions, trade regulation, family law, criminal prosecution, intellectual property, and dispute settlement.

The opening panel was held on Thursday evening, October 23, 2014, and was entitled "Law in a Time of Chaos." The panel was chaired by Ruth Wedgwood, and included Michael Farbiarz, Alexander Mirtchev, Nancy Okail, and James Traub.

Panels on Friday morning, October 24, 2014, were:

- U.S. Surveillance and Human Rights (chaired by Peter Margulies)
- Corporate Internal Investigations: International Aspects (chaired by David Zornow)
- European Union: Challenge or Chaos? (chaired by Elizabeth F. Defeis)
- International Adjudication in the 21st Century (chaired by Cesare Romano)
- Climate Geoengineering Governance: The Role of International Law (chaired by Andrew Strauss)
- Update on the International Criminal Court's Crime of Aggression: Considering Crimea (chaired by Jennifer Trahan)
- Third-Party Liability Regimes in High-Tech Industries When the Chaos of Massive, Catastrophic Accident Ensues: Space, Cyber, and Nuclear (chaired by Matthew Schaefer)
- Private International Law: Year in Review (chaired by David P. Stewart)
- "Hate Speech" and the Human Right to Freedom of Expression (chaired by Aaron X. Fellmeth)
- Role of Islamic Law in Conflict Mitigation (chaired by Robert E. Michael)

The Keynote Address entitled "Democratization of Foreign Policy and International Law, 1914-2014," was delivered by Lori Damrosch, President of the American Society of International Law.

The Keynote Address was followed by panels entitled:

- Pathways to Employment in International Law (chaired by Lesley A. Benn)
- Global Regulation of Financial Institutions by the U.S. Internal Revenue Service: The Unintended (?) Consequences of the Overreach of the FATCA, the Foreign Account Tax Compliance Act (chaired by Bruce W. Bean)
- Implementation and Realization of the Hague Convention on the Protection of Children
- Nuclear Non-Proliferation and Disarmament: U.S. Policy and International Law (chaired by Jack M. Beard)
- Potential Chaos on the Oceans: Baseline Issues (chaired by George K. Walker)
- Self-Determination, Secession, and Non-Intervention in the Age of Crimea and Kosovo (chaired by Valerie Epps)
- The Trans-Pacific Partnership Agreement: Challenges and Opportunities Ahead (chaired by Jose Antonio Rivas)
- International Investment Arbitration and the Rule of Law (chaired by Donald Francis Donovan)
- Chaos and Impunity: Core Crimes and Sitting Heads of State (chaired by Jordan J. Paust)
- Copyright and Human Rights in the Digital Environment (chaired by Peter K. Yu)

On Friday evening, October 24, 2014, the Permanent Mission of South Africa to the United Nations hosted a gala reception. The American Branch is grateful to the South Africa Mission for its hospitality and generosity.

Saturday October 25, 2014 featured an array of panels:

- Responsibility and Immunity in a Time of Chaos (chaired by Larry D. Johnson)
- Corporate Governance: A New Vector for Effective Transnational Labor Standards Enforcement? (chaired by Sonia E. Rolland)
- Current International Legal Issues in the Organization of American States (chaired by David P. Stewart)
- Supreme Law of the Land, or Something Less? The Changing Status of Treaties in United States Law (chaired by Gregory H. Fox)
- The Political Economy of Cross-Border Anti-Bribery & Corruption Laws and Enforcement (chaired by Benjamin Gruenstein)

- Balancing Territorial Integrity and Self-Determination Under International Law (chaired by Ved Nanda)
- The Developing Law of Public-Private Partnerships for Security and Resilience (chaired by Susan Ginsburg)
- Bitcoins (chaired by Ruth Wedgwood)
- New Developments in Human Rights at the United Nations (chaired by Christina M. Cerna)
- International Organizations Caught in Crossfire (chaired by Tom Syring)
- Emerging Trends in International Criminal Justice
- Protection of Civilians by Peace Operations: Current Policy and Practice (chaired by Matthew Hoisington)
- The TransAtlantic Trade and Investment Pact: Will It Succeed? (chaired by Paul Stephan)
- Addressing the Internal Challenges that Affect Diversity in the International Legal Field (chaired by Isabel Fernandez de la Cuesta)
- How Free Should Trade Be? (chaired by Matthew Heiman)
- Careers in International Human Rights, International Development, and International Rule of Law (chaired by Kathleen Doty)

The American Branch extends its gratitude to the 2014 ILW Program Committee composed of: Tamara Cummings-John (United Nations Office of Legal Affairs), Davis Robinson (Former Legal Adviser, U.S. Department of State), Stephen Shapiro (BSR Investments), Vivian Shen (International Law Students Association), David P. Stewart (American Branch of the International Law Association), and Ruth Wedgwood (American Branch of the International Law Association).

The American Branch also gratefully acknowledges the generous support of the following sponsors of 2014 ILW: American Bar Association; American Society of International Law; American University Washington College of Law; Arizona State University School of Law; Association of the Bar of the City of New York; European Affairs Committee of the Association of the Bar of the City of New York; BitFury; Boston University School of Law; Brill/Martinus Nijhoff; Cardozo Law School; Case Western Reserve University School of Law; Columbia Law School; Cornell Law School; Debevoise & Plimpton LLP; Federalist Society; Fletcher School of Law & Diplomacy, Tufts University; Foley Hoag LLP; Georgetown University Law Center; George Washington Law School; Human Rights First; International & Non-J.D. Programs. Fordham University School of Law; Johns Hopkins University, School of Advanced International Studies; Leitner Center for International Law and Justice, Fordham University School of Law; Lucinda Low and Daniel Magraw; New York University School of Law; New York University School of Professional Studies, Center for Global Affairs; Oxford University Press; Princeton University, James Madison Program; Princeton University, Law and Public Affairs Program;

Rutgers School of Law – Camden; School of Advanced International Studies, Johns Hopkins University; St. John's University Law School; University of Maine School of Law; University of Nebraska Law School; University of Pennsylvania Law School; University of Virginia School of Law; Wachtell, Lipton, Rosen & Katz; Washington and Lee School of Law; and Yale Law School.

INTERNATIONAL LAW WEEKEND 2014
FORDHAM UNIVERSITY SCHOOL OF LAW
OCTOBER 24, 2014

KEYNOTE ADDRESS

DEMOCRATIZATION OF FOREIGN POLICY AND INTERNATIONAL LAW, 1914-2014

BY LORI F. DAMROSCH

Hamilton Fish Professor of International Law and Diplomacy, Columbia University
and President, American Society of International Law

I. Introduction

I am honored to follow in the footsteps of previous presidents of the American Society of International Law who have spoken on the occasion of the International Law Weekend in New York. Some of my predecessors generated truly memorable sound bites in their keynotes, which live on in the Proceedings of the American Branch of the International Law Association and are remembered and quoted in international law classrooms. It was at the podium on International Law Weekend in November 1992 that my esteemed and beloved Columbia mentor Louis Henkin uttered one of his most famous sentences: "Away with the 'S'word!" The S-word, of course, is sovereignty. Under the title, "The Mythology of Sovereignty,"[1] Henkin explained:

> It is time to bring sovereignty down to earth ... cut it down to size, ... repackage it, perhaps even rename it. The quixotic among us might gird for a campaign to extirpate the term and forbid its uses in polite political and intellectual company or in international law. Away with the 'S'word!

I pay modest homage today to Henkin's deconstruction of sovereignty, by invoking the concept of a democratic people as the holders of popular sovereignty. My project is to trace a century-long trajectory of greater and greater popular participation in the making of foreign policy decisions and the implications of that trend for our field of international law.

From a baseline of 1914, we can plot democratization along several different trend lines. The starting point would be the "sovereigns," if I may call them that, on their respective thrones or other metaphoric seats of power in 1914. In Christopher Clark's valuable study, The Sleepwalkers:

[1] Louis Henkin, Notes from the President: The Mythology of Sovereignty, ASIL Newsletter (March-May 1993).

How Europe Went to War in 1914,[2] which I purchased in an airport bookshop on a trip to Central Europe this spring, we find three evocative photographs beginning on the facing page for a heading "Sovereign Decision-Makers."[3] The first shows Kaiser Wilhelm II and Tsar Nicholas II in a carriage, wearing the uniforms of each other's countries.[4] The next page has a close-up of Kaiser Wilhelm,[5] followed by King Edward VII,[6] father to King George V who would accede to the British throne in 1910, followed by an illuminating discussion of the genealogical ties among the monarchical club and comparisons of the degrees to which the three monarchical cousins had or had not been brought under constitutional and parliamentary restraints.[7] Our photo gallery would also show Emperor Franz Joseph of Austria-Hungary,[8] along with military and civilian leaders in each of these countries,[9] and of course representatives of the decision-makers in France's Third Republic,[10] as portrayed, for example, in the photographs reprinted in Margaret MacMillan's The War That Ended Peace: How Europe Abandoned Peace for the First World War[11] – which I found at the bookshop of the Australian War Museum in Canberra, just after having visited its sobering exhibit on Gallipoli and paid respects at the wall decorated with poppies where the names of the war dead are inscribed.

Our first trend line for democratization, then, would be the processes already well underway in 1914 and much accelerated by the Great War, of transformation from a world in which a small and closed club of European monarchs took their decisions largely behind closed doors, to one in which monarchical sovereignty gives way to constitutional governance.

A second trend line involves the dramatic expansion of the voices that could enjoy at least some degree of participation in choosing the leaders of their countries. Recall that in 1914 the women's suffrage movement was still far from achieving its goals in most European countries. According to Karen Knop's valuable study, Diversity and Self-Determination in International Law, women were years or even decades away from achieving the vote in any of the countries that went to war in 1914.[12] In this country, the Nineteenth Amendment giving women the right to vote was not ratified until 1920 (though a dozen American states had opened up the vote to women by 1917).[13] Britain partially enfranchised women by the end of the World War but not fully until 1928.[14] Knop

[2] Christopher Clark, The Sleepwalkers: How Europe Went to War in 1914 (2012).
[3] Id. at 170.
[4] Id. at 171.
[5] Id. at 172.
[6] Id.
[7] Id. at 173.
[8] Margaret MacMillan, The War That Ended Peace: How Europe Abandoned Peace for the First World War (2013), photo inserts between pp. 336-37, photo 5.
[9] Id., photo 18 showing Helmut von Moltke, chief of the German General Staff; photo 23 showing Herbert Asquith, British prime minister (1908-1916); and photo 25 showing Sir Edward Grey, British foreign secretary (1905-1916).
[10] Id., photo 17 showing General Joseph Joffre, chief of the French general staff, and President Raymond Poincaré.
[11] MacMillan, supra note 8.
[12] Karen Knop, Diversity and Self-Determination in International Law 284-85 (2002).
[13] Id. at 284 n. 36.
[14] Id. at 285.

gives the following dates for women's suffrage in a selection of countries: Denmark (1915), Austria (1918), Poland (1918), Germany (1919), and Hungary around the same time, but France, Italy, Japan, and Yugoslavia not until the 1940s.[15] The remarkable story that Knop tells in her book is of the interactions among self-determination movements in the interwar period and women's suffrage movements and women's peace movements in the same time frame,[16] with women in many cases being given the right to vote in international plebiscites to determine the future status of self-determination units, even before their sisters enjoyed the corresponding right to vote in the metropolitan powers.[17]

With self-determination we have our third trend line: the emergence from colonial domination of a very large number of new subjects of international law and establishment of new states, with the possibility that the peoples of those states could find their own voices in international relations and in international law. Much of that story belongs to the period following the Second World War, and I can only allude to it briefly today. Suffice it to say that the handful of monarchs who ruled Europe in 1914 also dominated non-European continents, thereby embroiling not just Europe but the world as a whole in the conflagration that began in the summer of 1914. After the Great War, the Wilsonian self-determination program and its embodiment in the Versailles Treaty led to the creation of a number of new states who were then admitted as members of the League of Nations. Even at its height, however, the League had only 58 members, as compared to the 193 members of the United Nations today.

The question of democratization in relation to the system of international organization is a vast problem beyond the scope of my remarks today. It is relevant, however, to the linkage between decision-making authority at the international and national levels, with respect to the main problem that I will address here, namely the democratization of foreign policy decisions with respect to international peace and security. Under the international security structure established after the Second World War, the U.N. Security Council is vested with principal responsibility for the maintenance of international peace and security. Many today consider the Security Council an indefensibly undemocratic body. There may well be merit to the demands for structural reform to allow for a broader-based representation within the Security Council. Even so, until a new system is devised and adopted, this imperfect organ is where much of the deliberation and decision-making over peace and security takes place.

These three main trend lines – transformation of monarchies into constitutional systems; expansion of political participation across numerous societies, and the emergence of newly-independent states – intersect with other century-long developments that have likewise worked profound changes how foreign policy decisions are taken and how international law is made and applied. A

[15] Id. at 285 n. 45.

[16] Id. at 284-99. For an illustration of one of the leading figures, see MacMillan, supra note [9], photo 14, showing Bertha von Suttner, "one of the most prominent figures in the growing international peace movement before the Great War."

[17] Knop, supra note 12, at 284-309.

more complete narrative would also take account of how domestic civil rights movements – for example in this country – intersected with the international human rights movement. As historians such as Mary Dudziak have documented, the Cold War confrontation gave powerful motivation for the U.S. government to demonstrate commitment to the advancement of the civil rights of African Americans in this country.[18]

We would also want to examine, in more detail than is possible here, the significance in different societies and at different points in time, of compulsory military service, with universal conscription (at least of men) even in peacetime having been the norm in most countries. As Margaret MacMillan reports (in one of a dozen index entries on conscription), "In the late 19th century every European power except Britain had a conscript army, with a small proportion of their trained men actually in uniform and a far larger number back in civilian society as reserves. When war threatened huge armies could be called into being in days."[19] Only Britain, protected by the seas, relied on a volunteer army.[20] In Britain, and in constitutional systems on the British model, conscription has required affirmative approval from parliament.[21]

In the histories of how and why Europe went to war in 1914, mobilization of the armies figures prominently in the narratives. Clark's Sleepwalkers characterizes the Russian general mobilization as "one of the most momentous decisions of the July crisis."[22] MacMillan gives us a photo taken in Berlin on July 31, 1914, with a caption reading, "On 31 July 1914 Germany took the first step towards general mobilisation and so to making war on France and Russia. Standing outside the old arsenal in Berlin, a lieutenant announces the state of 'imminent threat of war' in the traditional way."[23] Another photo shows families in Berlin waving good-bye in August 1914: its caption reads: "These troops from the reserves may well have been heading for the front lines, something the French had not counted on. As a result, French armies and the tiny British Expeditionary Force faced a stronger German attack than they had expected."[24]

Let's move ahead to a much later point in the 20th century, where conscription and democratic politics interacted in a different way. In the generation of which I am a part, the fact that young men were drafted in large numbers to serve in the Vietnam War, and resistance to the draft in that generation, were among the reasons for the adoption of the 26th Amendment to the U.S. Constitution in 1971, in which the voting age for all elections was lowered from 21 to 18. (1971 happens to have been the year that I turned 18, so I could cast my first vote in the 1972 presidential primary.) The 26th Amendment enfranchised a segment of the population, 18- to 21-year-olds, that

[18] Mary Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (2000).
[19] MacMillan, supra note 8, at xxvi.
[20] Id. at 296.
[21] See Lori F. Damrosch, The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative Powers, in Democratic Accountability and the Use of Force in International Law 39, 42-45 (Charlotte Ku & Harold K. Jacobson eds. 2002).
[22] Clark, supra note 2, at 509.
[23] MacMillan, supra note 8, photo 29.
[24] Id., photo 34.

up until that time had been subject to compulsory military service without having been able to vote for or against the elected officials who would send them to fight abroad. (Of course, only men were subject to the draft then, and that discrimination between men and women has persisted in the selective service registration system even though conscription is no longer in effect.) Now, in the United States and many other countries, military service is voluntary, which is a relevant factor in the political context for taking decisions to use force.

Before we leave the 1914 era and move to the segment of the century within the memories of most of us here, I would like to illustrate how civilians of the time anticipated the possibility of war. MacMillan gives us a photo showing Greek boy scouts training in first aid, with this caption: "All across Europe, civilians were urged to emulate the military and demonstrate such qualities as discipline, sacrifice and patriotism. Scouts and cadets were a manifestation of militarism. These boys in the Balkans also show the growing readiness for war in that troubled part of the world."[25] The next photo (again from MacMillan's book) shows a festival celebrating Joan of Arc: the caption observes that such commemorations of great historical figures helped to fuel intense nationalism in many European societies – the irony here being that Joan of Arc had "fought against France's new friend Britain."[26]

A final photograph from this period shows the Archduke Franz Ferdinand and his wife Sophie in Sarajevo on June 28, 1914, just before their assassination by Gavrilo Princip (shown in the inset in the upper corner).[27]

II. Main Themes for Democratization of Foreign Policy in the Current Period

I would now like to turn to the more recent part of our century-long period and take up one particular set of situations in which the demand for democratic decision-making asserts itself most strongly, namely the decision to commit national military power to an international military coalition. We could take a narrative arc that begins with Iraq's invasion of Kuwait in August of 1990 and the international military response of January 1991, then continues through the attacks of September 11, 2001 and the subsequent international intervention in Afghanistan, and then the renewal of military action in Iraq in 2003, and then the brink of a military intervention in Syria in after the chemical weapons attacks of last year, and finally the military engagement involving more than 20 coalition partners cooperating to suppress the so-called Islamic State of Iraq and Syria today. This selection from among the many military interventions of the last 25 years can illustrate six key propositions about democratic participation in foreign policy decisions and about the relevance of international law to those decisions:[28]

(1) Parliaments, and the people they represent, have been demanding a greater role in decisions

[25] Id., photo 15.
[26] Id., photo 16.
[27] Id., photo 28.
[28] This section of the lecture draws on Lori F. Damrosch, Coalitions of the (Un)willing: Iraq, Afghanistan, and Constitutional Decisions for War (unpublished work-in-progress).

to make external military commitments.
(2) Governments have become more inclined to accede to these demands, not only politically in relation to specific conflicts, but also by accepting the need for improved constitutional arrangements to enhance parliamentary involvement.
(3) Constitutional changes are in fact discernible in the direction of consolidating constitutional requirements for parliamentary participation.
(4) Parliaments and public opinion are increasingly concerned to connect constitutional decisions on war powers with the international legal appraisal of a military commitment.
(5) Courts are increasingly being asked to rule on the constitutionality of military engagements, or their compatibility with international law, or both, and in some cases have constrained the executive from supporting military actions that fall short of constitutional or international norms.
(6) All of the foregoing phenomena are noticeably affected by corresponding developments in other constitutional democracies.

Until recently, relatively few countries have had a clearly established constitutional rule on whether parliament is entitled to be consulted, to deliberate, and to participate affirmatively in decisions about the use of military force abroad. For example, when the first Iraq war was about to begin in January of 1991, the U.S. Congress deliberated and voted for an authorization for military force in accordance with its constitutionally-mandated responsibility under Article I of the U.S. Constitution. A number of other democratic parliaments followed suit, but in most of those cases, the assumption in the context of the constitutional systems of the participating countries was that the national executive sought political support for political reasons and not because of a constitutional requirement to do so. Indeed, for the two most significant military powers that joined with the United States in the 1991 coalition, namely the United Kingdom and France, it would have been the mainstream constitutional assumption that the Prime Minister in the British case and the President in France's case could have taken the relevant decisions on the basis of executive authority, without any constitutional requirement for parliamentary participation. The situation in those two countries has dramatically changed in constitutional terms in the intervening years, to the point that we can discern meaningful change in the United Kingdom's unwritten constitution and a formal constitutional amendment in France's case.

Until the trends of the 1990s and 2000s that have produced global constitutional demand for greater parliamentary involvement in war powers decisions in many democratic polities, the war power in the United Kingdom had always been considered to fall within Crown Prerogative, to be exercised by Her Majesty's Government without necessarily involving parliament, other than perhaps to be informed as events unfolded. Similarly, in France, under the 1958 Fifth Republic Constitution drafted to accommodate sweeping presidential powers to address external and internal security threats, President Charles de Gaulle and his successors could take decisions on deploying military force without consulting or seeking approval from the National Assembly. The same was true in most constitutional democracies in the modern period.

By the time of the first Iraq War of 1991, we begin to discern shifts in these patterns, first with national executives turning to their parliaments for political support to commit military forces to collective security engagements, and then with greater constitutionalization of these emerging practices. In the early 1990s, the German Federal Constitutional Court rendered several significant constitutional decisions interpreting the German Constitution to require parliamentary approval of external military commitments, in principle in advance. Parliaments elsewhere began paying attention to what other parliaments were doing, especially when multilateral troop commitments were involved and some national parliaments were already deliberating and voting.

Over the course of the 1990s and 2000s, especially in the wake of the second Iraq War of 2003 and the backlash either that parliaments had not had sufficient opportunity to deliberate and vote, or that they had been misled, we can discern trends to build in greater safeguards to ensure that parliaments would know both the factual and legal basis in IL for a proposed decision.

In the several post-mortems on the 2003 Iraq War, including in the United Kingdom where the Iraq Inquiry headed by Sir John Chilcott is moving toward completion of its work, a key theme has been the deep disagreements over whether the renewal of armed force in Iraq in 2003 had proceeded on the basis of flawed legal advice conveyed as answers to parliamentary questions – in particular, whether there was a proper basis under the UN Charter to resume military action in March 2003 without a new, sufficiently explicit authorization from the UN Security Council. In the course of the Chilcott inquiry, an unprecedented amount of attention has been given to differences of views on the questions of international law involved in the matter.

Meanwhile, by 2006, outside the context of a particular military crisis and on a bipartisan basis, the House of Commons endorsed a motion offered by then-Leader of the Opposition David Cameron, essentially crystallizing a kind of constitutional consensus on parliamentary participation in any further decisions to use military force, as indeed has become the practice in the United Kingdom and was followed last year with respect to Syria in the votes taken on August 29, 2013. What was different about last year's Syria votes was that for the first time ever, the government (by a narrow margin of 13 votes) did not achieve majority support for its motion and thus abandoned the plan for Syria to join the United States in making a forcible response to the use of chemical weapons in Syria. Questions about international law figured prominently in the House of Commons debate.

To bring us up to the present ISIS crisis, Prime Minister Cameron recalled the House of Commons for a vote that was held on September 26, 2014, which, by a margin of 524-43, authorized British participation in the military coalition against ISIS, but not in an unlimited way. Significantly, the resolution does not authorize ground troops in Iraq nor air strikes in Syria.

At the same time, and indeed on the same day, Belgium's parliament approved the deployment of fighter jets, cargo planes and military support to help fight ISIS in Iraq. Denmark which is one of the countries with a clear constitutional rule requiring parliamentary approval of military

engagements, followed suit and is contributing fighter jets to the coalition. Similarly, on October 7, 2014, the Canadian parliament voted to contribute aircraft and personnel to the military effort. What we see in these illustrations is that national parliaments are serving as the forum for deliberation and debate over fundamental foreign policy decisions.

In parallel, the counterpart in France to the global constitutional trend in favor of greater parliamentary participation in use-of-force decisions was the adoption in 2008 of an amendment to the war powers article of the Fifth Republic Constitution, to the effect that for any military engagement that continues for longer than 4 months, the National Assembly must vote to approve its prolongation. The preparatory work shows the influence of the US WPR.

Concerning France and Syria, President François Hollande indeed took the same position as President Obama in insisting that the atrocities committed by means of chemical weapons in Syria required a forcible response. On the international law dimension, Hollande was quoted as having said, "International law must evolve with the times. It cannot serve as an excuse to allow mass murder."[29] Under the French Constitution as amended in 2008, the President of the Republic has constitutional power to make a military commitment on his own, provided that it can be executed within a four-month time frame; at that point, the parliament is required to authorize an extension. Thus President Hollande could have gone forward with a limited use of force for a limited period of time, without needing to go to his own parliament. But in the wake of the UK vote, both President Obama and President Hollande, neither of whom had previously appeared inclined to place the matter before the national legislatures, both concluded that they should not proceed unilaterally, or at least should begin consultations with a view to determining whether the respective legislatures would be prepared to back up their positions. The National Assembly thus convened and debated the Syria crisis on September 4 in an extraordinary session. Not surprisingly, the leader of the opposition demanded to know, "Where is the UN resolution?"

Concerning the tendency of democratic parliaments to look across the English Channel, or across the Atlantic, and to engage in a kind of benchmarking of constitutional practices, the following snippet from the French debate may be illustrative. French parliamentarians wanted not only a debate on Syria, but a debate that would be just as good as the British debate – just as profound, just as illuminating, and just as decisive. French Opposition Leader Christian Jacob "went on to compare the French debate of an hour and a half unfavourably with the debate of 10 hours in Westminster."

III. Difficulties – or, the "Dark Side" of Democratization of Foreign Policy

In my research on these trends over the long term, and in my remarks up to this point, I began with a working assumption that democratic involvement in the crucial decisions on whether or not to commit national military power to international military coalitions is much preferable to the

[29] N.Y Times, Aug. 30, 2013.

historical starting point of early-20th-century monarchs taking their decisions behind closed doors, or the mid-to-late-20th-century counterpart of the "imperial Presidency" (in Arthur Schlesinger's term) or "imperial Prime Minister" doing so without much if any parliamentary participation. But my actual position is more nuanced. Although democratic participation can and should improve the process for achieving better outcomes, or at least to a closer fit between national policies and what the democratic public represented in parliament is willing to support, it does not necessarily mean that parliament's decisions – or non-decisions – will produce what the international system sorely needs, namely an optimal level of the global public good of peace and security for all. Let me identify a few concerns that I have about parliamentary checks and controls, and more generally about the spreading of responsibility for decision-making about international security over a very broad base.

Three general areas of to investigate would be: (1) Can parliaments and publics have enough information in real time to participate meaningfully in the hard decisions? (2) How effective can national parliaments be in exercising responsibility for these matters, especially where, as we see all too often, they are gridlocked or even pathologically dysfunctional in carrying out their ordinary responsibilities? (3) Will democratic parliaments rise to the challenge of exercising responsibility for international security decision-making in an era when terrorist threats and even actual terrorist attacks strike at the democratic process itself?

This week's events in Ottawa are a too-vivid illustration of the third of these concerns and challenges. Even before knowing what would be going on in the world or in our neighbor Canada's capital city on the day of my lecture, I was already planning to devote a short portion of my remarks to the problem, perceived or real, that threats of violence against a democratic people or against its leadership or the symbols of its national power could factor into parliamentary decisions in a different way from how national executives might weigh such threats. In the draft-in-progress on the day before a terrorist attack on Canada's parliament and the National War Memorial adjacent to it on Parliament Hill, I was going to comment on several incidents in which parliamentary deliberations over how to respond to a particular international security threat have taken place against the shadow of what some parliamentarians, and the publics they represent, might perceive as a threat to attack the country itself or its citizens anywhere in the world if the parliament votes in favor of supporting an international military coalition. Such a threat might emanate from a violent non-state group such as ISIS, whose spokesman has used social media to publicize the following ugly exhortation: "If you can kill a disbelieving American or European – especially the spiteful and filthy French – or an Australian, or a Canadian, or any other disbeliever from the disbelievers waging war, including the citizens of the countries that entered into a coalition against the Islamic State, then rely upon Allah, and kill him in any manner or way, however it may be." Or, in a different kind of example, on the eve of French parliamentary deliberations last year on whether France should make a military response to the use of chemical weapons against civilians in Syria, Le Figaro carried an interview with Bashar al-Assad of Syria, which was understood as a threat to French interests if France attacked Syria. In the Assemblée, several deputies saw this threat as an attempt to manipulate parliament.

IV. Conclusion: The Relevance of International Law

So what, then, is the relevance of these democratizing trends for our field of international law? How is international law figuring in national decision-making processes? Specifically, are national parliaments paying attention to international law? The right kind of attention? Are they serving as organs of compliance with international law, as well as organs of constitutional control over executive war-making initiatives? Do parliaments understand international law well enough? Do they understand it in the right way? Are they getting good advice on questions of international law as a predicate for exercising their constitutional functions?

Clearly, parliaments are paying more attention to international law than ever before. The backlash against the sense of having been misled about the legal basis for the 2003 war in Iraq certainly figured prominently in subsequent developments in the British House of Commons. There have been post mortem inquiries about the Iraq war not only in the United Kingdom, but also in the Netherlands, and not long ago Denmark decided to launch a comparable inquiry, which is expected to take several years. In each of these instances, the inquiry has addressed or will address not only what might have been done wrong in 2003, but how decisions processes can be improved for the future. International law is being examined closely in each of these inquiries. Elsewhere, for example in New Zealand, certain parliamentarians have pressed for framework legislation that would require a certification of international legality as a predicate for any national commitment to an international military operation, but so far these bills have not garnered enough support to be enacted.

Lawsuits in other countries have insisted that courts should rule on the legality of their country's participation, or proposed or potential participation, or even passive involvement, in a challenged international military operation. Although few of these lawsuits succeed (and in this country they almost inevitably fail on threshold grounds, such as lack of standing of a congressional plaintiff or the political question doctrine), initiation of litigation raising claims under international law is one way that advocates have drawn attention to the underlying legal arguments.

I will close by adverting to an essay published by Elihu Root, founder and first president of the American Society of International Law, in the first issue of the American Journal of International Law in 1907, which he titled, "The Need of Popular Understanding of International Law."[30] As democratic publics play an ever-growing role in making foreign policy, that need has never been greater.

A copy of this Keynote has also been published by the *ILSA Journal of International and Comparative Law*, 21 ILSA J. INT'L & COMP. L. 281 (2015).

[30] Elihu Root, The Need of Popular Understanding of International Law, 1 Am. J. Int'l L. 1 (1907).

INTERNATIONAL LAW WEEKEND MIDWEST 2015

On September 18, 2015, the Frederick K. Cox International Law Center at the Case Western Reserve University School of Law hosted International Law Weekend Midwest on the topic "New Beginnings, Resets, and Pivots: The International Legal Practice of the Obama Administration."

Two dozen of the country's leading international law experts discussed the legacy of the Obama Administration in foreign affairs. Former U.S. Ambassador at Large for War Crimes Issues and former Chief Prosecutor of the Special Court for Sierra Leone, Stephen Rapp, delivered the Keynote Address. He described the delicate pas de deux the Obama Administration has performed with the International Criminal Court. The subsequent panels, which were moderated by Professors Juscelino Colares, Avidan Cover, Richard Gordon, Michael Scharf and Tim Webster, explored the unrest in the Middle East and examined the Obama Administration's response to the crisis, the Administration's efforts regarding climate change, executive action on immigration reform, American influence in the Asia-Pacific area, the Obama Administration's legacy with respect to international criminal law, and international tax law and policy.

The Talking Foreign Policy panels included:

- Talking Foreign Policy: April 24, 2019 Broadcast: "Untangling the Yemen Crisis"
- Talking Foreign Policy: October 1, 2019 Broadcast: "The Rohingya Genocide"

The following panels were presented:

- The View from Syria: In War on Terrorism, Humanitarian Law Takes Back Seat (chaired by Roy Gutman)
- Codifying the Obligations of States Relating to the Prevention of Atrocities (chaired by Sean D. Murphy)
- Lawyering Peace: Infusing Accountability into the Peace Negotiations Process (chaired by Dr. Paul R. Williams)

The *Case Western Reserve Journal of International Law* published in the Spring 2016 issue Conference papers including the panel transcript of the "Talking Foreign Policy" broadcast, seventeen articles, three speeches, submissions from the Benjamin Ferencz International Essay Contest hosted by the Cox Center in partnership with the Planethood Foundation, and four notes by student editors, available at: https://scholarlycommons.law.case.edu/jil/.

The American Branch extends its gratitude to Professor Tim Webster for his leadership in organizing the 2015 ILW Midwest and to the Wolf Family Foundation for its generous grant, which made the event possible.

INTERNATIONAL LAW WEEKEND 2015

International Law Weekend 2015 was held at the House of the Association of the Bar of the City of New York on Thursday November 5, 2015, and Fordham University School of Law on Friday and Saturday, November 6 to 7, 2015. The theme of the Weekend was "Global Problems, Legal Solutions: Challenges for Contemporary International Lawyers." All panels were open without charge to members of the American Branch of the International Law Association, International Law Students Association, New York City Bar, staff of the United Nations and Permanent Missions, and students due to the generosity of co-sponsoring organizations.

The Weekend explored the many roles that international law plays in addressing global challenges. More than 30 Panels tackled issues involving current problems and innovative solutions in both public and private international law. The conference provided an opportunity for discussion and debate about the ways in which international law provides fundamental tools and mechanisms to address emerging global issues.

The opening panel was held on Thursday evening, November 5, 2015, and was entitled "The Rule of Law and the Post 2015 Development Agenda." The panel was chaired by David P. Stewart, and included David Donoghue, Juan Manuel Gomez Robledo, Irene Z. Khan, and Lise Kingo. It was followed by an open reception sponsored by Shearman & Sterling LLP.

Panels on Friday morning, November 6, 2015, were:

- Beyond International Commercial Arbitration? The Promise of International Commercial Mediation (chaired by S.I. Strong)
- The Post-2015 UN Development Agenda: A Different Future? (chaired by Christiane Bourloyannis-Vrailas)
- International Law and States in Emergency: Responses and Challenges (chaired by Milena Sterio)
- The Road to Paris: What Can We Expect from the 21st Conference of the Parties to UNFCCC?
- First Steps in the New Arms Trade Treaty Regime (chaired by William Worster)
- The Holdout Creditor Problem in Sovereign Debt Workouts (chaired by Lee Buchheit)
- International Investment Arbitration: Friend or Foe? (chaired by Chiara Giorgetti)
- TTIP, Trade, and Regulatory Cooperation (chaired by Gregory Schaffer)
- Private International Law in 2015: The Year in Review (chaired by Louise Ellen Teitz)

- Towards a New Implementing Agreement Under UNCLOS on Marine Biodiversity in Areas Beyond National Jurisdiction (chaired by Dire Tladi)

Miguel de Serpa Soares, United Nations Under-Secretary for Legal Affairs and United Nations Legal Counsel, delivered the Keynote Address entitled "UN70 – Contributions of the United Nations to the Development of International Law."

The Keynote Address was followed by panels entitled:

- Pathways to Careers in International Law (chaired by Lesley Benn)
- Arctic Ocean Stewardship (chaired by Suzanne Lalonde)
- Ethics for Counsel International Adjudication (chaired by Jeremy Sharpe)
- Gender Justice: Addressing Domestic Challenges Through International Law (chaired by Daniela Kravetz)
- Current Events Through the Lenses of International Law (chaired by David Stewart)
- Law-making by the UN Security Council (chaired by Scott Sheeran)
- Challenges of Pandemic Response from the Ebola Crisis (chaired by Noah Bialostozky)
- Saving Lives and Building Society: The EU's New European Migration Agenda (chaired by Dr. Catherine Tinker)
- The International Law and Policy of Counterterrorism (chaired by Vincent Vitkowsky)

On Friday evening, November 6, 2015, the Permanent Mission of Singapore to the United Nations hosted a gala reception. The American Branch is grateful to the Singapore Mission for its hospitality and generosity.

Saturday November 7, 2015, featured an array of panels:

- A Critical Look at Motions to Disqualify Arbitrators (chaired by Franco Ferrari)
- Sanctions in Transition (Moderated by Larissa Van den Herik)
- The Individual Petition Procedure in International Human Rights Law: Has It Lived Up To Its Expectations? (chaired by Christina M. Cerna)
- The DoD Law of War Manual: The Tension Between State and Non-State Expressions of Customary International Humanitarian Law (chaired by Michael Schmitt)
- It's "Shocking" to Think There is Corruption at FIFA (chaired by Bruce Bean)
- Accountability for Crimes in Syria and Iraq (chaired by Jennifer Trahan)
- Sustainable Development as a "Grundnorm" of International Environmental Law and Policy (chaired by Ved Nanda)

- Regulating On-Orbit Activities and Property Rights in Outer Space (chaired by Matthew Schaefer)
- Challenges Related to Incorporating and Respecting Children's Rights in Conflict Resolution Internationally (chaired by Kaitlan M. Ball)
- Emerging Trends and Practices in Guardianship (chaired by Esme Grant)
- TRIPS Agreement at 20 (chaired by Peter K. Yu)
- Tinker, Tailor, Cyber Spy: International Legality of Mass Surveillance, Cyber Attacks by State Actors and other Issues from the 2016 Jessup Compromis (chaired by Tariq Mohideen)
- International Courts as Architects of the International Legal System (chaired by Jean d'Aspremont)
- Rising Seas, Baselines Issues: The Work of the International Law Association Baselines and Sea Level Rise Committee (chaired by George Walker)
- Careers in International Development (chaired by Norman L. Greene)

The American Branch extends its gratitude to the 2015 ILW Program Committee composed of: Chiara Giorgetti (University of Richmond, School of Law), Jeremy Sharpe (Shearman & Sterling LLP), David Stewart (American Branch of the International Law Association), Santiago Villalpando (United Nations Office of Legal Affairs), Tessa Walker (International Law Students Association), and Ruth Wedgwood (President and ex officio, International Law Association).

The American Branch also gratefully acknowledges the generous support of the following sponsors of 2015 ILW: Advanced Discovery; American Bar Association; American Society of International Law; American University, Washington College of Law; Boston University; Brill/Martinus Nijhoff; Case Western Reserve University School of Law; Cardozo School of Law; The Center for Global Affairs, NYU – SPS; Center for Law and Intellectual Property, Texas A&M University School of Law; Chaffetz Lindsey LLP; Cleary Gottlieb Steen & Hamilton LLP; Columbia Law School; Cornell Law School; Council for American Students in International, Negotiations (CASIN); Covington & Burling LLP; Dean Rusk International Law Center, University of Georgia, School of Law; The Federalist Society International & National Security; Law Practice Group; Fletcher School of Law & Diplomacy, Tufts University; Foley Hoag LLP; Fordham University School of Law; George Washington University Law School; Georgetown University Law Center; Hofstra University, Maurice A. Deane School of Law; Human Rights First; International and Non-JD Programs, Fordham Law School; Johns Hopkins University, School of Advanced International Studies; King & Spalding LLP; Leitner Center for International Law & Justice; New York City Bar; New York University Law School; Oxford University Press; Permanent Mission of Singapore to the United Nations; Princeton University, James Madison

Program in American Ideals and Institutions; Princeton University Program in Law & Public Affairs (LAPA); Rutgers Law School; Shearman & Sterling LLP; St. John's University School of Law; Texas A&M University School of Law; University of Maine School of Law; University of Nebraska Lincoln College of Law; University of Pennsylvania School of Law; and White & Case LLP.

INTERNATIONAL LAW WEEKEND 2015
FORDHAM UNIVERSITY SCHOOL OF LAW
NOVEMBER 06, 2015

KEYNOTE ADDRESS

UN70 – CONTRIBUTIONS OF THE UNITED NATIONS TO THE DEVELOPMENT OF INTERNATIONAL LAW

BY MIGUEL DE SERPA SOARES

United Nations Under-Secretary for Legal Affairs and United Nations Legal Counsel

Introduction

The international legal order is decentralised, and no single central organ exercises functions akin to legislatures in national legal orders. States create international legal rules either implicitly, through their practice and *opinio juris*, the combination of which constitutes rules of customary international law, or explicitly, through the adoption of bilateral or multilateral treaties setting out legal rules and obligations for the States adhering to them. This creates a complex system in which the contribution of international subjects that are not States, such as international organizations, is not always clear.

International organizations are creatures of their mandates, brought into being by States to perform certain tasks. In the case of the United Nations, this mandate is exceptionally broad, encompassing almost all aspects of international life.

Generally speaking, the UN consists of three mutually-reinforcing pillars: (i) peace and security (ii) development and (iii) human rights. As established by the International Court of Justice in the Reparations advisory opinion, the Organization also enjoys an independent legal personality "in certain respects in detachment from its Members" that is indispensable to its activities. It is equipped with organs and special tasks.

Accordingly, while States are the legislators of the international legal system, over the seventy years of its existence, the UN has provided not only a forum for collective action, but also a defined legal framework and an independent agency to contribute to the development and consolidation of legal norms.

My comments will briefly trace the contribution of the UN to the development of international law in a few important ways. In particular, I will focus on (i) the role of the Organization as a venue

for collective action, including multilateral treaty negotiation, (ii) the law-making that occurs through the organs and institutions of the Organization, such as the work of the International Law Commission, the adoption of resolutions and decisions by the Organization's political organs and the jurisprudence of the International Court of Justice and (iii) the contribution of the legal opinions of the Office of Legal Affairs to the development of international legal rules and customary norms.

Venue for collective action

The broad mandate and near universal membership of the UN makes it a unique venue for collective action. No other international organization can match the breadth or depth of opportunities presented by the UN for States to give voice to their positions.

The UN also enjoys a presumptive legitimacy that complements its structural elements. It is premised on the principle of sovereign equality, giving each Member an important stake in the Organization's activities.

The substantive output of this collective action can take many shapes. In the context of contributions to the development of international law, a primary, although not exclusive, form is a multilateral treaty.

The number of multilateral treaties adopted under the auspices of the UN has grown exponentially. In 1977, around 80 multilateral treaties were deposited with the Secretary-General. Less than forty years later, this figure has risen to more than 560.

A further identifiable trend in modern treaty-making is the tendency towards the establishment of institutional mechanisms in relation to multilateral treaties, with Conferences of State Parties, Secretariats and other bodies now delegated core responsibilities in the negotiation, conclusion and implementation of treaties.

Law-making through the organs and institutions of the Organization

The Organization has also been involved in law-making through its various organs and subsidiary bodies, which has had a substantial impact on numerous areas of international law.

Article 13(1)(a) of the Charter calls on the General Assembly to initiate studies and make recommendations for the purpose of "encouraging the progressive development of international law and its codification." In implementing Article 13(1)(a), the Assembly has essentially established a "conveyer belt" of international law-making. The manufacturing process begins with the International Law Commission, where issues are considered and instruments are drafted, and traverses back through the General Assembly, in particular its Sixth Committee (Legal), where instruments are further considered and developed by Member States before being adopted and opened for accession. Outside of that process, the General Assembly and the Security Council

have also been influential on their own accord in developing international law through their deliberative functions. Finally, the International Court of Justice, while not entrusted with any legislative role, also contributes to the development of international law through its decisions in contentious cases and its advisory opinions.

In discharging Article 13(1)(a) of the Charter, the key consideration underlying the dual concepts of "progressive development" and "codification" of international law is the belief that written international law will remove the uncertainties of customary international law by filling existing gaps in the law, as well as by giving precision to abstract general principles whose practical application is not settled.

The practice of the International Law Commission over the last sixty-seven years has demonstrated that maintaining a strict distinction between the codification of settled law (*lex lata*) and the progressive development of international law (*de lege ferenda*) has not always been possible, since the mode in which it was operating when considering any particular topic of international law was largely a matter of opinion. Instead, the Commission has come to view the two modes as a single, composite, concept, where international law-making takes place on a continuum between codifying largely settled rules to progressively developing other aspects.

In the exercise of their deliberative functions, the General Assembly and the Security Council have also been active in the development of international law.

The Assembly's broad mandate has meant that it has considered a wide range of activities and topics. While much of this work has, necessarily, been undertaken at the political level, such activities have been accompanied by, or have led to, the further development of international rules.

Its contribution to the development of international law in this context has been more indirect, either by way of providing general policy guidance to the law-making process, or more procedural through the formal establishment of processes or subsidiary bodies with a mandate to consider the legal aspects of specific issues.

Of all the areas the Assembly has been involved in over the course of the last seventy years, its activities in the area of human rights have been particularly normative. The Assembly has adopted a number of declarations and other texts, many of which served as a basis for the subsequent negotiation of major multilateral treaties.

The key text is the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948, which served as the basis for the subsequent negotiation of the two Covenants (and inspired several other human rights treaties). The Assembly has also referred, in other major proclamations such as the Millennium Declaration of 2000, to the need, more generally, to respect internationally recognized human rights and fundamental freedoms. This is necessarily only a representative sample.

While the Security Council has a narrower mandate than the General Assembly, it has the power to take binding decisions on substantive matters.

According to Article 39 of the Charter, the Security Council has the authority to first determine the existence of a threat to the peace, a breach of the peace, or an act of aggression, and then "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." In practice, such measures have ranged from targeted sanctions against terrorists, to the establishment of peacekeeping operations and the creation of international criminal tribunals. Importantly, enforcement measures adopted by the Council under Chapter VII of the Charter are not constrained by the general prohibition on intervention in matters essentially within the domestic jurisdiction of States contained in Article 2(7) of the Charter.

In the exercise of its functions under the Charter, the Security Council has the power to take binding decisions in specific situations, and it has used its discretion to hold wrongdoing States and non-State actors alike responsible under international law. It has regularly found violations of international law and taken sanctions against the wrongdoer(s), including States and non-State actors, thus contributing to filling the enforcement gap that characterizes the decentralized international legal system.

Some of the first cases concerned Southern Rhodesia in 1966, in relation to the right to self-determination of the majority population; and South Africa, in 1977, in connection with its apartheid policies. In subsequent years, the Security Council strongly condemned "violations of international humanitarian law" in crises such as those in Somalia, Rwanda, and Sudan, which all involved internal conflicts. It also characterized the massacre in Rwanda as constituting genocide. Moreover, the Security Council attributed some such violations of international law to non-State actors, such as UNITA in Angola, the Bosnian Serbs, the Taliban or Al-Qaida, and the Janjaweed in Sudan. Since the early 1990s the Security Council has continuously addressed terrorism issues by means of sanctions.

Another major way by which the Security Council contributes to international law is the authorization of peace operations.

While traditional peacekeeping is said to have its legal basis in Chapter VI of the Chapter, the Security Council more recently has developed a practice of invoking Chapter VII of the Charter when authorizing more complex peace operations in volatile environments.

The significant role of the International Court of Justice in the development of international law is commonly accepted. It is the principal organ of the UN entrusted with a judicial function, that is the function of resolving legal disputes, but in the process of this the Court's ancillary function is undoubtedly to some extent the development of international law.

The almost uninterrupted existence of an International Court for nearly a century has resulted in the development of a significant body of international jurisprudence, which the Court seeks to keep consistent, but also sensitive to the development of international law. 6 The Court is also the only international law judicial institution with comprehensive jurisdiction under international law: its power to decide disputes extends to all disputes "concerning ... any question of international law."

The Court is, as such, uniquely placed among international courts and tribunals to contribute to the development of international law, and has done so in many crucial areas of international law.

Development of international law through the legal opinions of the Office of Legal Affairs

The contribution of the Office's legal opinions to the development of international law, broadly defined, should be viewed in the context of the Organization's operations as a whole, as well as its unique composition and the authority and responsibilities accorded to it by its Member States under the Charter of the UN, some of which are sui generis. The range of questions on which the Office is asked to provide legal advice is exceptionally broad, extending across the spectrum of international relations and reflecting the unique position of the UN in the larger international system.

The effectiveness of the Office's opinions relies less on formal authority, which tribunals and other judicial organs may enjoy, than on their intrinsic merits, legal soundness and persuasive force. Legal advice represents a critical element for ensuring that the UN, and each of its constituent entities, holds to its constitutional foundations and operates according to the rule of law.

The legal considerations associated with UN peacekeeping operations illustrate this point. Legal advice is provided at each step of the peacekeeping process, beginning with the establishment of the respective mission by the Security Council, the building-up of the mission's components through the receipt of contributions of personnel and equipment by Member States and the conclusion of the status-of-forces agreement with the host country.

The sanctions regimes established by the Security Council represent another area where advice from the Office of Legal Affairs has contributed markedly.

Another specialized area where the Office has prominently affected the development of international law relates to the privileges and immunities enjoyed by international organizations. Given the breadth of its operations, it is probably the world's most prolific actor in this regard.

To a certain extent, the Office acts for the Organization in its external relations and so is a direct participant in the process of shaping international law. This includes negotiating international agreements, formulating and making protests and presenting claims.

The Office's main activity, however, is the provision of internal advice. When the Office provides its opinion, it is then for its addressees to act (or not) upon that advice. In doing so, it is they, and not the Office, that establish the practice of the Organization. This practice contributes to the development of the Organization's rules. It also shapes the interpretation or application of the treaties to which the Organization is party or under which it has rights and obligations and contributes to or influences the development of rules of customary international law. The contribution of the Office's opinions to the development of international law is therefore largely indirect. It is nonetheless real.

A copy of this keynote has been published by the United Nations in its website and is available at: https://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS_Oxford_2015_Fordham-6-Nov-2015.pdf.

INTERNATIONAL LAW WEEKEND WEST 2016

International Law Weekend West 2016 was held at Brigham Young University Law School in Provo, Utah on January 29, 2016. The theme was "International Law in a Divided World." The Weekend addressed issues such as income inequality, international arbitration, corruption, the Middle East and the Islamic State, the European migration crisis, disasters and international law, the Presidential power to implement treaties, and career opportunities for students considering a future in public or private international law.

The Weekend opened with welcome remarks from Professors David H. Moore, Wayne M. and Connie C. Hancock Professor of Law and Associate Dean for Research and Academic Affairs at Brigham Young University's J. Reuben Clark Law School, and David P. Stewart, President of the American Branch of the International Law Association and Professor at the Georgetown University Law Center, followed by discussions from panels.

The morning panels included the following:

- Disasters and International Law
- The Middle East and the Islamic State
- Private International Law Practice
- International Business Trends
- Presidential Power to Implement Treaties
- Public International Law Practice

Professor Katerina Linos of the Berkeley Law School gave the Keynote Address entitled "International Norm Diffusion."

Thereafter, the afternoon panels included the following:

- Selective Enforcement of International Criminal Law
- Issues in International Anti-Corruption Law

The afternoon panels were followed by roundtable discussions on the following topics:

- The European Migration Crisis
- Contemporary International Arbitration
- Cyber Security

The event ended with dinner and a second Keynote Address entitled "Income Inequality and International Law" given by Chantal Thomas of Cornell Law School.

The American Branch is grateful to Professor David H. Moore for organizing ILW West 2016.

INTERNATIONAL LAW WEEKEND 2016

International Law Weekend 2016 was held at the House of the Association of the Bar of the City of New York on Thursday October 27, 2016, and Fordham University School of Law on Friday and Saturday, October 28-29, 2016. The theme of the Weekend was "International Law 5.0." All panels were open without charge to members of the American Branch of the International Law Association, International Law Students Association, New York City Bar, staff of the United Nations and Permanent Missions, and students due to the generosity of co-sponsoring organizations.

The Weekend explored the role of international law in areas ranging from technological advances to environmental transformations. The program addressed how international lawyers confront emerging forces and new scenarios at an accelerating rate to meet challenges posed by changes in the legal profession. A collection of engaging and provocative panels discussed how even settled principles of law are no longer fixed and how legal professionals must innovate to survive in the geography of international law.

The opening panel was held on Thursday evening, October 27, 2016, and was entitled "Leadership Transitions and International Law." The panel was chaired by David P. Stewart, and included Miguel de Serpa Soares, Paivi Kaukoranta, Brian Egan, and Donald Francis Donovan.

Panels on Friday morning, October 28, 2016, were:

- Surveillance and Human Rights (chaired by Peter Margulies)
- Private International Law in 2016: The Year in Review (co-chaired by Ronald A. Brand and Louise Ellen Teitz)
- Addressing Marine Biodiversity in Areas Beyond National Jurisdictions (chaired by Mark Simonoff)
- Feminist Approaches to International Law 25 Years On (chaired by Catherine Powell)
- Challenges for the International Criminal Court in a Changing World (chaired by David Donat-Cattin)
- Toward Chaos in Investment Arbitration? The Implication of CETA, TPP, and TTIP Investment Provisions (chaired by Melida Hodgson)
- Security, Rights, and Technological Change: Emerging Issues in Applying International Law (chaired by Karen Greenberg)
- Brexit and Its Consequences (chaired by Daren Rosenblum)

- Plight and Prospects: The Ongoing Crackdown on Cause Lawyers in China (chaired by Martin Flaherty)
- The Road from Paris: Implications of the Paris Agreement for Climate Policy in 2020 and Beyond (chaired by Andrew Strauss)

The Keynote Address entitled "Dealing with Bribery and Corruption in International Trade and Investment: Still at international Law 1.0?" was delivered by Lucinda Low, President of the American Society of International Law.

The Keynote Address was followed by panels entitled:

- International Legal Regulation of Armed Conflict in/from/through Outer Space (chaired by Peter Ramey)
- FCPA and Law Enforcement Investigations: Their Consequences on International Comity and International Arbitrations (chaired by Daniel Schimmel)
- Pathways to Careers in International Law (chaired by Lesley Benn)
- International Law and Disputes in the South and East China Seas (chaired by Ved Nanda)
- Safeguarding Democracy for the Next Generation: Case Studies in Legal Ethics Training (chaired by Philip G. Genty)
- The Investment-Related Aspects of Intellectual Property Rights (chaired by Peter K. Yu)
- The Post-9/11 Wars: Unresolved International Law Issues Facing the Next Administration (chaired by Charlie Savage)
- International Law and Migration in the Context of Complex Humanitarian Crises (chaired by Stephen R. Ojeda)
- The Once and Future International Law Commission (chaired by Lori Damrosch)
- The Recognition and Non-Recognition of States and Governments: Current Issues in U.S. Practice (chaired by David P. Stewart)

On Friday evening, November 6, 2016, the Permanent Mission of Peru to the United Nations hosted a gala reception. The American Branch is grateful to the Mission of Peru for its hospitality and generosity.

Saturday October 29, 2016, featured an array of panels:

- International Arbitration 5.0: Technology-Driven Innovation in Dispute Resolution
- Current Failures and Future Prospects for Addressing the Crisis in Syria (chaired by Leila Sadat)

- Empirical Research on International Legal Education (chaired by James Cooper)
- Bringing International Human Rights Home (chaired by Aaron X. Fellmeth)
- Change and Stability (or Instability) in the Edges of the Oceans: Coastal Baselines, Rising Seas: The Effect of Climate Change (chaired by George Walker)
- Innovations in International Trade and Investment Agreements (chaired by William J. Magnuson)
- International Arbitration in Latin America: Are We Innovating or Catching Up? (Patricia Cruz Trabanino)
- Above the Law? Innovating New Legal Responses to Build a More Accountable U.N. (chaired by Kristen Boon)
- Alternation Denied: Africa's 30+ Club (chaired by Tom Syring)
- Emerging Voices in International Law (chaired by Ruth Wedgwood)
- ICTY Convicts Karadzic: A Roundtable Discussion About a New Interpretation of Genocide? (chaired by Milena Sterio)
- International Health Emergencies: Is the Existing Framework Sufficient? (chaired by Chiara Giorgetti)
- 2017 Jessup Compromis Panel (chaired by Tamara Kosic)
- New Satellite Technologies and the Challenges for Space Law Evolution: Is Space Law Ready for Satellite 5.0? (chaired by Matthew Schaefer)
- Careers in International Development (chaired by Norman L. Greene)

The American Branch extends its gratitude to the 2016 ILW Program Committee composed of: William Aceves (Co-Chair; California Western School of Law), Peter K. Yu (Co-Chair; Texas A&M University School of Law), Samuel Baumgartner (University of Zurich Faculty of Law), Carlos Ivan Fuentes (United Nations), Rahim Moloo (Gibson, Dunn & Crutcher LLP), Jessica Simonoff (U.S. Department of State), David P. Stewart (American Branch of the International Law Association), and Tessa Walker (International Law Students Association).

The American Branch also gratefully acknowledges the generous support of the following sponsors of 2016 ILW: American Bar Association; American Society of International Law; American University; Washington College of Law; Arizona State University, Sandra Day O'Connor College of Law; Brill/Nijhoff Publishers; California Western School of Law; Case Western Reserve University School of Law; The Center for Global Affairs, NYU School of Professional Studies; Center for Law and Intellectual Property, Texas A&M; University School of Law; Chaffetz Lindsey LLP; Columbia Law School; Cornell Law School; Covington & Burling LLP; The Fletcher School, Tufts University; Foley Hoag LLP; Fordham University School of Law; Georgetown University; Hart Publishing; International and Non-J.D. Programs, Fordham

University School of Law; ISDE/Columbia University Dual Master´s Degree Program in Global Sports Law & Sports Management; James Madison Program in American Ideals and Institutions, Princeton University; Johns Hopkins University, School of Advanced International Studies; Leitner Center for International Law & Justice; New York City Bar Association; Oxford University Press; The Permanent Mission of Peru to the United Nations; Princeton University, Program in Law and Public Affairs; Shearman & Sterling LLP; St. John's University School of Law; Texas A&M University School of Law; University of Georgia School of Law; University of Nebraska; University of Pennsylvania Law School; University of Pittsburgh School of Law; White & Case LLP; Whitney R. Harris World Law Institute; and Washington University, School of Law.

INTERNATIONAL LAW WEEKEND 2016
HOUSE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
OCTOBER 27 TO 29, 2016

KEYNOTE ADDRESS

DEALING WITH BRIBERY AND CORRUPTION IN INTERNATIONAL TRADE AND INVESTMENT: STILL AT INTERNATIONAL LAW 1.0?

BY LUCINDA A. LOW

President, American Society of International Law

Introduction

I would like to express my thanks to David Stewart, the American Branch of the International Law Association, and to ILSA for the opportunity to address you today. It is a pleasure to be here with you here in New York at International Law Weekend.

The American Society of International Law (ASIL) has enjoyed a strong relationship with both the American Branch and ILSA for many years. It is a pleasure to see such a significant number of our members and leaders here as both speakers and participants. If you are not a member of ASIL, I hope you will consider joining. ASIL's mission is to educate about, and promote, international law, and that mission is even more critical today as it was in 1906 when we were founded.

In addition to our premier publications, the American Journal of International Law, International Legal Materials, and others, we provide timely insights on international law developments, opportunities to participate in interest groups covering a full range of topics, great meetings (although hats off to the organizers of this meeting for a fabulous turnout) and an membership that is 40% international and represents practitioners from both public and private settings, academics, and others. We aim to be thoughtful and balanced in a world where those qualities are sometimes under stress and to contribute to public dialogue through the credibility and relevance of our work.

The topic of my remarks today, "Dealing with Bribery and Corruption in International Trade and Investment: Still at International Law 1.0?", keys off your program theme.

Christine Lagarde, head of the IMF but also an international lawyer, gave a keynote recently at the International Bar Association's Biannual Conference in Washington, D.C. She used her platform to talk about the problem of corruption internationally—a problem on which the IMF has not

historically focused, but has recently begun to tackle with vigor. They believe that corruption, especially public corruption, fuels distrust in government, imposes enormous economic and social costs—estimated at $1.5-2 trillion dollars—approximately 2% of global GDP, undercuts countries' efforts to deliver sustainable and inclusive growth by weakening fiscal capacity (depressing tax revenues), skewing public spending towards areas with greater opportunity for graft, such as public procurement and construction projects, discouraging investment, and perpetuating inefficiency and entrenching poverty and inequality.

Some of these same reasons have caused the UN system increasingly to view corruption as being linked to human rights, as potentially undercutting political rights and affecting good governance, and inhibiting the realization of economic and social rights as well. The Office of the UN High Commissioner for Human Rights in 2013 published a joint statement of 134 countries entitled "The Human Rights Case Against Corruption" 6 (2013), available at http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf.

Among other things, it stated that:

> Corruption constitutes one of the biggest obstacles to the effective promotion and protection of human rights. . . . For too long, the anticorruption and human rights movements have been working in parallel rather than tackling these problems. . . . Experience shows that [the] fight against corruption can contribute significantly to the promotion of fundamental principles of human rights and the rule . . . .

While my remarks today will focus primarily on trade and investment—economic and commercial issues, we should not lose sight of the broader and deeper issues that are presented by corruption.

Definitional Issues: What Are Bribery and Corruption?

We could spend a lot of time talking about bribery and corruption, and what they mean. I will use the definition of corruption put forward by Transparency International, the leading anti-corruption NGO, which has become widely accepted: "the abuse of entrusted power for private gain". Its definition of public corruption, "the abuse of public office for private gain," is also worth noting.

Bribery is a form of corruption that, again using the TI definition, is "[t]he offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust."

Bribery and corruption can take the form of "grand corruption," typically involving major public contracts or other significant allocations of public resources. It can also take the form of "petty corruption," which typically occurs at a lower-level of government involving day-to-day activities.

Unlike fraud, bribery involves at least two actors: the one who gives the bribe (or offers, promises, or authorizes it) and the one who receives (or solicits or even extorts) it. The common law legal system calls the giver the "supply side", while the receiver is called the "demand side." Civil law countries use different terminology—active for the supply side and passive for the demand side, but I find that terminology doesn't properly capture what is often going on. No one would call solicitation or extortion a passive activity.

And of course, there can be intermediaries in the process: agents, partners, vendors, and others. Indeed, enforcement data show that third parties are very frequently used as conduits for improper payments.

Bribery and corruption are conducts that are rarely overt, which is why the concept of transparency is invoked so frequently in the context of combatting anti-corruption. It is often said that "sunshine is the best disinfectant." I will talk about all these concepts—anti-bribery and corruption (ABC) and transparency--and how they have developed at the international level.

Evolution of International ABC and Pro-Transparency Norms

Twenty years ago, there was no international law instrument dealing with bribery and corruption--no treaties, no soft law, no norms at the international level, no consensus on how the presence of bribery and corruption should affect the adjudication of international claims, commercial or investor-state, or state/state, and no international institutions dealing with the issue.

Prohibitions on Domestic Bribery

What did exist was national laws in virtually every country. Indeed, some countries with the highest levels of corruption had the greatest number of laws. These laws were mostly domestic in application, and predominately focused on public corruption, from both the supply and demand sides.

The approach taken by these statutes was predominately one of criminalization, although preventive measures could be found in some countries. For example, in the United States, coming out of the Watergate scandal in the early 1970s, financial disclosure (transparency), ethics, and gift rules were instituted at the federal level.

Despite the prevalence of domestic anti-bribery norms, there was limited enforcement in many countries, especially where rich and politically powerful were concerned. Development institutions such as the World Bank and other multilateral development banks (MDBs) closed their eyes to diversion of monies loaned/granted to developing countries for projects.

With limited exceptions—Judge Lagergren's famous ICC case, for instance from the 1980s, which refused to enforce a contract for corruption on public policy grounds, arbitral tribunals also tended to close their eyes to potentially tainted contracts or found a way not to deal with the issue.

Transnational Anti-Bribery Legislation: The FCPA

In 1977, the world's first transnational bribery statute, the U.S. Foreign Corrupt Practices Act (FCPA), was enacted. The statute, which had its origins in information gleaned during the Watergate investigation about foreign payments by major U.S. companies in their international business activities, is concerned with bribery and corruption of foreign public officials in international business.

The FCPA took a criminalization approach, focusing on the public sector, broadly defined. The statute is limited to on the supply side of the bribery issue, for various reasons that I can come back to. It seeks to focus more on grand than petty corruption issues, as demonstrated by its exception for facilitating payments.

The anti-bribery provisions were coupled with transparency rules for publicly- traded companies (SEC reporting companies). These rules include books and records and internal accounting control requirements that come close to strict liability standards and that are primarily enforced through civil/administrative actions. They have a broad sweep, applying to the consolidated multinational enterprise, including the most remote foreign subsidiary, without any financial materiality trigger.

The anti-bribery provisions are highly extraterritorial. While territorial jurisdiction is the basis for most of the statute's provisions, that standard (consistent with some other federal anti-fraud statutes) is broad: except for some foreign entities, all that is needed an act in furtherance of the bribe in connection with U.S. or foreign commerce, i.e., use of mails, telephone, email, or other communications systems, or use of the U.S. financial system. For those who qualify as "U.S. persons," alternative nationality jurisdiction is also available.

Although FCPA expansive in its substantive and jurisdictional reach, and controversial, the Congress left some things on the cutting floor when drafting it, particularly purely commercial bribery, and the demand side (the foreign official). The FCPA left the latter to the host country to address.

In 1988, the U.S. Congress, responding to criticisms that the FCPA disadvantaged U.S. business, sought to "level the playing field." The 1988 Omnibus Trade Act directed the Executive Branch to try to negotiate an international treaty to combat foreign bribery. This effort failed, essentially because the world was not then ready to tackle this topic.

But by the middle of next decade, circumstances had changed. We could spend a long time exploring the reasons for this change, which included: the end of the Cold War and the more open

societies and democratization trends that emerged in its wake in many countries; and the globalization of business and technological developments, including in communications that brought the world closer.

The Global Anti-Corruption Movement

The mid-1990s witnessed the beginning of the international anti-corruption movement. Transparency International, the leading non-governmental organization in this arena, was founded by former World Bank officials who had seen first-hand the pernicious effects of corruption on development while the institution closed its eyes to the problem, taking the legal position that raising any concerns would constitute interference in the internal affairs of a member state.

International norms, principally in the form of conventions, began to emerge in this period as well. The first initiatives occurred at a regional level, with the Inter-American States, which adopted the Inter-American Convention Against Corruption in 1996.

In 1997, the Organization for Economic Cooperation and Development (OECD) sponsored a convention that effectively internationalized the U.S. FCPA: the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention). This Convention, open to OECD non-member States as well as member States, is aimed at capital- exporting countries—the so-called "supply side" of bribery.

The late 1990s brought more regional and sub regional instruments, including two conventions from the Council of Europe, a Civil as well as a Criminal Law Convention Against Corruption, adopted in 1999. In 2003, the African Union adopted a corruption convention, the Convention on Preventing and Combating Corruption. That same year, the United Nations sponsored a global instrument, the United Nations Convention Against Corruption (UNCAC), which entered into force in 2005 and today boasts of 180 state parties.

The growing international anti-corruption consensus also spurred the World Bank into action. In the late 1990s, it adopted its first norms prohibiting fraud and corruption in Bank-financed projects, and instituted a rudimentary institutional framework to sanction firms and individuals that contravened those norms. That framework has since been expanded and harmonized across the regional development banks (the Inter-American, African, and Asian Development Bank, and the European Bank for Reconstruction and Development), which in 2010 entered into an agreement providing for the mutual recognition and enforcement of each others' debarment decisions (cross-debarment).

In addition to these binding agreements, the global anti-corruption movement has produced numerous "soft law" instruments, including OECD Ministerial Resolutions against tax deductibility, guidance on compliance programs for multinational enterprises, and others.

What Are the New Norms and What Is their Scope?

But what do these instruments, particularly the Conventions, do, you may ask? The answer is a range of things, depending on the specific Convention. Some (e.g., UNCAC) are much broader than others. The most targeted of these instruments, and probably not coincidentally the most effective, is the OECD Anti-Bribery Convention, which I will return to later in my remarks.

In general, the Conventions help harmonize standards among their member States, and eliminate obstacles to investigation and enforcement, such as dual criminality. They generally set a floor for content of domestic law norms, especially with respect to what practices should be proscribed, generally on a criminal basis. Typically, this includes norms relating not just to bribery and corruption, especially public corruption, both at the domestic and the international levels, but also closely related areas, e.g., money laundering, accounting, and the like.

These aspects are non-self- executing, i.e., they require implementing legislation at the national level. Most of the Conventions have adopted monitoring mechanisms to ensure proper implementation.

Many of the Conventions also contain preventive measures, e.g., disclosure and transparency provisions and others, primarily for the public sector but some for the private sector as well.

UNCAC, uniquely among the Conventions, features a chapter on asset recovery.

All of the Conventions seek to promote international cooperation, through self-executing provisions requiring cooperation in investigations and enforcement, such as mutual legal assistance and extradition.

Some of you may be thinking this sounds like more than Intl Law 1.0: aren't we at least at 2.0? It is true that these norms have evolved in a relatively short time period by international law standards, and have produced some remarkable changes. Today, for example, more than 60 countries have FCPA-like laws proscribing bribery/corruption in international business. Prosecutors in the United States and elsewhere are bringing major cases, with record penalties, and international cooperation is growing.

Just this year we have seen three U.S. prosecutions of "grand" corruption: Och-Ziff, Embraer, and Vimpelcom.

Och-Ziff is a New York-based financial services firm that ran afoul of the FCPA while seeking to secure interests in extractive industry projects in Libya, the Democratic Republic of the Congo and elsewhere. It paid $400 million in penalties to resolve its FCPA problems.

Embraer is a Brazilian business jet manufacturer that reached a settlement earlier this week, noteworthy as it is the first joint U.S./Brazil settlement. The case, involving contracts in the Dominican Republic, Saudi Arabia and Mozambique, is one of a number of prosecutions in the aviation sector in recent years. Embraer paid over $200 million in penalties.

Vimpelcom, a Dutch telecommunications firm, was accused of bribing the president of Uzbekistan in order to get a contract. The case came to the attention of the U.S. authorities through a referral from prosecutors in Switzerland. The U.S. and Dutch authorities cooperated in the investigation and prosecution, and shared the penalties, which were upwards of $800 million.

And during its last fiscal year (though September 30, 2016), the World Bank sanctioned 58 companies and firms, bringing the total number of sanctioned firms (not including cases of cross-debarment) to 783 since 1999. Sanctions can include permanent debarment, but even debarment for a period of years may signal corporate death for firms that depend on public contracts. The longest debarment term last year was 22 years and 6 months for a Ukrainian company (Incom) for having engaged in bribery, collusion, and obstruction.

But this enforcement progress masks and to some extent exacerbates gaps and asymmetries in the current system's architecture. What are these gaps and asymmetries?

Gaps and Asymmetries

First, laws and conventions are not enough. Their effectiveness depends on enforcement. Enforcement in turn incentivizes preventive measures by companies and governments. It also represents accountability.

But only a handful of States party to the OECD Anti-Bribery Convention (the most effective instrument) are engaged in active enforcement of their transnational bribery legislation. Of 41 States Parties to the OECD Anti-Bribery Convention in 2015, only four--the United States, Germany, Switzerland, and the United Kingdom--have been found to be actively enforcing their legislation. Another 15 have been categorized as having moderate/limited enforcement.[1] The remainder are categorized as little or no enforcement.[2]

Almost all of this enforcement activity is only on supply side, however.[3]

[1] The six countries found to have moderate enforcement are: Italy, Canada, Australia, Austria, Norway, Finland; the remaining 9 countries found to have limited enforcement are: France, Netherlands, South Korea, Sweden, Hungary, South Africa, Portugal, Greece and New Zealand.

[2] These classifications can change from year to year and even one prosecution can move the needle. Thus, states such as Brazil, that are in the "little or no" enforcement category, will presumably change, in Brazil's case due to Petrobras and Embraer.

[3] Note that the forfeiture of assets in Vimpelcom represents a limited exception.

Moreover, the scope of the transnational bribery offense defined in the OECD Anti-Bribery Convention is narrower than in the FCPA. Although both instruments cover public officials, the OECD Anti-Bribery Convention does not reach corruption involving political parties, party officials, or candidates for political office. Notably, these are the types of corrupt financing schemes revealed in the Mensalão scandal in Brazil. The current Petrobras, or Car Wash, scandal also involves campaign financing, but with a state-owned enterprise at the center, so it is covered by the Convention.

Nor does the OECD Anti-Bribery Convention, unlike some (e.g., UNCAC), reach private sector bribery. One consequence of that is that the FIFA corruption scandal, like the Olympics, is being prosecuted with tools other than FCPA/OECD Anti-Bribery Convention.

Intermediaries is another important area where there are coverage gaps. Most transnational bribery laws cover bribery and corruption, whether the conduct is undertaken directly by company or indirectly through third parties, such as consultants, agents, or other representatives. But the standards are not well developed, despite the recognition that bribery is very often carried out through intermediaries.

The very specific indirect liability provisions of the FCPA make clear that companies cannot put their heads in the sand, have had a profound effect on corporate compliance practices in relation to the formation, oversight, and even termination of third-party relationships. Due diligence has become much more standard and is supported by a cottage industry of investigative firms and other resources.

The Panama Papers revealed the international race to the bottom to find jurisdictions that would allow corporate ownership to be concealed. Too many jurisdictions around the world (including some U.S. states) do not require transparency with respect to legal much less beneficial ownership of companies. The Panama Papers also revealed the professionals, including lawyers, who aid and abet this type of activity. While professional advisors may be only a few steps removed from the actual commission of a criminal act, international norms at present don't impose requirements on them unless they are directly involved in criminal activity.[4]

The financial system has been another historical enabler of corruption—often through omission as much as commission. Although recent enforcement in anti-money laundering (AML)/sanctions areas have spurred huge investments in compliance, the more business the traditional financial institutions shun, the more of the market they cede to less scrupulous entities: alternatives in the unregulated or less regulated sector. This in turn can have effects on growth/lending—considering the fact that money is like the blood supply to an economy.

[4] Some national jurisdictions do require lawyers to report suspicious activities, which may include bribery as well as money laundering.

Indeed, in some respects the pursuit of corrupt practices is a cat and mouse game. Human inventiveness means that modalities are constantly changing. Consider the recent 1MDB scandal, involving embezzlement on a massive scale from the Malaysian Sovereign Wealth Fund. Tactics of the criminals there included mimicking the names of legitimate companies to trick the financial institutions, as well as the layering of companies to conceal who was behind the schemes.
But the biggest gap of all is on the "demand" side of the bribery equation.

Demand Side: The Biggest Gap of All

The OECD Anti-Bribery Convention, with its criminalization of transnational bribery, represents the most effective ABC treaty to date. But as we have seen, it is only applicable to the supply side of bribery.

The World Bank and other international financial institutions (IFIs) have active investigations and sanctions programs (note the numbers earlier), but these sanctions are generally on the supply side as well (contractors and consultants), not public officials in the countries where the projects take place.[5]

In investor-state disputes, corruption allegations have become a favored defense of host governments. Especially if the applicable treaty has an "in accordance with law" clause, if the Respondent State can prove corruption, it may in effect gain a free pass to expropriate or take other measures against a foreign investment, since the case will be at risk of dismissal on jurisdictional grounds.

Moreover, tribunals have been reluctant to attribute corrupt conduct of a government official to the state, even though the conduct of a corporate officer of employee is attributed to the employer.[6] Tribunals have also been reluctant to require states to have investigated/prosecuted conduct the bribery that they are claiming took place as a condition to asserting a corruption defense.

Some cases going on today[7] raise squarely issues of how the international law principle of proportionality should come into play: Should it be a zero-sum game or should the conduct of state actors be taken into account and relative responsibility weighed? International law is really at less than 1.0 in this area.

---

[5] IFI employees, however, can be subject to administrative sanctions by their institutions and may also be criminally prosecuted by their host countries in some circumstances. And there are limited exceptions: Last year, for example, the World Bank Sanctions Board (Decision No. 78) sanctioned an individual who was a public official (not a regular civil servant, political appointee etc., but rather a project manager who was acting in an official capacity). Generally the World Bank is reluctant to go after the demand side directly, but will make referrals to national authorities of the official's country for follow-up investigation and/or prosecution.

[6] *See, e.g., World Duty Free v. Kenya* (involving a seven-figure bribe received by the President of Kenya to induce him to approve a concession for duty-free stores at Kenyan airports).

[7] Not public as of the date of these remarks.

The net effect of this state of affairs is that state of the law--civil and criminal—has exacerbated the asymmetries in the system. And that's why I conclude that overall, we're still at 1.0. In a global world, with global commerce, movement of people, money, information, technology, a powerful case can be made for international law on several grounds:

First, there is international law as a gap filler, stepping in when domestic laws/mechanisms/institutions fail, for whatever reasons--lack of political will, lack of capacity, or others.

Second, a strong case can be made for international law as a minimum standard setter for global activities.

Third, if bribery & corruption are seen (as they are by an increasing number of people) as an issue that's inextricably linked to the effective enjoyment of other internationally recognized rights—like human rights—then international law may be necessary in this area.

What, Then, Should We be Seeking to Do With International Law 2.0 and Beyond in This Area?

The solutions may not all need to take the form of hard law: as noted earlier, there is a lot of soft law in this area. For example, a good deal of standard setting has been affected via soft law: The anti-money laundering standards of the Financial Action Task Force all take the form of soft law, as do standards for corporate compliance programs of the OECD and others. We also have an increasing number of supply chain guidance documents and corporate social responsibility/business and human rights norms in soft law instruments, as well as sector-specific initiatives such as the extractives industry transparency initiative (EITI).

This approach could be explored to deal with aspects of the beneficial ownership issue. There is a down side with a soft law approach, which is soft enforcement tools. But experience has shown these measures can be effective, e.g., naming and shaming. They can also pave the way for hard law and other accountability mechanisms.

And not all solutions need to take the form of international law. The United States, for example, stepped up its Kleptocracy Initiative efforts in the wake of UNCAC, and has seen some notable successes, including forfeiture actions against the family of the leadership of Equatorial Guinea (Obiang), the 1MDB forfeiture actions, and other cases associated with FCPA such as Vimpelcom ($800 mill), and others. The goal has been to return money to state (via an appropriate recipient—sometimes quite tricky to do).

But these actions are *in rem* against the assets that can be found in the jurisdiction, not *in personam* against the individuals engaged in the misconduct. They may take away some benefit but they do not represent full accountability. For that, international norms are needed.

So What Are International Law Options for the Demand Side?

Some have called for bribery and corruption to be designated an international crime and be included among the crimes over which the International Criminal Court (ICC) has jurisdiction. But that does not seem practical at this time.

The ICC right now has a narrow scope. And while bribery and corruption are now widely recognized to implicate international public policy, ABC/transparency are still not at the level of a jus cogens/peremptory norm of international law. Moreover, the ICC is still not accepted by many countries. Indeed, it is experiencing movement in the opposite direction, with the withdrawal of South Africa (this week), and Burundi earlier. In my view, even if it had jurisdiction, it would be unlikely to make a real dent in the demand side problem.

Some have called for the formation of a specialized international tribunal for transnational economic crime, to cover a range of transnational financial crimes, AML, ABC, etc., that require specialized skills to prosecute, such as forensic accounting capabilities. But it is not clear world is ready for this, either. It would take time to establish, gear up, and there are questions here, too about potential effectiveness.

Because of the doubts surrounding an international tribunal approach, others, such as Transparency International (TI), are working on a different approach: expanding universal jurisdiction over grand corruption and establishing it as an international crime. TI has developed a typology that States could adopt/enforce on the basis of universal jurisdiction, where home state of official does not prosecute. This proposal is not limited to the demand side, but in my view that should be the focus, because that is where the greatest need is in terms of combating impunity.

The definition of "grand corruption" that is used in this context (approved by a group at the IBA meeting in September) is as follows: "Grand Corruption occurs when a public official or other person deprives a particular social group or a substantial part of the population of a State of a fundamental right; or causes the State or any of its people a loss greater than 100 time the annual minimum subsistence income of its people as a result of bribery, embezzlement, or other corruption offense."

What jumps out from this definition (and explanatory notes) is that the concept is grounded in human rights norms (e.g., the Universal Declaration; ICCPR; ICESCR); and the yardsticks are victim/impact focused—and more on people (apparently not just citizens) than the state.

This approach raises a number of issues and questions:

First, does existing international law allow it? UNCAC Article 16(2) permits States to criminalize the demand side of bribery and corruption. But its jurisdictional provisions (Art. 42(1)) do not provide for universal jurisdiction. Rather, they contemplate that territoriality, nationality, and the

protective principle will serve as the jurisdictional bases for implementing legislation, in addition to any other jurisdictional bases permitted under domestic law (Art. 42(4)). Conceivably the protective principle could be used—protection needed when host state fails to act, but it is unclear what interests the legislating state would be relying on to protect.[8]

There are also questions as to who would qualify as a plaintiff: a self-styled victim? A successor government? The same government alleging it has been victimized by a rogue official?[9] A defrauded state enterprise?

What would happen if government of the host state is also pursuing a claim in parallel (e.g., pursuant to UNCAC obligations)? What would happen to any recovery? How should the recovery be measured? What do you do about official immunities? (Abuse of immunities is a longstanding and significant issue; consider, for example, attempted appointment this year by the Brazilian President Dilma Roussef of her predecessor, Lula, as her chief of staff to protect him from the Car Wash (Lava Jato) investigations. This area is ripe for a serious look from an international law perspective.

And what about state responsibility in the civil sphere? What should be the effect of bribery or corruption on investor-state disputes, for example, in relation to attribution, the consequences of corruption, the role of preventive obligations, for both the company and the State, etc.?
At the state-to-state level there are issues to be considered as well. For example, with respect to economic disputes in the WTO, should transparency become a positive norm in economic law? Should corruption be treated as a non-tariff barrier), as has just occurred in domestic law, in the 2015 Trade Facilitation Act?

With respect to regional/sub regional trade agreements, it is perhaps ironic that the much-maligned Trans-Pacific Partnership Agreement (TPP) represents the state of art on ABC and transparency principles, with provisions, inter alia, calling for transparency of laws; due process; public tendering; and enactment and enforcement of ABC laws.

Conclusion

The last 20 years have witnessed remarkable developments in anti-corruption and transparency norms at the international level. But for the reasons indicated, I still think 1.0 is the right number when you look at the state of affairs in the aggregate: particularly the gaps on the demand side. International law is only part of the solution in this area--domestic law and domestic enforcement are critical. Bilateral/multilateral assistance in strengthening the rule of law and government institutions is also very important. But international law has a major role to play as a minimum standard setter, gap filler, protector of essential interests and promoter of making norms effective.

[8] "Against the State Party" is the language of this provision.
[9] This has already arisen in some cases in the U.S., e.g., in the *Alcatel* case involving Costa Rica, where a state telecommunications authority (ICE) whose officials were bribed later (unsuccessfully) sought to claim victim status.

Further thinking is needed about some of these areas and initiatives must be chosen carefully in this next phase to move to 2.0 and beyond. It is not coincidental that the OECD Anti-Bribery Convention is the most successful instrument in this arena. It is the most targeted instrument, with most of the right membership for the supply side, and the institutional capacity to conduct monitoring to ensure implementation and enforcement. The OECD is clearly not the right answer for the demand side. We will need to figure out what will bring the drivers of demand side corruption to the table.

Thank you for your attention. I would be happy to answer any questions you may have.

INTERNATIONAL LAW WEEKEND 2017

International Law Weekend 2017 was held at the House of the Association of the Bar of the City of New York on Thursday October 19, 2017, and Fordham University School of Law on Friday and Saturday, October 20-21, 2017. The theme of the Weekend was "International Law in Challenging Times." All panels were open without charge to members of the American Branch of the International Law Association, International Law Students Association, and students due to the generosity of co-sponsoring organizations.

The Panels examined current global challenges, potential solutions, and a broad range of dynamic issues in both public and private international law including health crises, massive refugee outflows, climate change, and gender inequality. The Weekend considered the relevance of international law in the post-WWII regime and how it can re-establish its strong connection with the global community it serves.

The opening panel was held on Thursday evening, October 19, 2017, and was entitled "The Challenges Facing International Law." The panel was chaired by David P. Stewart, and included Martin Flaherty, Elinor Hammarskjold, Stephen Mathias, and Judge Theodor Meron.

The panels on Friday morning, October 20, 2017, were:

- The Alien Tort Statute & Corporate Liability: Take Two (chaired by Paul R. Dubinsky)
- From Crisis to Opportunity: International Arbitration in the Financial Sector After the Financial Crisis (chaired by Daniel Reich)
- The Use of Non-UN Sanctions for UN Purposes: An Old Debate Revisited (chaired by David P. Stewart)
- Fair Use and Global Copyright Reform (chaired by Peter K. Yu)
- The Israeli Occupation of Palestine at 50: Challenges to the Law of Occupation and Its Relevance (chaired by Ruti Teitel)
- Structural Constraints on Judicial Arbitrators' Independence? (chaired by Mark Pollock)
- The Internationalization of Private Law, The Privatization of International Law (co-chaired by Lucas Lixinski and Julian Arato)
- The Role of Customary International Law in Challenging Times (chaired by Brian Lepard)
- Using International Law to Advance Women's Rights in the United States (chaired by Tracy Higgins)
- International Water Conflict and Cooperation: Grappling with the Allocation of Freshwater Between States in the Face of Climate Change (chaired by Kenneth Juan Figueroa)

The Keynote Address was delivered by Judge Christopher Greenwood of the International Court of Justice. The Keynote Address was followed by panels entitled:

- The New Restatement (Fourth), Foreign Relations Law of the United States (chaired by Hon. Sidney H. Stein)
- Ethical Challenges: Evolving Norms and Practices for Arbitrator Disqualification (chaired by Daniel Reich)
- Pathways to Careers in International Law (chaired by Lesley Benn)
- Sequencing Peace & Justice in the Syrian Conflict (chaired by Paul Williams)
- Surveillance, Privacy & Human Rights: Outlook for 2018 (chaired by Peter Margulies)
- Human Rights After Trump: Survival and Resistance (chaired by Jonathan Hafetz and Barbara Stark)
- Challenges to Private International Law (chaired by Louise Ellen Teitz)
- Outer Space in the New Administration & Beyond: Commercial, Civil, and Growing Security Challenges (chaired by Jack M. Beard)
- The Future of the Law of Naval Warfare: The Launch of the ICRC's Updated Commentary to the Second Geneva Convention (chaired by Nathalie Weizmann)
- International Disaster Law: Where to Next? (chaired by Arnold Pronto)

On Friday evening, October 20, 2017, the Permanent Mission of the Republic of Bulgaria to the United Nations hosted a gala reception. The American Branch is grateful to the Bulgaria Mission for its hospitality and generosity.

Saturday October 21, 2017, featured an array of panels:

- Global Persecution of Lawyers (chaired by William A. Wilson III)
- The Changing Paradigm of Investment Protections in Latin America: Implications for Investment and Investor-State Arbitration (chaired by Kenneth Juan Figueroa)
- The Role of Complementarity in Ending Impunity (chaired by Mia Swart)
- Putting the Humanitarian in Humanitarian Intervention (chaired by Lauren Boccardi)
- Emerging Voices: Morning Session (chaired by Milena Sterio)
- Accountability for International Crimes in Syria and Beyond: A New UN Approach (chaired by Larry D. Johnson)
- NAFTA: What Does the Future Hold? (chaired by Christina Beharry)
- Defining Global Migration (chaired by Peter Spiro)
- Habeas, PRBs, and Military Commissions: What Legal Redress Would New Captures Sent to Guantanamo Have? (chaired by Andrea Harrison)

- The Global Public/Private Divide: Surrogacy, Contracts, and International Law (chaired by Cyra Akila Choudhury)
- International Humanitarian Law and Islamic Law: Toward Normative Engagement in a Challenging Time (chaired by Abed Awed)
- The Next Step for the ICC? A Crime of Aggression Primer (chaired by Jennifer Trahan)
- Jessup Problem Panel (chaired by Lesley Benn)
- International Recognition: Can the Normative be Practical? (chaired by Brad Roth)
- Emerging Voices: Afternoon Session (chaired by Bart Smit Duijzentkunst)
- Careers in International Development (chaired by Norman L. Greene)

The American Branch extends its gratitude to the 2017 ILW Program Committee composed of: Milena Sterio (Chair; Professor of Law & Associate Dean for Academic Enrichment, Cleveland-Marshall College of Law), David Attanasio (Associate, Dechert LLP), David P. Stewart (ABILA President; Professor from Practice, Georgetown University Law Center), Tessa Walker (Programs Director, ILSA), Bart Smit Duijzentkunst (Associate Legal Officer, United Nations), Jessica Simonoff (Attorney-Adviser, U.S. Department of State), Leila Sadat (Henry H. Oberschelp Professor of Law at Washington University School of Law; Director of the Whitney R. Harris World Law Institute), and Justinian Doreste (Associate, Chaffetz Lindsey LLP).

The American Branch also gratefully acknowledges the generous support of the following sponsors of 2017 ILW: American Bar Association; American Society of International Law; Brill USA, Inc.; California Western School of Law; Columbia Law School; Dean Rusk International Law Center, University of Georgia School of Law; Debevoise & Plimpton LLP; George Washington University Law School; Georgetown University Law Center; Fordham University School of Law; and International and Non-J.D. Programs, Fordham University School of Law.

INTERNATIONAL LAW WEEKEND WEST 2017

International Law Weekend West 2017 took place on Friday, February 24, 2017 at the University of Denver's Sturm College of Law. The theme was "International Law in a Time of Change." This well-attended event opened with warm welcomes by Sturm College of Law Dean Bruce Smith and ABILA's Professor Ved Nanda, Director of the Nanda Center for International and Comparative Law at the Sturm College of Law.

The first panel of the morning focused on "The Effectiveness – or Ineffectiveness – of the Inter-American System in the Protection of Human Rights: Jurisprudential Developments and Needed Reforms." It was moderated by Professor Andrew Reid of Sturm College of Law.

For the second panel of the morning, the topic was "Priorities for the New Administration in International Human Rights," moderated by Professor Anastasia Telesetsky of the University of Idaho School of Law. The luncheon lecture on "The New Restatement (Fourth) of the Foreign Relations Law of the United States" was presented by Professor David P. Stewart, President of ABILA, who is a professor at Georgetown University Law Center.

The first panel of the afternoon was titled "Sustainable Development: The Quest Continues." It was moderated by Professor Ved Nanda, the conference host. The final panel of the afternoon addressed issues of "Increasing Access to International Arbitration for Medium and Small Businesses." It was hosted by Todd Wells, Esq., Gleason Wells PC and Adjunct Professor of Law, Sturm College of Law.

The concluding Keynote Address of the conference was presented by James Anaya, Dean and Charles Inglis Thomson Professor at the University of Colorado School of Law. The following day, many attendees joined over 500 Denver Law alumni/ae and friends of Professor Nanda to celebrate his many accomplishments, not the least of which was his 50th anniversary of teaching international law at the University of Denver.

INTERNATIONAL LAW WEEKEND SOUTH 2017

Texas A&M University School of Law hosted International Law Weekend South 2017 on March 2 to 3, 2017. The theme of the weekend was "The Global Future of International Trade, Human Rights, and Development." This successful event was cosponsored by the American Society of International Law (ASIL). The conference focused on the trio of barrier-free trade, protection of human rights, and economic development that were the hallmarks and guiding principles of the international order created following the Second World War.

Law School Dean Andrew Morriss opened the conference, and ABILA President David P. Stewart made brief remarks. Plenary speakers included Edward Kwakwa, Senior Director of the Department for Traditional Knowledge and Global Challenges (and former Legal Counsel) at the World Intellectual Property Organization, and Professor David Gantz, Samuel M. Fegtly Professor of Law and Director Emeritus of the International Economic Law and Policy Program at the University of Arizona James E. Rogers College of Law. A number of expert panels discussed such topics as international corruption and the Foreign Corrupt Practices Act, intellectual property and regional trade agreements, the role of judges in enforcing international and regional agreements, and career "practice tracks" in the international arena.

On March 2, the panels were:

- New Developments in Resource Management and Trade: The Internationalization of the Local (chaired by Gabriel Eckstein)
- Making Trade Work for Sustainable Development: Possibilities and Challenges (chaired by Elizabeth Trujillo)

Day one of the event concluded with a plenary address on "Intellectual Property and Global Challenges" by Edward Kwakwa, Senior Director Global Challenges Department and former Legal Counsel of the World Intellectual Property Organization, followed by a reception.

Day two began with a plenary address on "Renegotiating NAFTA Without Tears: Risks and Rewards of Modifying the North American Free Trade Relationships" by Professor David Gantz, Samuel M. Fegtly Professor of Law and Director Emeritus of the International Economic Law and Policy Program of the University of Arizona James E. Rogers College of Law.

On March 3, the panels were:

- International Corruption and the Foreign Corrupt Practices Act (chaired by William Magnuson)
- Intellectual Property and Regional Trade Agreements (chaired by Irene Calboli and Sri Ragavan)
- The Role of Judges in Enforcing International and Regional Agreements (chaired by Sahar Aziz)
- Practice Tracks in the International Arena: Careers in International Law (cosponsored by the Texas A&M University School of Law International Law Society and the Office of Career Services)

The American Branch extends its gratitude to the 2017 ILW South Program Committee composed of: Charlotte Ku (Co-Chair), Peter K. Yu (Co-Chair), Sahar Aziz, Irene Calboli, Gabriel Eckstein, William Henning, William Magnuson, Milan Markovic, and Elizabeth Trujillo.

The American Branch also gratefully acknowledges the generous support of the following sponsors of 2017 ILW South: American Bar Association; American Society of International Law; and Texas A&M University School of Law.

INTERNATIONAL LAW WEEKEND SOUTH
TEXAS A&M UNIVERSITY SCHOOL OF LAW
MARCH 2, 2017

PLENARY ADDRESS

INTELLECTUAL PROPERTY AND GLOBAL CHALLENGES

BY EDWARD KWAKWA*

Senior Director Global Challenges Department and former Legal Counsel
World Intellectual Property Organization

My topic for this Plenary Address is "International Intellectual Property Law and Global Challenges." By global challenges, we mean: climate change, human rights, public health, food security, desertification, preservation of biodiversity, etc. In other words, challenges that are transnational in nature. They are challenges that cannot be addressed by any government or institution acting alone. They require collaborative action among governments, intergovernmental organizations (IGOs), non-governmental organizations (NGOs), universities, corporations and individuals.

As a highly specialized subject matter, intellectual property (IP) enjoyed many long and quiet years in the shade. But in the last 2 or 3 decades, it has come under the full glare of public opinion and scrutiny.

Today, the evolution of technology and the global economy have raised a number of challenges of a fundamental nature for the IP system. In this context, it is important to remember that IP is not an end in itself. IP is an instrumentality for achieving certain public policies.

Let me start with the challenge of technology. We all know that technology and business models evolve much faster than legislation. As the saying goes, law comes after technology. But in the IP field, an area of law that depends so much on technology, we can't afford this. In the IP system, we have very cumbersome, slow and time-consuming processes for reaching agreements. This is mostly through the treaty method. And this is not just a multilateral problem. It is also a problem for national legislatures. The challenge is trying to legislate for a moving target.

* This speech represents my own views, and does not necessarily reflect the views of the World Intellectual Property Organization (WIPO) or its Member States.

So now, the IP system is relying increasingly on practical initiatives as vehicles for international cooperation. An increased number of public-private partnerships are using platforms to try to achieve policy outcomes where once we might have used treaties.

In the area of public health, WIPO Re: Search was formed in 2011. This is a platform to build on partnerships and collaborations between technology holders and technology users. It creates partnership among WIPO, pharmaceutical companies, research and academic institutions and an NGO, Bio Ventures for Global Health (BVGH), based in Seattle. Partners include most of the world's major pharmaceutical companies, such as: Eisai, GlaxoSmithKline, Johnson & Johnson, Merck, Novartis, Pfizer, Sanofi and Takeda.

How does it work? Members provide access to IP by uploading their assets and other pharmaceutical resources, compounds, technologies, and know-how and data available for research and development for neglected tropical diseases, malaria and TB onto the searchable, public Re: Search database.

The Partnership Hub, BVGH, actively facilitates specific collaborations between Re: Search Members. WIPO administers supporting services, including access to resources and opportunities such as fellowships and sabbaticals. WIPO Re:Search is an example of how industry is sharing IP assets with non-profit and academic researchers worldwide to advance therapeutic development for diseases that disproportionately affect individuals and communities in low and middle income countries. These IP assets are shared free of charge between Members. In short, Re:Search provides a concrete example of how improving access to medicines can be achieved by catalyzing the development of medicines where none currently exist.

WIPO also is involved in discussions on climate change and the role of IP. The topic is always present in UNFCCC agenda discussions, and the focus is usually on access to technology and technology transfer. And in respect of food security, IP's role can be seen in relation, inter alia, to biodiversity agriculture, trade and IP (namely in the form of plant breeders rights, geographical indications, trademarks, and even of patents). It is recalled that the 2010 Nagoya Protocol sets up a mechanism for access and benefit sharing under the CBD, although it does not provide explicit rules on IP rights.

Finally, a short word on the UN's Sustainable Development Goals (SDGs). In respect of the SDGs, IP plays an important role. To provide a quick summary, examples of the role IP can, does, and will continue to play, in the SDGs, include: SDG 9 on Industry, Innovation & Infrastructure; SDG 2 (zero hunger); SDG 3 (good health and well-being); SDG 4 (quality education); SDG 6 (clean water and sanitax); SDG 11 (sustainable cities and communities); and SDG 13 (climate action).

INTERNATIONAL LAW WEEKEND SOUTH
TEXAS A&M UNIVERSITY SCHOOL OF LAW
MARCH 2, 2017

PLENARY ADDRESS

RENEGOTIATING NAFTA WITHOUT TEARS

BY DAVID A. GANTZ*

Samuel M. Fegtly Professor of Law and Director Emeritus of the International Economic Law and Policy Program of the University of Arizona James E. Rogers College of Law

I. Introduction

NAFTA has been a success in terms of trade creation and by increasing the competitiveness of American enterprises and workers with competitors in Europe and Asia. It has encouraged businesses to meet the challenges of new technology and has been of great importance to agriculture producers in both Mexico and the United States; US agricultural exports to Canada ($21.8 billion) and Mexico ($18.3 billion) represent the United States' second and third largest export markets. NAFTA is far from perfect, but it has become a whipping boy for trade deficits and other problems created by globalization and unwise US policies. Among these, both major political parties have utterly failed to help the losers from globalization adjust to a changing job market in the United States. US competitiveness continues to suffer inter alia from reduced government spending on R&D, underfunding of public education at all levels, failure to preserve road, bridge and port infrastructure, and frequent gridlock within the government.

Trump Administration's trade objectives have not (as of March 2017) been fully articulated, although it appears clear that the Administration seeks to bring manufacturing back to the United States from Mexico and elsewhere, reduce the trade deficits with Mexico, China and other countries, and require Mexico to pay for the border wall. It remains to be seen whether any of these could be facilitated with renegotiating NAFTA, which the President has called the worst trade agreement in history. NAFTA options include leaving NAFTA alone (unlikely), renegotiating (difficult but probably the best approach), or US withdrawal from NAFTA (very risky both

* Samuel M. Fegtly Professor Emeritus, Rogers College of Law, the University of Arizona; Will Clayton Fellow for Trade and International Economics, Center for the United States and Mexico, Baker Institute for Public Policy, Rice University. This summary of a presentation Texas A&M Law School in March 2017 has been subject to editing and minor expansion, but the uncertainties of the Trump Administration's trade policies six weeks after the President took office have been preserved, along with the inaccuracies of some of the author's predictions.

economically and politically). Reverting to separate agreements with Canada and Mexico, respectively, could also be a possibility. Populist unhappiness with NAFTA doesn't recognize the impact in past 30 years of new technologies, representing 75% of US job losses over that period. Nor has the Administration factored in the potential lost value of US exports to Mexico and Canada, with total regional trade approaching $1.2 billion, or appreciated the fact that about 40% of the value of a car from Mexico represents US parts and components

Reducing the US trade deficit is probably not feasible except by drastically reducing regional trade and US deficit financing or increasing the US savings rate. Changes in NAFTA if accepted by Mexico and Canada could encourage greater investment in the US rather than Mexico might be possible, but it is difficult to estimate how many new jobs would be crated for US workers rather than positions for robots. Other changes such as better labor and environmental protection and enforcement in Mexico are desirable in a new NAFTA, as are the modernizations needed for an agreement negotiated more than 25 years ago.

Thus, rational renegotiation could improve a 25-year-old agreement in several areas, drawing from Trans-Pacific Partnership (agreed among NAFTA Parties but from Trump withdrew in January). Among these, most of which are incorporated in the TPP—President Obama's backdoor approach to modernizing NAFTA-- include ecommerce, small and medium-sized businesses, state-owned enterprises, competition law, data protection and improved government procurement. A renegotiated NAFTA could also see revisions in energy, and cooperation with terrorism, drugs, and immigration. Some institutional structures, such as the Commission for Environmental Cooperation, the Free Trade Commission and state-to-state dispute settlement could be improved.

II. Withdrawal Considerations

The notice of denunciation of NAFTA under Article 2205 triggers a six-month period after which withdrawal could actually be effectuated by executive order. Under international law there appears to be no bar to such denunciation but some of NAFTA's features including tariff levels as embodied in the 1993 NAFTA Implementation Act would remain. Whether President Trump could terminate NAFTA as a matter of domestic law without Congressional assent is unclear. Presidential withdrawal from an international trade agreement has never been challenged in court. Unilateral withdrawal by the Administration over Congressional objections could trigger a constitutional crisis given the presence of the Commerce Clause. That being said, Congress over the past half-century has often delegated its power to the president in legislation. See, inter alia:

- The 1962 Trade Expansion Act §232(b)-(c) permitting unspecified actions to adjust imports when they allegedly threaten national security
- §123(a) of that Act to address relief from import competition
- §122 of the 1974 Trade Act permits an additional 15% tariff for up to 150 days without Congressional approval to deal with "large and serious balance of payments deficits"

- §301 of the 1974 Trade Act provides that tariff rates may be increased where another country violates trade agreements or takes actions that are "unjustifiable and burdens or restricted US commerce"
- The International Emergency Economic Powers Act of 1977 provides that when a national emergency is declared, the president has broad powers to restrict or prohibit transactions with foreign nationals and their property, subject to congressional consultations
- The 1993 NAFTA Implementation Act §201(a)(1) permits tariff modifications necessary or appropriate to carry out specified articles of the Agreement
- The 1993 NAFTA Implementation Act §201(b)(1) also provides that within confines of agreement the president may inter alia proclaim additional duties that are necessary or appropriate to maintain general level of reciprocal and mutually advantageous concessions
- The 2015 Trade Promotion Authority legislation, §103(a) provides that where existing duties or import restrictions of foreign country are unduly burdensome president may inter alia impose additional duties needed to carry out a trade agreement, but duty cannot be raised above June 29, 2015 levels

The legality of some of these provisions if invoked would be highly questionable under WTO rules and would likely result in immediate retaliation from Canada, Mexico and other US trading partners.

Renegotiation of NAFTA would also be subject to the other requirements of the 2015 Trade Promotion Authority, including 90-day notice requirements and various other obligations to consult with Congress. TPA also includes negotiating objectives which are different from Trump's but might be waived or amended. A renegotiation that at least purported to repatriate US jobs and effectively protect workers in Mexico could be popular with many Democrats (Charles Schumer, Elizabeth Warren, Sherrod Brown, Bernie Sanders and Nancy Pelosi among others) and with the United Auto Workers and the AFL-CIO. However, some Republicans would be far less enthusiastic, making it difficult at this very early stage to predict availability of a House or Senate majority on certain key issues such as investment and worker protection, or overall.

III. The Trans-Pacific Partnership

The agreement concluded in 2016 among twelve Pacific Rim countries (eleven after the US withdrawal is at this writing the most modern and comprehensive trade agreement ever concluded by the United States. Its future is unclear. Some of TPP's more than 30 chapters could easily be incorporated into a new NAFTA (ecommerce, SOEs, competition, SMEs, procurement). Others would require some modification (labor, environment, intellectual property and services). Among the more difficult to negotiate would be chapters protecting foreign investment, unfair trade remedies and state-to-state dispute settlement (which was ineffective under NAFTA and may well be under TPP as well). There was strong opposition to TPP from both Hilary Clinton and Donald Trump (very unwise in my view) during the 2016 election cycle, but such opposition does not appear to carry over to many of the TPP provisions that might find their way into a new NAFTA.

IV. Possible Additions to NAFTA

It would be helpful to incorporate the 2013-14 changes in Mexican hydrocarbon laws permitting foreign investment into the new agreement's text to discourage their evisceration should a more populist president be elected in 2018. Guaranteed access for Canadian and US foreign investment in the Mexican hydrocarbons sector, never achieved in Chapter 6 of the original NAFTA, would be highly desirable for all Parties. The agreement could also benefit from strengthened and hopefully simplified rules of origin, e.g., for autos and auto parts. Higher North American content requirements are also a possibility. Explicit cooperation requirements for terrorism and illegal migrants are desirable but difficult to negotiate in the current political climate. As noted earlier state-to-state dispute settlement could be improved procedurally as could the current NAFTA Chapter 19 mechanism for addressing unfair trade disputes. The same is true for labor rights provisions, making it possible for Mexican workers to form independent labor unions and to engage in meaningful collective bargaining (impossible under current Mexican practices). Such improvements are probably a necessity to secure Congressional approval. One could also hope for a stronger Commission for Environmental Cooperation and enhanced trilateral consultation mechanisms in many areas of coverage.

V. The Unattainable

As suggested earlier there is probably nothing the Administration can do through a new NAFTA to address the chronic US trade deficit with Mexico. It also seems inconceivable to me that Mexico will agree directly or indirectly to finance a border wall. It may be possible to discourage some US investment, such as in the hydrocarbons industry if there is no investor-state dispute settlement, but in other major industries such as autos and auto parts dispute settlement does not appear to be a major issue. In my view job creation in the US depends on increasing US exports to Canada, Mexico and other nations, a process that is enhanced through trade agreements and is retarded when trade agreements are rejected, as with TPP. Investment and job creation in the United States might also be enhanced by changes in the federal tax code and reducing the marginal tax rate for businesses. Overall, a strong economy benefits almost everyone even though it would likely result in an increased trade deficit. Such increased GDP growth would be difficult to sustain if agricultural and manufacturing exports to Canada and Mexico decrease, as would occur if the Administration withdraws from NAFTA or fails to negotiate a replacement.

VI. Implications of Reversion to WTO or CUSFTA Rules

Should NAFTA be terminated by the United States without replacement, the Parties' most favored nation tariffs would apply to all trade, a change that would impact some sectors more than others. The US MFN tariffs on autos and are relatively low, 2.5%, 3% for auto parts, with 5%-6% MFN tariffs for Mexico and Canada. Small truck imports into the United States are 25%, a carryover from the "chicken war" 50 years ago with the European Union. The impact on the highly integrated US auto industry would be more in the breaking of supply chains, where in some situations a

particular part will cross international borders five or six times before being assembled into a finished auto. The elimination of rules of origin (requiring 62.5% of auto content to be of North American origin) plus WTO-permitted rebates of import tariffs on parts and components would mean US and Mexican auto producers could rely more on parts from Japan, Korea, China and elsewhere. Now and in the future North American auto production depends on some Asian parts and components; if those parts become more expensive so will cars sold to consumers in North America.

With agriculture, under NAFTA almost all US products are duty-free when exported to Mexico, and vice-versa. (The United States exports mostly grain and meat products and imports fruits and vegetables such as tomatoes, avocadoes and cantaloupes.) Mexico could diversify its demand to Argentina, Brazil, Australia and elsewhere, although logistical barriers (shipment by sea instead of truck) would take some time to overcome. The United States imports 69% of its fresh vegetable and 37% of fresh fruit imports from Mexico. Without NAFTA, US imports of tomatoes, avocados and other fruits and vegetables would decrease and/or increase dramatically in price. For example, U.S. cantaloupe tariffs would increase from 0 to 12.8-29.8% depending on the season. The United States has no easy short-term domestic substitute because there is no available labor force for picking lettuce (70% illegal) and water is scarce in Arizona and California. The service economies in both states, along with grocery store shoppers everywhere in the United States, would suffer.

Without NAFTA, Mexico's obligations in intellectual property are the 1995 WTO TRIPS rules although the nation has an incentive to maintain strong enforcement to encourage foreign investment. These are similar to NAFTA's but would undoubtedly be strengthened if NAFTA were modernized. Current level of financial services probably won't change but market access will no longer be guaranteed by treaty, and US investors will lack the protection of NAFTA Chapter 11 for investor-state dispute settlement. (The WTO agreements include no significant investor protections.)

The 1988 US-Canada FTA, which would apply again automatically if NAFTA were to be terminated preserves zero or minimal tariff treatment between US and Canada, including on autos since 1986, but Canadian supply chains depending on Mexico would suffer depending on the old rules of origin for autos entering US. Other aspects of CFTA could be revised over several years with only limited problems., assuming the Trump Administration does not seek to terminate the CFTA as well. Agricultural exports to Canada are about $20 billion worth of mostly processed foodstuffs but less likely to decrease under a bilateral FTA. The relatively closed Canadian dairy and grain markets would presumably continue. The Trump Administration at the present time doesn't seem worried about US-Canada trade because the deficit is minimal, but that could change if the deficit were to increase. The United Auto Workers functions on both sides of the US-Canadian border.

VII. Alternatives to NAFTA for Canada and Mexico

Canada and Mexico share one very significant economic problem: for each, more than 75% of their total exports are sent to the United States. While both are making efforts to diversify, with both countries negotiating with the European Union and joining the TPP, major changes do not seem likely in the foreseeable future. For both countries the termination of NAFTA by the United States could encourage diversification of exports to take on greater urgency, even though major trade agreements often require many years to conclude.

Canada would suffer less from US termination of NAFTA in the short term, assuming that the CFTA with the United States remains in force. However, the shortcomings of an agreement negotiated more than 30 years earlier are obvious, including the lack of investor-state dispute settlement, limited coverage of agriculture, no government procurement provisions and other modern coverage areas. The lack of full access to the Mexican auto parts market would be a significant disadvantage for Canadian auto companies although free trade with Mexico under TPP would be helpful if TPP goes forward without the United States. Should Canada pursue its own deal with the United States to the perceived disadvantage of Mexico Canada's relations not only with Mexico but with other countries in Latin America could suffer.

The weighted average MFN tariff for Mexico is about 7.5% (compared to 3.5% for the United States and 4.2% for Canada), with Mexico having made major unilateral tariff reductions over the past decade. US tariffs on imports from all WTO members are thus relatively low despite spikes for small trucks and cantaloupes and some other products as noted below. Still, Mexico would lose benefits of NAFTA rules of origin and settlement of unfair trade disputes under NAFTA Chapter 19. Mexico's current tariffs could discourage some US exports, particularly from competitors located in countries which have free trade agreements with Mexico (more than 25). Some US investment, particularly in Mexican manufacturing, could be discouraged, but the alternatives would likely be lower wage cost countries in Asia rather than the United States.

VIII. Other Factors

The overall impact of eliminating NAFTA on the North American economies is difficult to predict because of many factors in addition to those noted earlier. In the future, a border adjustment tax, as threatened by the Trump Administration might poison bilateral relations from the outset of the Administration and greatly complicate negotiation of a new NAFTA. The Mexican peso is periodically subject to devaluation against the US dollar when investors lose their confidence. Termination of NAFTA would thus likely lead to depreciation of the peso which among other effects would somewhat mitigate US tariff increases, particularly with agriculture, fisheries and minerals are fully of Mexican origin. The strong US dollar tends to make US exports to Canada, Mexico and elsewhere more expensive there and makes U.S. imports relatively less expensive with or without free trade agreements. Consumers in all three countries could see, after NAFTA were

terminated, increase costs for consumers for such items as food, reducing their ability to spend on other items, both necessities such as food and luxuries such as shoes and TV sets and new cars.

While it is not always obvious except perhaps for autos and auto parts, the North American economies are integrated over a wide range of sectors. Many small and medium sized enterprises operate across the borders, e.g., between Ciudad Juarez and El Paso; for example, the cutting of a mattress cover takes place in the United States while the sewing is done in Mexico, with the finished product re-exported to the United States. Without NAFTA tariff benefits, the entire operation would be likely to be shifted to Asia. In some cases, existing US customs laws (item HS 9802) would permit Mexican firms to assemble parts and components made in the United States and export the finished goods to the United States, with duties payable only on the Mexican (labor) value added.

Although it is not evident in many of President Trump's statements during the campaign, where he called Mexicans "thieves and rapists," good Mexican-US relations have many benefits that go well beyond economic factors. These include inter alia cooperation on immigration and illegal drug traffic and sharing of scarce water resources in the Rio Grande and Colorado River. Since the 1830s, it should be remembered, the United States and Mexico have enjoyed a strong, cordial relationship for only about the most recent 30 years, beginning in the mid-1980s. With a 2000-mile, often porous border, good relations rather than a poisoned atmosphere have benefits for the United States as well as Mexico even if the promised border wall cuts in the opposite direction.

IX. Conclusions

One needs to be very careful six weeks into the Trump Administration about making predictions. The only certainty today is uncertainty about Trump Administration's evolving trade policies and how they will affect US and North American stakeholders. Despite the rhetoric it seems likely that because of the economic costs, opposition in the agricultural and automotive sectors, and Congressional resistance, termination of NAFTA by the Trump Administration will be avoided, at least for the time being. The risks of reversion to CFTA with Canada, even with some modernization, or WTO rules between the United States and Mexico are very high both politically and economically. Many Americans, particularly those not in the top 10% of income levels, including some who have opposed NAFTA for various reasons, would not welcome an increase in their cost of living, almost inevitable if NAFTA is terminated without a replacement.

Renegotiation of NAFTA is desirable for modernization purposes after 25 years. It may meet some but probably not nearly all of the Trump Administration's objectives. As noted earlier it would not likely have much impact on the US trade deficit. Many in the Congress would strongly support improving NAFTA's weak environmental and labor rules, but even a significant improvement in the rights of workers and unions in Mexico would only marginally reduce the approximately 5:1 hourly labor cost differential, and then only over several years at best. The basic outlines of the Administration's negotiating position can be expected to emerge during 2017, but unless and until

the negotiations are concluded it will be impossible to know the extent to which the Administration will be required to compromise to reach an agreement. Many Democrats in Congress, even more than Republicans, have been strongly opposed to NAFTA for many years. It is thus possible that a successful renegotiation of NAFTA by the Trump Administration, that seeks to increase manufacturing employment in the United States and significantly improve protection of labor rights in Mexico could ultimately attract bipartisan support in the US Congress.

INTERNATIONAL LAW WEEKEND 2018

International Law Weekend 2018 was held at the House of the Association of the Bar of the City of New York on Thursday October 18, 2018, and Fordham University School of Law on Friday and Saturday, October 19-20, 2018. The theme of the Weekend was "Why International Law Matters." All panels were open without charge to members of the American Branch of the International Law Association, International Law Students Association, staff of the United Nations and Permanent Missions, and students due to the generosity of co-sponsoring organizations.

The Weekend reviewed the development of international law and discussed current developments and emerging trends in investment arbitration, investor-state dispute settlement, international investment law, military space operations, blockchains, due process and refugees, freedom of expression, the Trump Administration and trade law, national security law, climate change, global migration, treaties and indigenous communities, and careers in international law.

The Weekend opened with an address by Professor Harold Koh, former Dean of Yale Law School and former Legal Adviser, U.S. State Department, on Thursday evening, October 18, 2018 entitled "The Current Administration's Approach to International Law."

The Panels on Friday morning, October 19, 2018, were:

- Is Investment Arbitration at Serious Risk? (chaired by David Attanasio)
- Can the Law of Military Space Operations Be Analogized from the "Terrestrial" Laws of War: A Roundtable Discussion (chaired by Chris Borgen)
- Identity in the Age of Blockchain and Refugees (chaired by Isabelle Figaro)
- 70 Years After the UDHR: Are We at the Endtimes of Human Rights? (chaired by Christina M. Cerna)
- The Global Crackdown on Civil Dissent and Freedom of Expression (chaired by Neil Pakrashi)
- Old Wine in New Bottles? The Trump Administration and Trade Law (chaired by Julian Arato)
- Due Process for Refugees at Borders: A Challenge for International law (chaired by Megan Corrarino)
- Investor-State Dispute Settlement: A Brave New World or the Clock that Went Backward? (chaired by Kenneth Figueroa)
- The Meaning of Torture in National Security (chaired by Alka Pradhan)
- War, Peace, and International Law on the Korean Peninsula (chaired by Jack M. Beard)

Sean Murphy of George Washington School of Law delivered the Keynote Address entitled "The United States and International Law in the 21st Century," which was followed by panels entitled:

- Investing in Climate Change Technologies: Barriers and Opportunities (chaired by Michael Gerrard)
- The Inquiry on Protecting Children in Conflict (chaired by Diane Marie Amann)
- Pathways to Careers in International Law (chaired by Lesley Benn)
- Do Multilateral Intellectual Property Negotiations Still Matter in the Age of Plurilateralism? (chaired by Sean Flynn)
- The New Global Compact on Migration (chaired by John Cerone)
- Imposing Obligations on Foreign Investors: An Emerging Trend in International Investment Law (chaired by Andrea Bjorklund)
- Surveillance, Privacy, and Human Rights: The Outlook for 2019 (chaired by Peter Margulies)
- The Rome Statute at 20: Dedicated to the Memory of M. Cherif Bassiouni, the "Father" of International Criminal Law and the ICC (chaired by Leila Sadat)
- Planting Grassroots Human Rights (chaired by Aaron X. Fellmeth)
- Refoule Me Once, Shame on Who? The United States and Non-Refoulement Under the Convention Against Torture in Armed Conflict (chaired by Nicole Hogg)

On Friday evening, October 19, 2018, the Permanent Mission of Estonia to the United Nations hosted a gala reception. The American Branch is grateful to the Estonia Mission for its hospitality and generosity.

Saturday October 20, 2018, featured an array of panels:

- Private International Law Matters (chaired by Louise Ellen Teitz)
- Does International Criminal Justice Work? Syria, North Korea, and the Role of International Criminal Justice in Resolving Global Crises (chaired by Milena Sterio)
- The Use of Force in Peace Operations (chaired by Ian Johnstone)
- The Security Council in a Fracturing World: Questions of Effectiveness, Legitimacy, and Legal Coherences (chaired by Hannah Woolaver)
- Will the Treaty on Genetic Resources and Traditional Knowledge Provide Meaningful Protection to Indigenous Communities (chaired by Peter K. Yu)
- Smart Contracts and Blockchain: Where Will Disputes Arise and How Should They Be Resolved? (chaired by Daniel Reich)
- Is Investment Law Harmonious with the Rule of Law? (chaired by Diora Ziyaeva)

- Statelessness: The Worldwide Absence of Legal Protection (chaired by Maryellen Fullerton)
- The Demise of the WTO Appellate Body? (chaired by Amelia Porges)
- Legacies and Memories of International (Criminal) Law (chaired by Mark Drumbl)
- Free from Treaty Interpretation's Last Stand: Why the Vienna Convention Treaty Interpretation Rules Matter More than Ever in the Outer Space Domain (chaired by Matthew Schaefer)
- The BBNJ Negotiations: Where Do We Stand after Beginning of the Intergovernmental Conference? (chaired by Elizabeth Rodriquez-Santiago)
- 2019 Jessup Compromis Panel (chaired by Lesley Benn)
- Protecting the Environment Before, During, and After Armed Conflict (chaired by Stefan Oeter)
- Emerging Voices (chaired by Martin Flaherty)
- Careers in International Development (chaired by Norman L. Greene)
- How Customary International Law Matters in Protecting Human Rights (chaired by Brian Lepard)

The American Branch extends its gratitude to the 2018 ILW Program Committee composed of: Milena Sterio (Co-Chair; Professor of Law & Associate Dean for Academic Enrichment, Cleveland-Marshall College of Law); Martin Flaherty (Co-Chair; Professor of Law, Fordham University Law School); David P. Stewart (ex officio, ABILA President; Professor from Practice, Georgetown University Law Center); Leila Sadat (ex officio, ABILA President-Elect; James Carr Professor of International Law at Washington University School of Law; Director of the Whitney R. Harris World Law Institute); Tessa Walker (ex officio; ILSA Programs Director); Bart Smit Duijzentkunst (Associate Legal Officer, United Nations); Jessica Simonoff (Attorney-Adviser, U.S. Department of State); Ashika Singh (Associate, Debevoise & Plimpton LLP); David Attanasio (Associate, Dechert LLP); Stephanie Farrior (Distinguished Faculty Scholar, Vermont Law School); Anil Kalhan (Professor of Law, Drexel University School of Law); Lucas Lixinski (Associate Professor, University of New South Wales); and William Aceves (Professor of Law, California Western School of Law).

The American Branch also gratefully acknowledges the generous support of the following sponsors of 2018 ILW: American Bar Association; American Society of International Law; Arizona State University; Brill USA, Inc.; California Western School of Law; Case Western Reserve University School of Law; Columbia Law School; Dean Rusk International Law Center, University of Georgia School of Law; Debevoise & Plimpton LLP; Foley Hoag LLP; George Washington University Law School; Georgetown University Law Center; Fordham University

School of Law; International and Non-J.D. Programs, Fordham University School of Law; Leitner Center for International Law & Justice; New York City Bar Association; New York University Center for Global Affairs; Oxford University Press; Princeton University, James Madison Program in American Ideals and Institution; Princeton University, The Program in Law and Public Affairs; The Fletcher School, Tufts University; University of Georgia School of Law, University of Nebraska; University of Pennsylvania Law School; University of Pittsburgh School of Law; White & Case LLP; Whitney R. Harris World Law Institute and Washington University School of Law.

INTERNATIONAL LAW WEEKEND 2018
HOUSE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
OCTOBER 18, 2018

OPENING ADDRESS

THE TRUMP ADMINISTRATION'S APPROACH TO INTERNATIONAL LAW

HAROLD HONGJU KOH*

It is a great honor to address this opening session of International Law Weekend 2018. But I speak at a time of considerable tumult.

As Donald Trumps' presidency careens into its third year, thoughtful observers around the world, including many friends in the International Law Association, are understandably experiencing exhaustion, whiplash, and bewilderment. Each day brings new, wildly contradictory assessments of the progress of Trump's myriad initiatives. In the increasingly sharp struggle between our current Administration and international law, who's winning?

On global matters, Trump has visibly reveled in shaking free of his handlers. An unpredictable tweet-driven policy has emerged, subsumed under the amorphous slogan 'American first.' Trump's brutal immigration policies, including separating migrant children from their parents at the border, have touched international nerves and triggered a newly intense round of street demonstrations at home. Trump's disastrous summit with Putin at Helsinki – historically a symbolic site of American human rights leadership – has confirmed not only his disdain for his own intelligence community, but also his unwillingness to engage seriously on human rights, Ukraine, or Russian election hacking. Both the Paris Climate and Iran Nuclear deals teeter along, as allies focus on how to fill the void created by Trump's withdrawal of U.S. leadership. Meanwhile, Iran has taken matters into its own hands, now suing the United States for breaching the Iran Nuclear Deal before the International Court of Justice.[1] America's wars continue apace:

* Sterling Professor of International Law and former Dean (2004-09), Yale Law School; Legal Adviser, U.S. Department of State (2009-13); U.S. Assistant Secretary of State for Democracy, Human Rights and Labor (1998-2001). These remarks are based on a keynote address delivered on October 18, 2018 at International Law Weekend in New York on "The Current Administration's Approach to International Law." As co-head of the Yale Law School's Peter Gruber Rule of Law Clinic, I served as counsel of record to the amicus brief of former national security officials in the U.S. travel ban litigation discussed in this Essay. This essay is adapted from Harold Hongju Koh, The Trump Administration and International Law (Oxford University Press 2019) and is current through May 2019. A version of these remarks has been published in 24 Australian International Law Journal 1 (2018)

[1] Rick Gladstone, *Iran Sues U.S. Over Broken Nuclear Deal and Reimposed Sanctions*, N.Y. Times, July 17, 2018, <https://www.nytimes.com/2018/07/17/world/middleeast/Iran-sues-us-over-sanctions.html>

as Bashar al-Assad tightens his grip on Syria, and Trump's administration engages in direct talks with the Taliban, even while its leader threatens near-term withdrawal from both Afghanistan and Syria. Meanwhile, new terrorist threats emerge, even as ISIS has lost ground on the battlefield.[2] With respect to North Korea, Trump's premature boast of a diminished North has crumbled as Trump's own intelligence chiefs have concluded that in fact, Kim Jong-un has taken few real steps to denuclearize.

In the international trade area, two long years of 'Trump change' have damaged and threaten to destroy four fundamental features of the post-Bretton Woods multilateral trading system: (1) bilateral and regional diplomacy, (2) the 'trade rule of law', (3) the WTO and its system of multilateral dispute resolution, and (4) the effort to refocus the trade community's attention from nationalistic security concerns to a twenty-first century focus on equality and redistribution.[3] And Trump's continuing insistence on confronting NATO and attacking multilateral institutions has created a growing sense of inversion as America battles its traditional allies and embraces its traditional adversaries.

I. Trump v. Hawaii

As proof that Trump is in fact gaining ground, some might point to the U.S. Supreme Court's closely watched decision in 2018 in Trump v. Hawaii.[4] Buoyed in that case by the pivotal vote of his first Supreme Court nominee, Neil Gorsuch, Trump finally secured a 5–4 decision upholding Travel Ban 3.0. In July 2018, Justice Anthony Kennedy's resignation handed Trump a game-changing opportunity to shift the Court's balance rightward for a generation, creating a vacancy that Trump promptly filled by nominating Judge Brett Kavanaugh, a young, reliably conservative, international-law sceptic from the D.C. Circuit who was narrowly seated after a tumultuous confirmation process. Liberals darkly warned that things are finally falling apart and that Trump, backed by his stream of judicial appointments, will now surely secure permanent transformation of the American policy landscape.

But on closer inspection, the latest developments only confirm the complexity of the situation. The Court's 5–4 decision in the Travel Ban case shows that civil society's ability to check Trump's overreaching will depend crucially on the courage and integrity of the courts. In one sense, the Hawaii decision was predictable, having been signaled by the Court's willingness to stay the lower court's preliminary injunction since December 2017, which ensured that the policy would continue

[2] Mujib Mashal & Eric Schmitt, *Pursuing Talks, U.S. Shifts Tack on the Taliban*, N.Y. Times, July 16, 2018; Eric Schmitt, *ISIS May be Waning, but Global Threats of Terrorism Continue to Spread*, N.Y. Times, July 6, 2018 <https://www.nytimes.com/2018/07/06/world/middleeast/isis-global-terrorism.html>.

[3] *See* Harold Hongju Koh, *Trump Change: Unilateralism and the 'Disruption Myth' in U.S. Trade Policy*, 44 Yale J. Int'l Law Online (2019), https://cpb-us-w2.wpmucdn.com/campuspress.yale.edu/dist/8/1581/files/2019/02/Koh_YJIL-Symposium_Trump_Change_02.05.19amriyq.ppdf.

[4] *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

for half a year before the final Supreme Court decision. But Trump's Travel Ban win ultimately turned on this transparently implausible assertion in Chief Justice John Roberts' majority opinion: that the infamous Japanese internment case, 'Korematsu [v. United States][5] has nothing to do with this case.' [6] In Trump, Chief Justice Roberts conceded nearly seventy-five years late that Korematsu 'was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — 'has no place in law under the Constitution.'[7]Yet remark- ably, in the same breath, he called it 'wholly inapt to liken that morally repugnant order to' Trump's Travel Ban.[8] In fact, the wholly apt resemblance to Korematsu should have been enough to invalidate the Travel Ban on its face.

As Justice Sonia Sotomayor's trenchant dissent observed, the Trump Court 'blindly accept[ed] the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, [in the process] redeploy[ing] the same dangerous logic underlying Korematsu…'.[9]In both Korematsu and Trump, the president had invoked an amorphous national security threat to justify a sweeping discriminatory policy limiting the freedom of a particular group. In both cases, the government asserted a grossly overbroad group stereotype that presumed that membership in that group, standing alone, signaled a hidden desire to harm the United States.[10] As Justice Jackson had warned in his prescient Korematsu dissent, 'once a judicial opinion . . . rationalizes the Constitution to show that the Constitution sanctions such an order, . . . [t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.'[11] Far from rejecting the parallel to Korematsu, Trump eagerly seized it as a weapon to justify his call for a 'total and complete shutdown of Muslims entering the United States,'[12] claiming that President Franklin Delano Roosevelt 'did the same' by interning Japanese-Americans during World War II.[13] Nevertheless, the Court adamantly insisted that Korematsu had nothing to do with Trump.

The Trump majority overlooked the manifest wrong of both policies: the U.S. government's insistence on judging and harming people based not on the content of their individual character

[5] *Korematsu v. United States*, 323 U.S. 214 (1944).
[6] 138 S. Ct., 2423.
[7] Ibid.
[8] Ibid.
[9] Ibid 2448.
[10] As Trump said, 'Islam hates us . . . We can't allow people coming into this country who have this hatred of the United States.' Anderson Cooper, *Exclusive Interview with Donald Trump*, CNN, Mr. 9, 2016, <http://www.cnn.com/TRANSCRIPTS/1603/09/acd.01.html>.
[11] 323 U.S., at 246 (Jackson, J., dissenting).
[12] Jenna Johnson, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States'*, Wash. Post, Dec. 7, 2015, <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states>.
[13] Meaghan Keneally, *Donald Trump Cites These FDR Policies to Defend Muslim Ban*, ABC News, Dec. 8, 2015, 1:01 PM, <https://abcnews.go.com/Politics/donald-trump-cites-fdr-policies-defend-muslim-ban-story?id=35648128>.

but on their membership in a supposedly dangerous group — defined by descent, nationality, or religion — whose dangerousness the U.S. government had never proven. While the Travel Ban nominally barred entry based on country of origin, two of the named countries — North Korea and Venezuela — were clearly inserted as window dressing to provide cover for the five Muslim-majority countries that were the Ban's real targets.

To sustain the Ban, the Trump majority committed grievous errors of both fact and law. As a matter of fact, the Trump majority claimed that there was 'persuasive evidence that the entry suspension has a legitimate grounding in national security concerns.'[14] But as the amicus brief of former national security officials from both Republican and Democratic administrations chronicled, throughout the fifteen months of the Travel Ban litigation, the U.S. government never offered a sworn declaration from a single executive official who was willing to describe either the national security-based need for the executive orders or the chaotic process that had led to their adoption.[15] Nor did the government point to any other evidence of a national security imperative that could remotely justify its unprecedented actions. To the contrary, Trump officials' own dilatory actions in the wake of the first iteration of the Travel Ban showed that even they never took seriously their own claims of national security urgency.

As a matter of law, the Trump majority misread the pivotal statute, the Immigration and Nationality Act, to 'exude[] deference to the President in every clause', a description better suited to the Court's own opinion than to the law itself.[16] The Court never plausibly explained why that law, which authorised the president to suspend entry of 'immigrants or nonimmigrants', was not modified by a subsequent statutory provision that expressly prohibited nationality-based discrimination in the issuance of immigrant visas.[17] The majority uncritically accepted the government's claim that what had undeniably begun life as a Muslim Ban had evolved into 'a facially neutral policy denying certain foreign nationals the privilege of admission.'[18] But as Justice Sotomayor's dissent clarified — citing chapter and verse from Trump's own Twitter feed — '[t]he full record paints a . . . harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.'[19] Ironically, only weeks earlier, the Court had found that state officials' expressions of hostility to religion toward a baker who had declined to serve LGBT customers violated the baker's freedom of religion.[20] Yet in Trump, the Court dismissed repeated, far more overt anti-Muslim statements from Trump and his senior advisers as irrelevant to similar constitutional claims. The Court never acknowledged that the original bigotry that had infected the first Travel Ban had carried over to

[14] *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018).
[15] Brief for Former National Security Officials as Amicus Curiae Supporting Respondents, Trump v. Hawaii, 138 S. Ct. 2392 (2018).
[16] 138 S. Ct., 2400.
[17] *Immigration and Nationality Act of 1965*, 8 U.S.C. § 1182(f).
[18] 138 S. Ct., 2423.
[19] Ibid 2435.
[20] *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 584 U.S. (2018) 138 S. Ct., 2402.

its two successors, which — notwithstanding the government's recitation of a subsequent 'worldwide review process under- taken by multiple Cabinet officials' — were thinly disguised to preserve the original Ban's group-discrimination template.[21] As Justice Clarence Thomas himself once conceded, 'if a policy remains in force, without adequate justification and despite tainted roots…, it appears clear — clear enough to presume conclusively — that the [government] has failed to disprove discriminatory intent.'[22]

Most troubling, the Trump majority upheld the legality of the government's conduct by applying an absurdly deferential standard of review. As one commentary described the Court's reasoning: 'even if we know that an immigration policy was motivated by blatant official animus against a religion, the policy should be sustained so long as the government proffers some rational national security basis for it.'[23] The majority chose to defer broadly to an executive action that, as the national security officials' brief demonstrated, had not emerged from the considered judgment of executive officials, was not a credible response to a bona fide security threat, and rested on inconsistent, ever-shifting rationales.

For three reasons, on closer inspection, the Trump Court's ruling decides less than it symbolizes. First, the Court's ruling rested on statutory grounds, so it could be re- versed in the legislative arena now that the House of Representatives has changed hands. Second, as with the other Trump policies, other transnational actors will surely invoke transnational legal process to contest and limit the impact of the Court's ruling on multiple fronts. No airline flies directly from any of the banned countries directly to the United States; accordingly, government authorities in each country will need to decide whether they will cooperate in religious discrimination in violation of international law. Third, the Travel Ban litigation is not over. Thus far, it has failed only to prove the Ban unconstitutional on its face. It still remains to be seen whether, in practice, the elaborate system of individualized exemptions and waivers accompanying the Ban actually allows individual travelers' circumstances to be meaningfully taken into account in the making of entry decisions. The Trump Court remanded the case back to the lower courts so that litigation would proceed without a preliminary injunction, but it also found that U.S. persons had standing to challenge the Ban's application and that the core issues were effectively justiciable. On remand, discovery can now proceed, and evidence of government discrimination in individual cases can be introduced.[24] As Justice Stephen Breyer's dissent pointed out, many different plaintiffs — including 'lawful permanent residents, asylum seekers, refugees, students, children, and numerous others' — can now test to see how often the bureaucracy actually awards individualised exceptions

[21] 138 S. Ct., 2402.

[22] *United States v. Fordice*, 505 U.S. 717, 747 (1992) (Thomas, J., concurring).

[23] Adam Cox et al., *The Radical Supreme Court Travel Ban Opinion—But Why it Might Not Apply to Other Immigrants' Rights Cases*, Just Security, June 27, 2018, <https://www.justsecurity.org/58510/radical-supreme-court-travel-ban-opinion-but-apply-immigrants-rights-cases/>.

[24] Noah Feldman, *Take Trump's Travel Ban Back to Court*, Bloomberg, June 29, 2018, 12:26 PM, <https://www.bloomberg.com/view/articles/2018-06-29/take-trump-s-travel-ban-back-to-court>.

to the blanket Ban.[25] And if, as Justice Sotomayor suspects, the 'waiver program is nothing more than a sham', a court could issue an injunction permanently blocking the Ban for being unconstitutional as applied.[26]

In short, the Travel Ban episode is far from over. One battle does not determine who wins the legal war. The transnational-legal-process struggle will continue on many fronts. One might have hoped that the Court would affirm the many courts that had invalidated the Ban in its relatively early stages. But it is worth recalling that sometimes a favourable court ruling comes at the end, not the beginning, of the legal process. We should not forget that Korematsu itself was overruled in the court of public opinion — through concerted action on many fronts — decades before the Roberts Court finally got around to pronouncing it dead.

How willing the courts are to defer to executive authority remains pivotal, because the Travel Ban represents only the most prominent Trump administration policy that, in Justice Sotomayor's words, 'now masquerades behind a facade of national-security concerns.'[27] After all, this president has repeatedly played national security as his 'trump card'. This is the same president who, while separating infants from their parents at the U.S.–Mexico border in the name of national security, bizarrely declared Canada to be a national security threat.[28] This is the same president who, while harshly condemning and using military force in response to Assad's use of chemical weapons against the Syrian people, remains unwilling to lift his nationality-based ban on Syrians entering the United States. And this is the same president whose administration is broadly claiming national security justifications for expelling transgender individuals from the U.S. military,[29] is imposing steel and aluminium tariffs on allies under Section 232 of the 1962 Trade Expansion Act,[30] and is still contemplating, in the name of national security, emergency action under the Defense Production Act and the Federal Power Act to require grid operators to make 'stop-loss' purchases from failing coal power plants.[31] Given the Trump Court's credulous acceptance that national security concerns justified a Travel Ban, we can soon expect the administration to seek similar

[25] *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018).
[26] Ibid 2445.
[27] Ibid 2433.
[28] Dov S. Zakheim, *Canada as a National Security Threat to the United States*, Hill, June 4, 2018, 1:30 PM,<http://thehill.com/opinion/national-security/390527-canada-as-a-national-security-threat-to-the-united-states>.
[29] Dave Phillips, *Judge Blocks Trump's Ban on Transgender Troops in Military*, N. Y. Times, Oct. 30, 2017, <https://www.nytimes.com/2017/10/30/us/military-transgender-ban.html>.
[30] *Section 232 Tariffs on Aluminum and Steel*, U.S. Customs and Border Protection, <https://www.cbp.gov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel> (last updated June 29, 2018); Proclamation 9705 (Mar. 8, 2018) (Adjusting Imports of Steel into the United States); Proclamation 9704 (Mar. 8, 2018) (Adjusting Imports of Aluminum into the United States).
[31] Jennifer A. Dlouhy, *Trump Prepares Lifeline for Money-Losing Coal Plants*, Bloomberg, May 31, 2018, 8:49 PM, <https://www.bloomberg.com/news/articles/2018-06-01/trump-said-to-grant-lifeline-to-money-losing-coal-power-plants-jhv95ghl> (last updated June 1, 2018, 9:44 AM); *The Trump Administration's Coal and Nuclear Proposal Undermines the Resiliency of the Grid*, Inst. For Energy Res., June 13, 2017, <http://instituteforenergyresearch.org/analyss/trump-adminstrations-coal-nuclear-proposal-undermine-grid-resiliency-%E2%80%A8/>.

judicial validation of these other national security masquerades as well. Surely, the confirmation of Judge Brett Kavanaugh to the U.S. Supreme Court would shift the Court even more in that direction. But even so, not every struggle gets to the Supreme Court, and those that do rarely get there quickly. So it will still be up to the lower courts, which have proven almost universally hostile to every iteration of the Travel Ban, to determine whether their job is to fortify the administration's national security façades or whether — as Chief Justice Marshall wrote in Marbury v. Madison — it is 'the province and duty of the judicial department to say what the law is.'[32]

II. The Law Pushes Back

At the time of writing, such judicial pressure is graphically playing out amid the firestorm surrounding Trump's signature initiative: his immigration policies. Previous administrations handled undocumented family border crossings through civil immigration proceedings. But days after taking office, Trump announced that detention, deportation, and criminal prosecution would become the rule for any undocumented person crossing into the United States, regardless of whether they could ultimately establish the right, under both domestic and international law, to be present in the United States as a bona fide asylum seeker fleeing persecution at home.[33]

Once again, Trump relied on a discriminatory group stereotype. He presumed without proof that every single undocumented individual crossing an American border is a criminal, rather than a victim deserving of the protection of American and international refugee laws. The Trump administration then deepened the crisis by abruptly instituting a 'zero-tolerance' policy of prosecuting all such undocumented crossing cases.[34] To strictly implement the new zero-tolerance policy, border agents picked incarceration over family unity and took the horrifying step of separating children from their parents, who were then held in adult jails pending court appearances.

As wrenching images of small children being forcibly taken from their parents flooded the media, massive street protests erupted, replaying the earlier Travel Ban demonstrations. But once again, the administration had overlooked a significant legal impediment. In the 1997 Flores litigation, a federal court had entered a settlement directing that children could not be held in detention for more than twenty days.[35] So under Flores, if detained families are to stay together while awaiting immigration proceedings, they must stay together outside of jails. The ACLU filed a class-action lawsuit that won a court-ordered deadline from U.S. District Judge Dana Sabraw, a George W. Bush appointee. That order gave the Trump administration two weeks to return separated children younger than five to their parents[36] and thirty days to reunite parents with several thousand older

[32] 5 U.S. (1 Cranch) 137, 177 (1803).
[33] Dara Lind, *The Wall is the Least Aggressive Part of Trump's Executive Actions on Immigration*, Vox, Jan. 25, 2017, 3:40 PM, <https://www.vox.com/2017/1/25/1437847/trump-immigration-order-wall-deport-sanctuary>.
[34] *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. Dep't of Just., Apr. 6, 2018, <https://www.justice.gov/opa/pr/attorney-general-accounces-zero-tolerance-policy-criminal-illegal-entry>.
[35] Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK(Px).
[36] Margaret Hartmann, *Judge Orders Trump Administration to Reunite Migrant Families Within 30 Days*, N.Y.

children who had been detained by the government.[37] Administrative chaos ensued as it became clear that the Trump administration could not meet Judge Sabraw's deadlines be- cause, among other obstacles, it did not actually know where many of the children were. Under intense pressure, Trump capitulated and issued an executive order reinstating the principle of family unity.

District Court Judge Dolly Gee, the judge supervising the Flores settlement, then rejected the Justice Department's request to alter the terms of that settlement, meaning that migrant children still cannot be legally detained for more than twenty days. Because U.S. immigration authorities lack the facilities to detain thousands of families, the Trump administration had no choice but to reverse course yet again, abruptly announcing that the reunited migrant families would be released into the United States with the parents wearing ankle monitors. The announcement effectively acknowledged that, pending appeal, the administration would adhere to its 'zero-tolerance' immigration policy in name only; so in practice Trump returned to the same pejoratively named 'catch-and-release' policy that he had railed against so often at his political rallies.[38] Under pressure from overlapping judicial mandates, Trump officials reverted to allowing families into the United States to await immigration proceedings, a process that, barring reversal of the policy and given current judicial backlogs, could take years.

As the 2018 midterm election approached, Trump's immigration policies shifted from week to week, each new change immediately running into an immovable legal obstacle. Warning darkly of a 'caravan' threatening to invade the southern border, Trump claimed that he would eliminate birthright citizenship, ignoring that it would require a constitutional amendment revising the Fourteenth Amendment's mandate that '[a]ll persons born... in the United States ... are citizens of the United States ....'[39] The Administration then pivoted to another policy, whereby entering aliens could only claim asylum at a recognised port of entry, this time running afoul of a clear statutory directive that '[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival) ... irrespective of such alien's status, may apply for asylum.'[40] At the end of 2018, Trump shut down the U.S. government over his unpopular demand for a taxpayer-funded wall (which he had campaigned for on the repeated cry that Mexico would pay for it), but ended up caving, first for three weeks, and again when this issue came back up three weeks later.

Mag., June 27, 2018, 5:16 AM, <http://nymag.com/daily/intelligencer/2018/06/judge-reunite-migrant-families-in-30-days-end-separations.html>.

[37] Sarah Nechamkin, *Exactly How Many Separated Immigrant Families Have Been Reunited?*, N.Y. Mag., July 12, 2018, 12:05 PM, <https://www.thecut.com/2018/07/how-many-separated-immigrant-families-have-been-reunited-trump.html>.

[38] Julie Garcia, *Is 'Zero Tolerance' Policy for Immigrants Still in Effect? Depends Who You Ask*, Caller Times, June 26, 2018, 8:32 PM <https://www.caller.com/story/news/local/2018/06/26/zero-tolerance-policy-immigrant-families-separated-reuinifcation-process/733912002/>; Dara Lind, *'Catch and Release' Explained: The Heart of Trump's New Border Agenda*, Vox, Apr. 9, 2018, 12:50 PM, ('In fiscal years 2017 . . . most immigrants . . . [d]id show up to their court dates: 60,000 immigrants showed up only to get deported. Thousands more actually won their cases . . .').

[39] U.S. Const. Amend. XIV.

[40] 8 U.S.C. § 1158(a)(1) (2018) (emphasis added).

So time and again, transnational legal process pushed Trump's immigration policies back. What Trump and his subordinates overlooked was that the patchwork of laws and policies they had scorned as 'catch and release' are in fact part and parcel of transnational legal process. Collectively, these laws are a bulwark of legal protection for certain vulnerable populations such as refugees, children, and families, populations that over time the United Nations, Congress, and the courts have all accorded special solicitude.[41] Trump cannot simply brush those legal protections aside by shouting 'end catch and release'.

Instead, he must do the hard and tedious work of mobilizing his bureaucracy to invoke existing legal mechanisms that will pressure Congress or the courts to change the laws through established legal channels. Because he has not done that work, at this point the law remains unchanged, and Trump's immigration policies have largely reverted to the status quo ante, but only after massive public outcry and untold human suffering.

III. Continuity and Resilience

On global matters, the same basic tale of continuity and resilience can be told. On the surface, we see massive turmoil as Trump's tweets superficially signal abrupt shifts in America's policies regarding such countries of concern as China, Iran, North Korea, and Russia and such high-profile issues as immigration, international trade, denuclearization, and the retreat from the two-state solution in the Middle East. Trump's unpredictable bull-in-a-china-shop rhetoric has engendered controversy wherever he goes, turning previously routine diplomatic meetings — such as the NATO summit in Brussels or his bilateral visit to the prime minister of Great Britain — into nail-biting high-wire acts. A pattern has emerged whereby Trump signals that he will disrupt a previously settled relationship, the media explodes, U.S. allies push back, Trump partially recants, and policy eventually resettles in roughly the same place that it was before Trump roiled the waters. Foreign policy toward lower-profile nations and issues continues to be governed largely by lower political appointees, career bureaucrats, and standard operating procedures, unless and until those issues rise to the rare level that attracts the White House's political attention and micromanagement. So outside the headlines, key national security and defense policies continue to be made according to long-standing legal and policy principles and frameworks embedded in congressional statutes, executive orders, presidential policy guidance, and institutional custom.[42]

North Korea provides yet more proof that, even with regard to the high-profile countries of concern, Trump has disrupted the status quo without meaningfully changing policies. After issuing a vague

[41] *See* Dara Lind, *Why is the Obama Administration Still Fighting to Keep Immigrant Families Behind Bars?*, Vox, July 29, 2015, 2:20 PM, <https://www.vox.com/2015/7/29/9067877/family-detention-immigration-flores>; Dara Lind, *The Process Congress Wants to Use for Child Migrants Is a Disaster*, Vox, July 15, 2014, 9:00 AM, <https://www.vox.com/2014/7/15/5898349/border-children-mexican-central-american-deport-quickly-2008-law>.

[42] *See, e.g.,* 2016 Legal and Policy Frameworks discussed in Chapter 5; National Security Strategy of the United States (Dec. 17, 2017); Summary of the National Defense Strategy of the United States (2018) (whose key principles were made public by Defense Secretary James Mattis).

400-word June 2018 Singapore Declaration, Trump tweet- ed, 'I have confidence that Kim Jong Un will honor the contract we signed & even more importantly, our hand-shake. . . . We agreed to the denuclearization of North Korea.'[43] But plainly, he misunderstood that under international law, a handshake is just a hand- shake; it creates no binding international legal treaty, contract, or agreement. Instead of clarifying a negotiating sequence and timetable Trump naively concluded that two countries merely talking about 'denuclearization' had enough concrete legal meaning to merit tweeting that the North Korean nuclear threat had somehow ended. But in the weeks following the Singapore Summit, things rapidly deteriorated: Secretary of State Mike Pompeo received harsh diplomatic treatment in a Pyongyang visit where he was shunted off to Kim Jong-un's subordinates. The North Koreans subsequently missed their deadline to bring the remains of American soldiers to a meeting at the demilitarized zone.

It soon became embarrassingly clear that Kim had played Trump by securing equal billing with a sitting American president, humiliating his secretary of state, and demanding that he adhere strictly to the terms of a Singapore Declaration that contains none of the detail that Trump forgot to write into it. When Trump's aides speak of 'denuclearization', they are referring to a far more detailed and sequenced series of steps that Trump apparently never described to Kim — and may not understand himself — that would actually lead to the final 'complete, verified, and irreversible denuclearization' (CVID) of the peninsula. Accordingly, the North Korean Foreign Ministry now predict- ably dismisses Pompeo's request for clarity and sequence as a 'unilateral and gangster-like demand. . . . which run[s] counter to the spirit of the Singapore summit meeting and talks.'[44]

As Colin Kahl has pointed out, the Barack Obama policy of 'strategic patience' toward North Korea always 'require[d] a long, hard slog — grinding bilateral and multilateral talks, negotiated freezes, confidence-building steps, and agreements to gradually roll back Pyongyang's [nuclear] program all the while bolstering the U.S. deterrent against North Korean aggression and strengthening regional alliances to manage and mitigate interim risks.'[45] These were exactly the smart-power steps the Obama administration followed to build the Iran nuclear deal, which Trump abandoned without a plan B. They are also exactly the steps that Trump has not yet begun with respect to a future North Korean deal, for which he again seems to have no plan B, apart from a counterproductive return to the bellicose rhetoric of 'fire and fury'. At his 2018 State of the Union speech, Trump trumpeted that he would have a second summit with Kim Jong Un at the end of February in Hanoi. But he still had not defined his objectives or agreed with Kim on what kind of 'denuclearization' he was seeking. And even though North Korea had already taken down Sony's

[43] Trump, Donald (@realdonaldtrump). July 9, 2018, 10:25 AM. Tweet

[44] Jessica Donati and Andrew Jeong, *North Korean Nuclear Talks Are Thrown Off Balance as Accounts by U.S. and Pyongyang Clash*, Wall St. J., <https://www.wsj.com/articles/pompeo-cites-progress-in-north-korea-nuclear-talks-1530967772> (last updated July 7, 2018. 10:53 AM).

[45] Colin Kahl, *Trump Has Nobody to Blame for North Korea but Himself*, Foreign Pol'y, July 11, 2019, 5:08 PM, <https://foreignpolicy.com/2018/07/11/trump-has-nobody-to-blame-but-himself-for-north-korea-nuclear-pyongyang-pompeo/>.

American grid in a massive cyberattack,[46] Trump did nothing to address the looming threat posed by North Korea's growing cyber capacities. Over two years, America's North Korea policy had simply reverted back to square one, having moved no closer to North Korean denuclearization.[47] And once again, Trump's eagerness to claim premature victory, combined with his temperamental unwillingness or inability to do the hard and tedious work of actually mobilising his bureaucracy to build new and better international legal mechanisms, has led the policy back to an inferior version of the status quo ante.

To be sure, the Trump administration is still in relatively early days. Significantly, on those rare occasions where the administration has closed ranks with traditional Republicans and worked hand in glove with Senate Majority Leader Mitch McConnell, it has enjoyed its few meaningful victories: winning an unpopular tax cut and two Supreme Court confirmations. But at the same time, this uneasy coalition of Trumpites and Republicans have twice spectacularly lost legislative efforts to repeal Obamacare, although another round may yet be coming. Over time, the ongoing steady stream of judicial confirmations could well cement Trump's policy changes into law and rewrite established rights and norms. Any meaningful strategy of resistance therefore increasingly turns on driving a wedge between the Trumpites and traditional Republicans, on such 'wedge issues' as trade, immigration, and appeasement with Russia.

IV. What Lies Ahead

Now that the November 2018 by-elections have shifted the House of Representatives into Democratic hands— and as Special Counsel Bob Mueller issues more indictments that cast Trump's political legitimacy into doubt[48] — the Republicans will face a vexing choice: whether to retain Trump as their presidential candidate for 2020 or to replace him with someone more traditional. But if replacing Trump as the Republican presidential candidate means alienating Trump's base and keeping his supporters away from the polls, it is an almost certain recipe for electoral defeat in 2020.

In short, as Trump dances further out on the high wire, he may feel freer, but in fact he becomes far more vulnerable to being toppled. As I learned as a human rights policymaker watching many

[46] Tim Starks, *U.S. Indicts North Korean national for Sony hack, massive cyberattacks*, Politico, September 6, 2018, <https://www.politico.com/story/2018/09/06/justice-department-north-korea-sony-hack-771212>.
[47] David E. Sanger, *Kim and Trump Back at Square 1: If U.S. Keeps Sanctions. North Korea Will Keep Nuclear Program*, N.Y. Times, Jan. 1, 2019 <https://www.nytimes.com/2019/01/01/world/asia/kim-trump-nuclear.html>.
[48] William K. Rashbaum, et al., *Cohen Pleads Guilty, Implicating President*, N.Y. Times, Aug. 22, 2018, <https://www.nytimes.com/2018/08/21/nyregion/michael-cohen-plea-deal-trump.html?&hp&action=click&pgtype=Homepage&clicksource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news>; Sharon Iafraniere, *Paul Manafort Guilty of 8 Fraud Charges*, <http://www.nytimes.com/208/08/21/us/politics/paul-manafort-trial-verdict.html?HP&action=click&pgtype=Homepage&clicksource=story-heading&module=a-lede-package-region&region=top-news&WT.nav=top-news>.

political strongmen fall, when you make everyone happy to see you go, you go quickly. Powerful people who bully those around them end up with few friends, and even fewer who will help save them when they become vulnerable. When you attack as overly constraining the very partnerships, processes, and laws that provide you with a safety net of legitimacy, then without it, you plummet.

As you all well know, what we are witnessing with Trump is having an impact not just in the United States, but around the world. The global rise of populist authoritarians and the global challenge to human rights and the rule of law have reached crisis proportions. A prominent global rule-of-justice index reported that fundamental human rights had diminished in almost two-thirds of the 113 countries surveyed in 2017; the same index assessed that since 2016, rule-of- law scores had declined in thirty-eight countries.[49] In Poland, once a beacon for emerging democracies, an authoritarian government has conducted a sweeping purge of the Polish Supreme Court, leading tens of thousands to take to the streets in protest.[50] The Philippine Supreme Court nullified the appointment of its chief justice only one month after President Rodrigo Duterte called her his 'enemy' for speaking out against his brutal drug war and against his directive that the southern Philippines be placed under military rule.[51] Hungary has adopted openly xenophobic laws that criminalise people for helping asylum seekers.[52] Right-wing governments have taken power in Austria and Italy.[53] Venezuela has experienced an almost complete collapse of the rule of law. In an effort to purge his own 'deep state', Turkey's Erdoğan fired 18,000 civil servants for unspecified links to terror groups in advance of his recent inauguration.[54]

In each of these countries, the example America sets over the next few years will be very closely watched. Thus far, the resilience of American institutions has largely checked Trump at home. But that resilience may finally give way if Trump is re-elected for another term. At the same time, his greatest impact may come from fueling the global rise of authoritarianism and retreat from the rule of law and human rights. His persistent instinct to attack democratic leaders and embrace and emulate authoritarians is emboldening repressive governments elsewhere. His demonization of migrants at home fuels anti-immigrant xenophobia abroad. Concurrently, the arrival to power of Mike Pompeo and John Bolton has bolstered the Trump administration's concerted effort to

[49] *WJP Rule of Law Index 2017–2018*, World Just. Project, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-indez-2017%E2%80%932018> (last visited July 14, 2018).
[50] Marc Santora, *Poland Purges Supreme Court, and Protestors Take to Streets*, N.Y. Times, July 3, 2018, <https://www.nytimes.com/2018/07/03/world/europe/poland-supreme-court-protest.html>
[51] Andreo Calonzo, *Top Philippine Judge Removed After Attacks on Duarte's Drug War*, Bloomberg, May 11, 2018, 2:34 AM, <https://www.bloomberg.com/news/articles/2018-05-11/top-phillippine-judge-removed-after-attacks-on-duarte-s-drug-war>.
[52] Patrick Kingsley, *As West Fears the Rise of Autocrats, Hungary Shows What's Possible*, N.Y. Times, Feb. 10, 2018 <https://www.nytimes.com/2018/02/10/world/europe/hungary-orban-democracy-far-right.html>.
[53] Jon Henley, *Rise of Far-Right in Italy and Austria Gives Putin Some Friends in the West*, Guardian, June 7, 2018, 12:00 AM, <https://www.theguardian.com/world/2018/jun/07/rise-of-far-right-in-italy-and-austria-gives-putin-some-friends-in-the-west>.
[54] Associated Press, *Turkey Fires Thousands for Alleged Terror Links*, Boston Globe, July 8, 2018, <https://www.boston-globe.com/news/world/2018/07/08/turkey-fires-thousands-for-alleged-terror-links/w66vkgtmvhxdvqubmakaqo/story.html?Event=event25?Event=event25>.

undermine the rule-of-law institutions of the post-war legal order — whether the United Nations and its human rights mechanisms, the European Union, or global institutions of trade and security. Indeed, Trump has recently hinted at his desire to withdraw from both NATO and the World Trade Organization, in what now seems to be an intentional pattern, not just lashing out.[55] Some have even suggested — supported by the incorrect legal argument of American academics, in my judgment[56]– the existence of a sweeping unilateral presidential power to withdraw, without congressional approval, from any and all international agreements to which the United States is a party.

As Trump's rhetoric empowers authoritarians antagonistic to the rule of law, the democratic states that would ordinarily push back are being disparaged, the civil society and media institutions within those same states are being squeezed, and the international in-situations that would resist are being undermined. Under intense pressure, some of these institutions may break. Some treaty regimes may collapse. Particularly if Trump ends up serving two terms, the longer-term story could be that repeated body-blows to the global body politic contribute to the slow ungluing of the fragile frame-work of Kantian global governance that has struggled to hold together for seven decades. But if the responses to Trump's immigration policies show us anything, it is the resilience of our enduring core institutions: the courts, Congress, the media, bureaucracy, subnational entities, and civil society. With luck and perseverance, these institutions and processes should outlive Trump's deviations and play a critical role in reknitting together our society and our alliances once he is gone.

V. Conclusion

So in the battle of Donald Trump vs. International Law, who is winning? In the penultimate round of Muhammad Ali's famous rope-a-dope fight in Zaire, most observers thought that his opponent, George Foreman, was decisively winning. Foreman pummeled Ali wildly as Ali covered up, absorbed punishment, loudly protested, and counterpunched. In hindsight, we now know that at that moment it was Ali, not Foreman, who was about to prevail. But we also know that the battering took a grave toll on Ali's long-term health and well-being. So who ends up winning in the longer term will depend not just on who is stronger or more determined in the moment but also on who is more resilient in the long run.

Going forward, the main question should be, who speaks for America? Donald Trump's tweets and actions? Or America's enduring civic institutions, whose founding commitments to upholding

[55] Ewan Macaskill, *Trump Claims Victory as Nato Summit Descends into Mayhem*, Guardian, July 12, 2017, 1:16 PM, <https://www.theguardian.com/world/2018/jul/12/donald-trump-nato-summit-chaos-germany-attack-defence-spending>; Bob Bryan, *Trump Reportedly Wants to Pull the US out of the WTO, a Move that Would Wreck the International Trade System*, Bus. Insider, June 29, 2018. 11:50 AM, <https://www.businessinsider.com/trump-leave-world-trade-organziation-wto-2018-6>.

[56] Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 Yale L.J. F. 432 (Nov. 12, 2018).

human rights and the rule of law have defined America since our country's inception? In his parting opinion that clinched the majority in Trump v. Hawaii, Justice Kennedy fretted that '[a]n anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect. . . .'[57] Regrettably, in the Travel Ban case, the Court declined to require that commitment. But in the many struggles that still lie ahead, the rest of us must not similarly surrender.

To our many friends around the world, who belong to the International Law Association or are gathered at this International Law Weekend, I say: don't stop believing. The America you believed in is embattled, but it's still here. It is under siege, but it's fighting back, with law. With resilience and persistence, we can get by. So please, please don't give up on us. On this, as on so many other things, we can get by, but we will need a little help from our friends.

Thank you for listening.

[57] *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018).

INTERNATIONAL LAW WEEKEND MIDWEST
MARCH 2019

The University of Dayton School of Law and the University of Dayton Human Rights Center, together with the American Branch of the International Law Association, hosted the 2019 Gilvary Symposium, International Law Weekend Midwest on Saturday, March 16, 2019 at Dayton University School of Law. The theme of the Weekend was Things Fall Apart or Creative Destruction?: The Future of the Rule of Law in International Governance. This event focused on two key questions: (1) Are we in an era of transition in international governance from one stable state to another or are we in an era where the fundamental norms and rules have begun to fall apart to be replaced by pure power politics? and (2) Might the current unstable and fluid relationship to the rule of law in international relations provide space for new entrants and new solutions rather than be a retreat from law?

Justice Carlos Bernal of the Constitutional Court of Colombia delivered the Keynote Address which discussed transitional justice in Colombia in the wake of the Colombian government and FARC peace agreement that concluded one of the world's longest running contemporary conflicts. In his presentation, he highlighted how Colombia's domestic and transnational conflicts, the peace process, and its aftermath posed unique problems for a Constitutional Court, especially one in a country in which the US has historically played a large role in domestic outcomes. He also posed the following questions: "What has happened to US influence in Colombia?" and "What role has it played in either supporting or subverting the rule of law?"

The Weekend also featured four panels:

- Human Rights and Humanitarian Law – Norms in International Refugee and Asylum Law (chaired by Shelley Inglis)
- Environmental Law – Climate Change and the Point of No Return (chaired by Professor Dalindyebo Shabalala)
- International Economic Law – Trade Norms, New Norms? (chaired by Professor Dalindyebo Shabalala)
- Global Governance – Reconstruction or Falling Through the Cracks? (chaired by Professor Natalie Hudson)

Professor Dalindyebo Shabalala delivered the closing remarks.

The American Branch extends its gratitude to Professor Shabalala for his leadership in organizing the March 2019 ILW Midwest and to the Honorable James J. Gilvary Fund for Law, Religion, and Social Justice for its generous grant which made the event possible.

The American Branch also gratefully acknowledges ABILA member Stephanie Farrior for representing it in the event.

INTERNATIONAL LAW WEEKEND MIDWEST SEPTEMBER 2019

Case Western Reserve University School of Law hosted an International Law Weekend Midwest on Friday September 20, 2019. The theme of the event was "Atrocity Prevention: The Role of International Law and Justice." The Weekend featured two dozen of the world's foremost experts of humanitarian law and policy and discussed how the world has reached a nadir for human suffering. The Panels looked at how social media is being used as a tool for incitement and discussed issues concerning the attacks on the International Criminal Court and how the Security Council was being paralyzed by the use of the veto.

The Weekend opened with welcome remarks from Dean Michael Scharf, Co-Dean of Case Western Reserve University School of Law, and Prof. Leila Sadat of Washington University School of Law, President of the American Branch of the International Law Association. It was followed by the presentation of the International Association of Penal Law (AIDP) Book of the Year Award by Associate Dean Milena Sterio of Cleveland Marshall College of Law, President of the AIDP/U.S. National Section.

Sean Murphy, Professor of International Law of the George Washington University Law School, delivered the Keynote Address titled: "Atrocity Prevention: The Role of International Law and Justice: Codifying the Obligations of States Relating to the Prevention of Atrocities."

The panels at the event were:

- Legal Challenges to the Security Council Veto in the Context of Atrocity Crimes (chaired by Stephen Petras)
- Regulating Social Media that Fosters Atrocity Crimes (chaired by Raymond Ku)
- Preventing Atrocities in Yemen (chaired by Michael Scharf)
- The ILC's Draft Convention on Crimes Against Humanity (chaired by Avidan Cover)
- Threats and Challenges Confronting the International Criminal Court (chaired by James Johnson)

The Weekend was organized by the Law School's Frederick K. Cox International Law Center and was made possible through the joint sponsorship of the American Society of International Law, the American Branch of the International Law Association, the International Association of Penal Law, the Cleveland Council on World Affairs, the International Law Section of the Cleveland Metropolitan Bar Association, and the Greater Cleveland International Lawyers' Group

INTERNATIONAL LAW WEEKEND MIDWEST 2019
CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
SEPTEMBER 20, 2019

KEYNOTE ADDRESS

ATROCITY PREVENTION: THE ROLE OF INTERNATIONAL LAW AND JUSTICE: CODIFYING THE OBLIGATIONS OF STATES RELATING TO THE PREVENTION OF ATROCITIES

SEAN D. MURPHY[1]

I. Introduction

Many thanks, Dean Scharf, for that warm introduction and for the invitation to serve as the keynote speaker at this very important conference on atrocity prevention. You have assembled here an extraordinary group of speakers and participants, on a topic that is very timely, when we consider what is happening in places such as Myanmar, North Korea, Syria, Venezuela, or – as our third panel today will discuss – Yemen.

Indeed, I am very pleased, in my capacity as President of the American Society of International Law, for the Society to be co- sponsoring this event, given that one of the Society's two "signature topics" concerns atrocity prevention.[2] Todd Buchwald, who is here, serves as the chair of the steering committee for that topic, and you, Dean Scharf, are a member of that committee, with both of you bringing to bear deep backgrounds and expertise in this area.

I am further pleased that this conference provides an opportunity to discuss the International Law Commission's 2019 Articles on Prevention and Punishment of Crimes against Humanity (2019 CAH Articles), which is the subject of our fourth panel. Those Articles were just adopted by the Commission last month in Geneva, and have now been sent to the U.N. General Assembly for its consideration this fall.[3] So, it is quite timely to discuss what they say about atrocity prevention and

[1] Manatt/Ahn Professor of International Law, George Washington University Law School; Member, U.N. International Law Commission

[2] See *Atrocity Prevention: The Role of International Law and Justice*, AM. SOC'Y OF INT'L L., https://www.asil.org/topics/signaturetopics/atrocity- prevention [https://perma.cc/NF58-JNX3].

[3] The 2019 CAH Articles, with commentary, may be found in the U.N. International Law Commission's 2019 Annual Report. *See* Report of the International Law Commission on the Work of Its Seventy-first Session, U.N. Doc A/74/10, at 11–140 (2019) [hereinafter CAH Articles]. For the 2019 CAH Articles, see *id.* at 11–21. For the 2019

whether they should serve as the basis for a Convention on the Prevention and Punishment of Crimes against Humanity.

I have titled this keynote address "Codifying the Obligations of States Relating to the Prevention of Atrocities." In addressing this topic, I am not going to focus on the functioning of international institutions, such as the U.N. Security Council (to be discussed by panel 1) or the International Criminal Court (to be discussed by panel 5). Rather, my focus is on international obligations embedded in major multilateral treaties that address the issue of prevention, either expressly or implicitly. In doing so, I will attempt to connect the past to the present, so as to highlight six obligations of States relating to prevention that the Commission deemed essential for inclusion in its 2019 CAH Articles. Before doing that, however, allow me to say a few words about the current framework of major multilateral treaties that contain provisions on prevention of crimes or human rights violations, beginning with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (1948 Genocide Convention).[4]

II. Codifying the Prevention of Atrocities or other Wrongs: Treaties from 1948 to 2019

An early significant example of an obligation of prevention may be found in the 1948 Genocide Convention, which contains three provisions that speak to issues of preventing that particular atrocity.[5]

- Article I provides: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[6]
- Article V provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III."[7]
- Article VIII provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."[8]

CAH Articles with commentary, see *id.* at 22–140.

[4] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[5] *See id.*

[6] *Id.* at 280.

[7] *Id.*

[8] *Id.* at 282.

Thus, the 1948 Genocide Convention contains important elements relating to prevention: a general obligation to prevent genocide; an obligation to enact national measures to give effect to the provisions of the Convention;[9] and a provision for States parties to call upon the competent organs of the United Nations to act for the prevention of genocide.[10]

Such types of preventive obligations thereafter featured in most multilateral treaties addressing crimes, certainly at least since the early 1970's.[11] Examples include: the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,[12] the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[13] the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid;[14] the 1979 International Convention against the Taking of Hostages;[15] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984 Torture Convention);[16] the 1985 Inter-American Convention to Prevent and Punish Torture;[17] the 1994 Inter-American Convention on the Forced Disappearance of Persons;[18] the

[9] *See id.* at 280-282.

[10] Genocide Convention, *supra* note 4, at 282.

[11] *See generally Multilateral Treaties Deposited with the Secretary General*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/Content.aspx?path=DB/titles/page1_en. xml [https://perma.cc/8PWW-BA68] (providing a link to a list of multilateral treaties deposited with the UN Secretary General).

[12] *See* Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 10, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 ("Contracting States shall, in accordance with international and national law, endeavour to take all practicable measure[s] for the purpose of preventing the offences mentioned in Article 1.").

[13] *See* Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 4, Dec. 14, 1973, 28.2 U.S.T. 1975, 1035 U.N.T.S. 167 ("States Parties shall cooperate in the prevention of the crimes set forth in article 2, particularly by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories.").

[14] *See* International Convention on the Suppression and Punishment of Crime of Apartheid art. 4, Nov. 30 1973, 1015 U.N.T.S. 243 ("The States Parties to the present Convention undertake . . . (a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime.").

[15] *See* International Convention against the Taking of Hostages art. 4, Dec. 17, 1979, 1316 U.N.T.S. 205 ("States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of . . . offences . . . including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages.").

[16] *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.").

[17] *See* Inter-America Convention to Prevention and Punish Torture art. 1, Mar. 28, 1996, O.A.S.T.S. No. 67 ("The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention."); see also id. art. 6 ("The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.").

[18] *See* Inter-American Convention on Forced Disappearance of Persons art. 1, Mar. 28, 1996, O.A.S.T.S. No. 68, 33 I.L.M. 1429 ("The States Parties to this Convention undertake . . . (c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; (d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.").

1994 Convention on the Safety of United Nations and Associated Personnel; [19] the 1997 International Convention on the Suppression of Terrorist Bombings;[20] the 2000 United Nations Convention against Transnational Organized Crime;[21] the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;[22] the 2000 Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime;[23] the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime;[24] the 2002 Optional Protocol to the

[19] *See* Convention on the Safety of United Nations and Associated Personnel art. 11, Dec. 9, 1994, 2051 U.N.T.S. 363 ("States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.").

[20] *See* International Convention for the Suppression of Terrorist Bombings art. 15, Dec. 15, 1997, 2149 U.N.T.S. 256 ("States Parties shall cooperate in the prevention of the offences set forth in article 2.").

[21] *See* United Nations Convention against Transnational Organized Crime art. 9, 2225 U.N.T.S. 209 ("In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.") [hereinafter Transnational Organized Crime Convention]; see also id. art. 9, ¶ 2 ("Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions"); id. art. 29, ¶ 1 ("Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention."); id. art. 31, ¶ 1 ("States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime.")

[22] *See* Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children art. 9, Nov. 15, 2000, 2237 U.N.T.S. 319 (supplementing the Transnational Organized Crime Convention and stating "[s]tates Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization").

[23] *See* Protocol against the Smuggling of Migrants by Land, Sea and Air art. 11, 2241 U.N.T.S. 480 ("Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.") [hereinafter Protocol against the Smuggling of Migrants]; see also id. art. 11 ("Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol."); id. art. 14, ¶ 1 ("States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol.").

[24] *See* Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition art. 9, May 31, 2001, 2326 U.N.T.S. 208 ("A State Party that does not recognize a deactivated firearm as a firearm in accordance with its domestic law shall take the necessary measures, including the establishment of specific offences if appropriate, to prevent the illicit reactivation of deactivated firearms.") [hereinafter Protocol against the Illicit Manufacturing and Trafficking in Firearms]; see also id. art. 11 ("In an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition, each State Party shall take appropriate measures: (a) To require the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through

1984 Torture Convention;[25] the 2003 United Nations Convention against Corruption;[26] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (2006 Enforced Disappearance Convention).[27]

Some multilateral human rights treaties, even though they are not focused on the prevention of crimes as such, contain obligations to prevent or suppress human rights violations. Examples include: the 1966 International Convention on the Elimination of All Forms of Racial Discrimination;[28] the 1979 Convention on the Elimination of All Forms of Discrimination against Women;[29] and the 2011 Council of Europe Convention on Preventing and Combating Violence

---

its territory; and (b) To increase the effectiveness of import, export and transit controls, including, where appropriate, border controls, and of police and customs transborder cooperation."); id. art. 14 ("States Parties shall cooperate with each other and with relevant international organizations, as appropriate, so that States Parties may receive, upon request, the training and technical assistance necessary to enhance their ability to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms.").

[25] *See* Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, preamble, Dec. 18 2002, 2375 U.N.T.S. 237 (recalling that "the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures") [hereinafter Optional Protocol to the Convention against Torture]; see also id. art. 3 ("Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.").

[26] *See* United Nations Convention against Corruption art. 6, Dec.14, 2005, 2349 U.N.T.S. 41 ("Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption.") [hereinafter Convention against Corruption]; see also id. art. 9 ("Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision- making, that are effective, inter alia, in preventing corruption."); id. art. 12 ("Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.").

[27] *See* International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 23, 2010, 2716 U.N.T.S. 3 (stating that the parties are "[d]etermined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance") [hereinafter Convention for the Protection from Enforced Disappearance]; see also id. art. 23 ("Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized . . . Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished . . . Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.")

[28] *See* International Convention on the Elimination of All Forms of Racial Discrimination art. 3, Mar. 7, 1966, 660 U.N.T.S. 195 ("States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.").

[29] *See* Convention on the Elimination of All Forms of Discrimination against Women art. 2, Dec.18, 1979, 1249 U.N.T.S. 13 ("States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate

against Women and Domestic Violence.[30] Some multilateral human rights treaties do not refer expressly to "prevention", "suppression," or "elimination" of the act but, rather, focus on an obligation to take appropriate legislative, administrative, and other measures to "give effect" to or to "implement" the treaty,[31] which may be seen as encompassing necessary or appropriate measures to prevent the act. Examples include the 1966 International Covenant on Civil and Political Rights[32] and the 1989 Convention on the Rights of the Child.[33] As the above demonstrates, there exists a framework of treaties, some with extremely high levels of adherence by States, containing provisions on the prevention of crimes or human rights violations, that may be drawn upon when considering the obligations of States to prevent atrocities. The U.N. International Law Commission's 2019 CAH Articles drew upon these prior treaties to craft its own provisions on prevention of crimes against humanity.[34] In doing so, six essential obligations emerged, which I will discuss in turn.

III. Six Obligations of States Relating to Prevention of Atrocities

Exactly what types of obligations of States fall within the realm of "prevention" might be debated; it could generally be thought that some obligations are directly connected to prevention (obligations of prevention) while others are of a different nature, though bearing upon the issue of prevention (obligations relating to prevention). The distinction may not be of any great

means and without delay a policy of eliminating discrimination against women.") [hereinafter Convention Eliminating Discrimination Against Women]; see also id. art. 3 ("States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.").

[30] *See* Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence art. 2, C.E.T.S. 210 ("Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the use of sanctions, where appropriate; abolishing laws and practices which discriminate against women.").

[31] *See* International Covenant on Civil and Political Rights art. 2, Mar. 23, 1976, 999 U.N.T.S. 171 ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.") [hereinafter Covenant on Civil and Political Rights]; *see also* Convention on the Rights of the Child art. 4, Nov. 20, 1989, 1577 U.N.T.S. 3 ("States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.") [hereinafter Convention of the Rights of the Child].

[32] Covenant on Civil and Political Rights, *supra* note 31, art. 2, ¶ 2.

[33] Convention on the Rights of the Child, *supra* note 31, art. 4.

[34] *See generally* CAH Articles, supra note 3.

significance, and for present purposes I will simply characterize the following six obligations of States as all relating, directly or indirectly, to prevention atrocities.

A. Obligation #1: States Shall Not Themselves Commit Acts of Atrocities

The first obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall not itself commit acts that constitute crimes against humanity.[35] This may seem an especially obvious way of preventing such atrocities, which may explain why it is typically viewed as implicitly present in existing treaties, while not explicitly stated.

Such an obligation "not to engage in acts" was viewed by the Commission as containing two components.[36]

The first component is that States have an obligation not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law."[37] In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), the International Court of Justice found that the identification of genocide as a crime, as well as the obligation of a State to prevent genocide, necessarily implies an obligation of the State not to commit genocide.[38] It stated:

> Under Article I the States parties are bound to prevent such an act, which it describes as 'a crime under international law', being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as 'a crime under international law': by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[39]

[35] *See* CAH Articles, *supra* note 3, at 13.
[36] *Id.* at 48.
[37] *Id.* at 48–53. For analysis of the obligation of prevention in the case, see Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 E.J.I.L. 695 (2007).
[38] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, 113 (Feb. 26).
[39] *Id.*

The second component of this obligation "not to engage in acts" is that States have obligations under international law not to aid or assist, or to direct, control or coerce, another State in the commission of an internationally wrongful act.[40]

Importantly, the Court also decided that the substantive obligation reflected in Article I was not, on its face, limited by territory but, rather, applied "to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations [...] in question."[41] Further, while much of the focus of that Convention is on prosecuting individuals for the crime of genocide,[42] the Court stressed that the breach of the obligation not to commit genocide is not a criminal violation by the State but, rather, concerns a breach of international law that engages State responsibility.[43] The Court's approach is consistent with views previously expressed by the Commission,[44] including in the commentary to the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts.[45] There, the Commission stated: "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them."[46] Thus, a breach of the obligation not to commit genocide engages the responsibility of the State if the conduct at issue is attributable to the State pursuant to the rules on the responsibility of States for internationally wrongful acts.[47] Indeed, in the context of disputes that may arise under the 1948 Genocide Convention, Article IX refers, inter alia, to disputes "relating to the responsibility of a State for genocide."[48] While such an obligation not to commit the acts in question is implicit in many existing multilateral treaties on crimes or human rights, the International Law Commission viewed it as important to express such an obligation explicitly in the 2019 CAH Articles.[49] Consequently, Article 3, paragraph 1, provides: "Each State has the obligation not to engage in acts that constitute crimes against humanity."[50]

[40] *Id.* at 217.
[41] *Id.* at 120.
[42] *See generally* Genocide Convention, *supra* note 4.
[43] Bosn. & Herz. v. Serb. & Montenegro, 2007 I.C.J. at 114. (noting that international responsibility is "quite different in nature from criminal responsibility").
[44] *Yearbook of the U.N. International Law Commission 1998*, vol. II (Part Two), U.N. Doc. A/CN.4/SER.A/1998/Add.l, at 65 (1998) (finding that the Convention on the Prevention and Punishment of the Crime of Genocide "did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility").
[45] *Yearbook of the U.N. International Law Commission 2001*, vol. II (Part Two), U.N. Doc. A/CN.4/SER.A/2001/Add.1, at 142 (2001) (providing commentary to art. 58 of the draft articles on responsibility of States for internationally wrongful acts).
[46] *Id.*
[47] *Id.*
[48] Genocide Convention, *supra* note 4, art. IX.
[49] CAH Articles, supra note 3, at 48.
[50] *Id.* at 13, art. 3(1).

B. Obligation #2: States Undertake Generally to Prevent Atrocities

The second obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall undertake generally to prevent crimes against humanity.[51] This obligation is expressed at a very general level; as such, it may be seen as an umbrella obligation of prevention, one aspect of which relates to the State's exercise of influence with persons or groups that are not directly under its authority.

Thus, in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), the International Court of Justice considered the meaning of the express wording of article I of the 1948 Genocide Convention that parties "undertake to . . . prevent" genocide.[52] It stated:

> That obligation requires the States parties, inter alia, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III.[53]

The Court went on to explain that a State party to the Genocide Convention is expected to use its best efforts (a due diligence standard) when it has a "capacity to influence effectively the action of persons likely to commit, or already committing" the acts, which in turn depends on the State party's geographic, political and other links to the persons or groups at issue.[54] At the same time, the Court found that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed."[55] Hence, this second obligation inter alia requires that a State exercise due diligence to prevent persons or groups not directly under its authority, but with whom it has influence, from committing crimes against humanity.

To capture this second obligation for the 2019 CAH Articles, the Commission first adopted Article 3, paragraph 2.[56] That paragraph reads in part: "Each State undertakes to prevent ... crimes against humanity, which are crimes under international law, whether or not committed in time of armed

---

[51] *Id.* at 13, art. 4.

[52] Bosn. & Herz. v. Serb. & Montenegro, 2007 I.C.J. at 111–13.

[53] Id. at 113 (highlighting that the Court used this conclusion, in part, to support its view that there existed, implicitly, an obligation upon the State itself not to commit acts of genocide, declaring "[i]t would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law").

[54] *Id.* at 221.

[55] Id.; see also Yearbook of the U.N. International Law Commission, 2001, supra note 45, at 59 ("The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs.")

[56] CAH Articles, *supra* note 3, at 13, art. 3(2).

conflict."[57] The Commission then addressed in greater depth the content of this second obligation through other obligations set forth in the 2019 CAH Articles, to which I now turn.

C. Obligation #3: States Shall Take Legislative or Other Measures to Prevent Atrocities

The third obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall take legislative or other measures that assist in preventing crimes against humanity in any territory under its jurisdiction.[58]

Article 2, paragraph 1, of the 1984 Torture Convention, which provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[59] In commenting on this provision, the Committee against Torture has stated:[60]

> States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.

As to the specific types of measures that shall be pursued by a State, in 2015 the Human Rights Council adopted a resolution on the prevention of genocide[61] that provides some insights into the kinds of measures that are expected in fulfilment of Article I of the 1948 Genocide Convention. Among other things, the resolution: (a) reiterated "the responsibility of each individual State to protect its population from genocide, which entails the prevention of such a crime, including incitement to it, through appropriate and necessary means;"[62] (b) encouraged "Member States to build their capacity to prevent genocide through the development of individual expertise and the creation of appropriate offices within Governments to strengthen the work on prevention;"[63] and (c) encouraged "States to consider the appointment of focal points on the prevention of genocide, who could cooperate and exchange information and best practices among themselves and with the

[57] *Id.*
[58] *Id.* at 13, art. 4.
[59] Convention Against Torture, *supra* note 16, art. 2(1).
[60] *See* Committee Against Torture, U.N. Doc. CAT/C/GC/2, ¶ 4 (Jan. 24, 2008).
[61] Rep. of the Human Rights Council, U.N. Doc. A/70/53, at 20 (2015).
[62] *Id.* at 22.
[63] *Id.*

Special Adviser to the Secretary-General on the Prevention of Genocide, relevant United Nations bodies and with regional and sub-regional mechanisms."[64]

In the regional context, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)[65] contains no express obligation to "prevent" violations of the Convention,[66] but the European Court of Human Rights has construed Article 2, paragraph 1 (on the right to life), to contain a positive obligation on States parties to safeguard the lives of those within their jurisdiction, consisting of two aspects: (a) the duty to provide a regulatory framework and (b) the obligation to take preventive measures.[67] At the same time, the Court has recognized that the State party's obligation in this regard is limited.[68] The Court has similarly held that States parties have an obligation, pursuant to article 3 of the Convention to prevent torture and other forms of ill- treatment.[69]

Likewise, although the 1969 American Convention on Human Rights[70] contains no express obligation to "prevent" violations of the Convention, the Inter-American Court of Human Rights, when construing the obligation of the States parties to "ensure" the free and full exercise of the rights recognized by the Convention,[71] has found that this obligation implies a "duty to prevent," which in turn requires the State party to pursue certain steps.[72] The Court has said:

---

[64] *Id.* at 22–23.

[65] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

[66] *See id.*

[67] Makaratzis v. Greece, 2004-XI Eur. Ct. H.R. 195, ¶ 57. *See also* Kiliç v. Turkey, 2000-III Eur. Ct. H.R. 128, ¶ 62 (finding that article 2, paragraph 1, obliged a State party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction); Valentin Câmpeanu v. Romania, 2014 Eur. Ct. H.R. 222, ¶ 130.

[68] Mahmut Kaya v. Turkey, 2000-III Eur. Ct. H.R. 149, ¶ 86 ("Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2, paragraph 1,] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."). *See also* Kerimova v. Russia, Application Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, 5684/05, Eur. Ct. H.R., Final Judgment, ¶ 246 (2011); Osman v. the United Kingdom, 1998-VIII Eur. Ct. H.R. 101, ¶ 116.

[69] A v. United Kingdom, 1998-VI Eur. Ct. H.R. 85, ¶ 22; see also O'Keeffe v. Ireland, 2014 Eur. Ct. H.R. 173, ¶ 144.

[70] American Convention on Human Rights: "Pact of San José, Costa Rica" (Nov. 22, 1969), O.A.S.T.S. No. 17955, 1144 U.N.T.S. 123 [hereinafter American Convention on Human Rights].

[71] *Id.* art. 1(1) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination."). *See also* African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (providing that the States parties "shall recognise the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them").

[72] Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 175 (Jul. 29, 1988). See also Gómez-Paquiyauri Brothers v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 155 (Jul. 8, 2004); Juan Humberto Sánchez v. Honduras, Preliminary Objections, Merits, Reparations, and Costs Judgment, Inter- Am. Ct. H.R. (ser. C) No. 99, ¶¶ 137, 142 (June 7, 2003).

> This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.[73]

Similar reasoning has animated the Court's approach to the interpretation of article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture.[74]

To capture this third obligation for the 2019 CAH Articles, the Commission adopted Article 4, subparagraph (a), which provides that: "Each State undertakes to prevent crimes against humanity, in conformity with international law, through: (a) effective legislative, administrative, judicial or other appropriate preventive measures in any territory under its jurisdiction; …."[75] The term other "preventive measures" rather than just other "measures" was used by the Commission to reinforce the point that the measures at issue in subparagraph (a) relate solely to those aimed at prevention.[76] The term "appropriate" offers some flexibility to each State when implementing this obligation, allowing it to tailor other preventive measures to the circumstances faced by that particular State. The term "effective" implies that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective measures. Thus, the specific preventive measures that any given State shall pursue with respect to crimes against humanity will depend on the context and risks at issue for that State with respect to these offences. Such an obligation usually would oblige the State at least to:[77]

- adopt national laws and policies as necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission;
- continually keep those laws and policies under review and as necessary improve them;
- pursue initiatives that educate governmental officials as to the State's obligations under the 2019 articles; and
- implement training programs for police, military, militia and other relevant personnel as necessary to help prevent the commission of crimes against humanity.

---

[73] Velásquez-Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 175 (Jul. 29, 1988).
[74] Tibi v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 159 (Sept. 7, 2004). *See also* Gómez-Paquiyauri Brothers v. Peru, Reparations and Costs Judgment Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 155 (Jul. 8, 2004).
[75] CAH Articles, *supra* note 3, at 13, art. 4(a).
[76] *Id.*
[77] For comparable measures with respect to prevention of specific types of human rights violations, see Rep. of the Comm. on the Elimination of Discrimination Against Women, ¶ 770, U.N. Doc. A/43/38 (1988) (containing General Recommendation No. 6 on effective national machinery and publicity); Rep. of the Comm. on the

Of course, some measures, such as training programs, may already exist in the State to help prevent wrongful acts (such as war crimes, murder, torture, or rape) that relate to crimes against humanity.[78] If so, the State is obliged to supplement those measures, as necessary, specifically to prevent crimes against humanity.

D. Obligation #4: States Shall Cooperate with other States, International Organizations and, as Appropriate, Non-Governmental Organizations for the Prevention of Atrocities

The fourth obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall cooperate with other States, relevant intergovernmental organizations, and, as appropriate, other organizations, all for the purpose of preventing crimes against humanity.[79]

The duty of States to cooperate in the prevention of crimes against humanity arises, in the first instance, from Article 1, paragraph 3, of the Charter of the United Nations, which indicates that one of the purposes of the Charter is to "achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all".[80] Further, in Articles 55 and 56 of the Charter, all Members of the United Nations pledge "to take joint and separate action in cooperation with the

[78] Elimination of Discrimination Against Women, ¶ 438, U.N. Doc. A/45/38 (1990) (containing General Recommendation No. 15 on the avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome); Rep. of the Comm. on the Elimination of Discrimination Against Women, ¶ 9, U.N. Doc. A/47/38 (1993) (containing General Recommendation No. 19 on violence against women); Rep. of the Comm. on the Rights of the Child, U.N. Doc. A/59/41, annex XI (2003) (containing General Comment No. 5 on general measures of implementation of the convention); Rep. of the Human Rights Comm., U.N. Doc. No. A/59/40 (Vol. I), annex III (2004) (containing General Comment No. 31 on the nature of the general legal obligation imposed on states parties to the covenant); Rep. of the Comm. on the Rights of the Child, U.N. Doc. A/61/41, annex II (2005) (containing General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin); Rep. of the Comm. on the Elimination of Racial Discrimination, ¶ 460, U.N. Doc. A/60/18 (2005) (containing General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system). See also G.A. Res. 60/147, annex (Dec. 16, 2005) (stating that the obligation to "respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to . . . [t]ake appropriate legislative and administrative and other appropriate measures to prevent violations.")

[79] For example, training or dissemination programs may already exist in relation to international humanitarian law and the need to prevent the commission of war crimes. Common Article 1 to the 1949 Geneva Conventions obliges High Contracting Parties "to respect and ensure respect" for the rules of international humanitarian law, which may have encouraged pursuit of such programs. See Int'l Comm. of the Red Cross, *Commentary on the First Geneva Convention*, ¶¶ 145–146, 150, 154, 164, 178 (2016) (discussing common article 1). Further, Article 49 of Geneva Convention I—a provision common to the other Conventions—also imposes obligations to enact legislation to provide effective penal sanctions and to suppress acts contrary to the Convention. See id. ¶¶ 2842, 2855, 2896 (discussing article 49). *See generally* Lindsey Cameron et al., *The Updated Commentary on the First Geneva Convention - A New Tool for Generating Respect for International Humanitarian Law*, 97 INT'L R. OF THE RED CROSS 900, 1209–26 (2015).

[80] CAH Articles, *supra* note 3, at 13, art. 4(b).

Organization for the achievement of" certain purposes, including "universal respect for, and observance of, human rights and fundamental freedoms for all."[81]

Specifically, with respect to preventing crimes against humanity, the General Assembly of the United Nations recognized in its 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity.[82] Among other things, the Assembly declared that States shall cooperate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.[83]

Further, I note that the Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts provides that "States shall cooperate to bring to an end through lawful means any serious breach" by a State "of an obligation arising under a peremptory norm of general international law."[84]

To capture this fourth obligation for the 2019 CAH Articles, the Commission adopted Article 4, subparagraph (b), which provides that: "Each State undertakes to prevent crimes against humanity, in conformity with international law, through: ... (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations."[85]

The term "relevant" is intended to indicate that cooperation with any particular intergovernmental organization will depend, among other things, on the organization's functions and mandate, on the legal relationship of the State to that organization, and on the context in which the need for cooperation arises.[86] Further, subparagraph (b) provides that States shall cooperate, as appropriate, with other organizations, such as the components of the International Red Cross and Red Crescent Movement, within the limits of their respective mandates.[87] These organizations include non-governmental organizations that could play an important role in the prevention of crimes against humanity in specific countries.[88] The term "as appropriate" is used to indicate that the obligation of cooperation, in addition to being contextual in nature, does not extend to these organizations to the same extent as it does to States and relevant intergovernmental organizations.[89]

---

[81] U.N. Charter art. 1, ¶ 3.
[82] U.N. Charter arts. 55–56. G.A. Res. 3074 (XXVIII), ¶¶ 3, 7 (Dec. 3, 1973).
[83] *Id.* ¶ 3.
[84] *Yearbook of the U.N. International Law Commission, 2001*, *supra* note 45, at 29.
[85] CAH Articles, supra note 3, at 13, art. 4(b).
[86] *Id.* at 61.
[87] *Id.* at 13, art. 4(b).
[88] *Id.* at 61.
[89] *Id.*

E. Obligation #5: States Shall Not Send a Person to a Place Where the Person Would be in Danger of Being Subjected to an Atrocity

The fifth obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall not send a person to another State where he or she might become the victim of crimes against humanity.[90]

As is well-known, the principle of non-refoulement obligates a State not to return or otherwise transfer a person to another State where there are substantial grounds for believing that he or she will be in danger of persecution or some other specified harm.[91] That principle was incorporated in various treaties during the twentieth century, including the 1949 Fourth Geneva Convention,[92] but is most commonly associated with international refugee law and, in particular, article 33 of the 1951 Convention relating to the Status of Refugees (1951 Refugees Convention).[93] Other conventions and instruments[94] addressing refugees have incorporated the principle, such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.[95]

The principle also has been applied with respect to all aliens (not just refugees) in various instruments[96] and treaties, such as the 1969 American Convention on Human Rights[97] and the 1981 African Charter on Human and Peoples' Rights.[98] Indeed, the principle was addressed in this broader sense in the Commission's 2014 Articles on the Expulsion of Aliens.[99] The Human Rights

---

[90] CAH Articles, *supra* note 3, at 13, art. 5(1).

[91] *Id.* at 62.

[92] Geneva Convention IV art. 45, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. *See* Int'l Comm. of the Red Cross, *Commentary on the First Geneva Convention*, ¶¶ 706–718 (2016) (discussing how common article 3 implicitly includes a *non-refoulment* obligation).

[93] Convention Relating to the Status of Refugees art. 33, ¶ 1, July 28, 1951, 189 U.N.T.S. 2545 ("No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

[94] *See, e.g.*, Cartagena Declaration on Refugees, § 3, ¶ 5, Nov. 22, 1984 (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama), *available at* https://www.unhcr.org/en-us/about-us/background/45dc19084/cartagena-declaration-refugees-adopted- colloquium-international-protection.html [https://perma.cc/MV9Y- F4SP].

[95] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art. 2, Sept. 10, 1969, 1001 U.N.T.S. 45.

[96] *See, e.g.*, G.A. Res. 2312 (XXII), art. 3 (Dec. 14, 1967); Eur. Consult. Ass., Recommendation No. R (84) 1 of the Committee of Ministers to Member States on the Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised as Refugees, 336th Sess., Doc. No. 195 (1984).

[97] American Convention on Human Rights, supra note 70, art. 22, ¶ 8.

[98] African Charter on Human and Peoples' Rights art. 12, ¶ 3, June 27, 1981, 1520 U.N.T.S. 217.

[99] Int'l Law Comm'n, Rep. on the Work of Its Sixty-Sixth Session art. 23, U.N. Doc. A/69/10 (2014) ("No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law.").

Committee and the European Court of Human Rights have construed the prohibition against torture or cruel, inhuman or degrading treatment, contained in Article 7 of the 1966 International Covenant on Civil and Political Rights[100] and Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms[101] respectively, as implicitly imposing an obligation of non-refoulement even though these conventions contain no such express obligation.[102] Further, the principle of non-refoulement is often reflected in extradition treaties, by stating that nothing in the treaty shall be interpreted as imposing an obligation to extradite an alleged offender if the requested State party has substantial grounds for believing the request has been made to persecute the alleged offender on specified grounds.[103]

Of particular relevance for the 2019 CAH Articles, the principle has been incorporated in treaties addressing specific crimes, such as torture and enforced disappearance. For example, Article 3 of the 1984 Torture Convention was modelled on the 1951 Refugees Convention, but added the additional element of "extradition" to cover another possible means by which a person is physically transferred to another State.[104] Article 16 of the 2006 Enforced Disappearance Convention formulates the rule as follows:

> 1. No State Party shall expel, return ("*refouler*"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.[105]

The "substantial grounds" standard used in such treaties has been addressed by various expert treaty bodies and by international courts.[106] For example, the Committee against Torture, in

[100] Human Rights Comm., *General Comment 20: Article 7*, ¶ 9 (1992), *in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, at 30 ("State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or refoulement.").

[101] Chahal v. The United Kingdom, App. No. 22414/93, 23 Eur. Ct. H.R. Rep. 413 (1996).

[102] *General Comment 20: Article 7, supra* note 100, ¶ 9. See also David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non- Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1 (1999).

[103] *See, e.g.,* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

[104] *Id.; see also* Refugees and Stateless Persons art. 33, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

[105] International Convention for the Protection of All Persons from Enforced Disappearance art. 16, Dec. 20, 2006, 2716 U.N.T.S. 3 (entered into force Dec. 23, 2010).

[106] Comm. Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in

considering communications alleging that a State has violated Article 3 of the 1984 Torture Convention, has stated that "substantial grounds" exist whenever the risk of torture is "foreseeable, personal, present, and real."[107] It has also explained that each person's "case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards."[108]

In guidance to States, the Human Rights Committee has indicated that a State has an obligation "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[109] In interpreting this standard, the Human Rights Committee has concluded that States must refrain from exposing individuals to a real risk of violations of their rights under the Covenant, as a "necessary and foreseeable consequence" of expulsion.[110] It has further maintained that the existence of such a real risk must be decided "in the light of the information that was known, or ought to have been known" to the State party's authorities at the time and does not require "proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk."[111]

The European Court of Human Rights has found that a State's obligation is engaged where there are substantial grounds for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.[112] In applying this legal test, States must examine the "foreseeable consequences" of sending an individual to the receiving country.[113] While a "mere possibility" of ill-treatment is not sufficient, it is not necessary, according to the European Court, to show that subjection to ill-treatment is "more likely than not."[114] The European Court has stressed that the

---

the Context of Article 22, U.N. Doc. CAT/C/GC/4, at 2 (Sept. 4, 2018) [hereinafter Comm. Against Torture, *General Comment No. 4*]; see also Dadar v. Canada, Comm. Against Torture, No. 258/2004, ¶ 8.4, U.N. Doc. CAT/C/35/D/258/2004 (Dec. 5, 2005) (outlining relevant communications); G.A. Dec. 356/2008, U.N. Doc A/65/44, at 329 (May 6, 2010).

[107] Comm. Against Torture, *General Comment No. 4*, *supra* note 106, ¶ 11.

[108] *Id.* ¶ 13.

[109] Human Rights Comm., General Comment No. 31, ¶ 12, U.N. Doc. CCPR/ C/21/Rev.1/Add. 13 (May 26, 2004).

[110] *See, e.g.*, Chitat Ng v. Canada, Human Rights Comm., No. 469/1991, ¶ 15.1(a), U.N. Doc A/49/40 (Sept. 25, 1991); A.R.J. v. Australia, Human Rights Comm., No. 629/1996, ¶ 6.14, U.N. Doc. CCPR/C/60/D/692/1996 (Aug. 11, 1997); Hamida v. Canada, Human Rights Comm., No. 1544/2007, ¶ 8.7, UN. Doc. CCPR/C/98/D/1544/2007 (May 11, 2010).

[111] *See, e.g.*, Maksudov, Rakhimov, Tashbaev, and Pirmatov v. Kyrgyzstan, Human Rights Comm., Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, ¶ 12.4, U.N. Docs. CCPR/C/93/D/1461, 1462, 1476 & 1477/2006 (July 31, 2008).

[112] *See, e.g.*, Soering v. United Kingdom, 14038 Eur. Ct. H.R. 88, ¶ 88 (1989); Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. Ct. H.R. 413 (1996).

[113] Saadi v. Italy, 37201 Eur. Ct. H.R. 6, ¶ 130 (2008).

[114] *Id.* at. ¶¶ 131, 140.

examination of evidence of a real risk must be "rigorous."[115] Further, and similarly to the Human Rights Committee, the evidence of the risk "must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion,"[116] though regard can be had to information that comes to light subsequently.[117]

Contemporary formulations of the *non-refoulement* principle (such as appears in the 2006 Enforced Disappearance Convention[118]) contain a second paragraph providing that States shall take into account "all relevant considerations" when determining whether there are substantial grounds for the purposes of paragraph 1.[119] Such considerations include, but are not limited to, "the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law."[120] Indeed, various considerations may be relevant. When interpreting the 1966 International Covenant on Civil and Political Rights, the Human Rights Committee has stated that all relevant factors should be considered,[121] and that "[t]he existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed."[122] The Committee against Torture has developed, for the purposes of the 1984 Torture Convention, a detailed list of "non-exhaustive examples of human rights situations that may constitute an indication of risk of torture, to which [States parties] should give consideration in their decisions on the removal of a person from their territory and take into account when applying the principle of '*non-refoulement*.'"[123]

When considering whether it is appropriate for States to rely on assurances made by other States,[124] the European Court of Human Rights considers such factors as whether the assurances are specific or are general and vague,[125] whether compliance with the assurances can be objectively verified

[115] *Id.* at. ¶ 128.
[116] *Id.* at. ¶ 133.
[117] *See, e.g.*, El-Masri v. the former Yugoslav Republic of Macedonia, 39630 Eur. Ct. H.R. 9, ¶ 214 (2012).
[118] *See, e.g.*, International Convention for the Protection of All Persons from Enforced Disappearance art. 16, Dec. 20, 2006, 2716 U.N.T.S. 48088 (entered into force Dec. 23, 2010).
[119] *See, e.g.*, *id.*
[120] *Id.*
[121] Mohammed Alzery v. Sweden, Human Rights Comm., No. 1416/2005, ¶ 11.3, U.N. Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).
[122] *Id.*
[123] Comm. Against Torture, *General Comment No. 4*, *supra* note 106, ¶ 29.
[124] *Id.* ¶ 20. ("The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported should not be used as a loophole to undermine the principle of non-refoulement as set out in Article 3 of the Convention, where there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State.").
[125] Saadi v. Italy, 37201 Eur. Ct. H.R. 6, ¶¶ 147–148 (2008).

through diplomatic or other monitoring mechanisms,[126] and whether there is an effective system of protection against the violation in the receiving State.[127]

To capture this fourth obligation for the 2019 CAH Articles, the Commission adopted Article 5, which provides:

> 1. No State shall expel, return (*refouler*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.[128]

While, as in earlier conventions, the State's obligation under 2019 CAH Article 5, paragraph 1, is focused on avoiding exposure of a person to crimes against humanity, this obligation is without prejudice to other obligations of non-refoulement arising from treaties or customary international law. Indeed, the obligations of States contained in all relevant treaties continue to apply in accordance with their terms.

F. Obligation #6: States Shall Punish Atrocities as a Means of Prevention

The sixth obligation of States relating to prevention that the Commission identified, when reviewing prior treaties, was that every State shall punish crimes against humanity.

The International Court of Justice noted that the duty to punish, in the context of the 1948 Genocide Convention, is connected to (but distinct from) the duty to prevent.[129] While it said that "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons

---

[126] *See, e.g.*, Chentiev and Ibragimov v. Slovakia, Nos. 21022/08 & 51946/08 (Sept. 14, 2010), *available at* http://hudoc.echr.coe.int/eng?i=001-100935 [https://perma.cc/43CW-6KAL].

[127] *See, e.g.*, Soldatenko v. Ukraine, No. 2440/07, ¶ 73 (Jan. 23, 2009), available at http://hudoc.echr.coe.int/eng?i=001-89161 [https://perma.cc/N464-H9JJ]; Othman (Abu Qatada) v. United Kingdom, No. 8139/09, ¶ 189 (May 9, 2012), *available at* http://hudoc.echr.coe.int/eng?i=001-108629 [https://perma.cc/6564-2G9F] (explaining that other factors that Court might consider include: whether the terms of assurances are disclosed to the Court; who has given assurances and whether those assurances can bind the receiving State; if the assurances were issued by the central government of a State, whether local authorities can be expected to abide by such assurances; whether the assurances concern treatment which is legal or illegal in the receiving State; the length and strength of bilateral relations between the sending and receiving States; whether the individual has been previously ill- treated in the receiving State; and whether the reliability of the assurances has been examined by the domestic courts of the sending State).

[128] 2019 CAH Articles, *supra* note 3, at 13, art. 5.

[129] *See generally* Bosn. & Herz. v. Serb. & Mont., 2007 I.C.J. Rep. 43.

committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent,"[130] the Court found that "the duty to prevent genocide and the duty to punish its perpetrators . . . are . . . two distinct yet connected obligations."[131] Further, the "obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty."[132]

To capture this sixth obligation for the 2019 CAH Articles, the Commission first adopted Article 3, paragraph 2.[133] That paragraph reads in part: "Each State undertakes ... to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict."[134] The Commission then addressed in greater depth the content of this sixth obligation through other obligations set forth in the 2019 CAH Articles, beginning with Article 6, which sets forth various measures that each State must take under its criminal law: to ensure that crimes against humanity constitute offences; to preclude certain defenses or any statute of limitation; and to provide for appropriate penalties commensurate with the grave nature of such crimes.[135] Measures of this kind are essential for the proper functioning of further provisions of the 2019 CAH Articles, which relate to the establishment and exercise of criminal jurisdiction over alleged offenders.

V. All Measures of Prevention Must Be Consistent with International Law

One important issue concerns whether such obligations of prevention might be seen as having any effect on international rules concerning the non-use of force or non-intervention, such as appear in the U.N. Charter.[136] The International Court of Justice importantly stated in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) that, when engaging in measures of prevention, "it is clear that every State may only act within the limits permitted by international law."[137]

In crafting the 2019 CAH Articles, the Commission deemed it important to express that requirement both in the preamble and in the draft articles themselves.[138] Thus, in the preamble, the Commission included a paragraph: "Recalling the principles of international law embodied in the Charter of the United Nations,"[139] while in the chapeau of draft Article 4 on "Obligation of prevention," it included a clause indicating that any measures of prevention must be "in conformity

[130] *Id.* at 219, ¶ 426.
[131] *Id.* at 219, ¶ 425.
[132] *Id.* at 219–20, ¶ 427.
[133] CAH Articles, *supra* note 3, at 13
[134] *Id.*
[135] *Id.* at 13–14.
[136] *Id.* at 57.
[137] Bosn. & Herz. v. Serb., 2007 I.C.J. Rep. at 221, ¶ 430.
[138] CAH Articles, *supra* note 3, at 11, 13 (laying out the obligation of prevention in both the preamble and article 4).
[139] *Id.* at 11, preamble.

with international law."[140] As such, any measures undertaken by a State to fulfill its obligation to prevent crimes against humanity must be consistent with the rules of international law, including rules on the use of force set forth in the U.N. Charter, international humanitarian law, and human rights law.[141] In short, the State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity.

VI. Do Such Treaty Provisions Actually Work to Prevent Atrocities?

I will conclude by noting that, in recent years, several commentators have questioned the effectiveness of multilateral treaties, especially human rights instruments, with some even attempting to test empirically whether adherence to human rights instruments has truly altered State compliance with human rights.[142] Others have responded by pointing to various ways that such treaties might influence States and to deficiencies in the methods and assumptions being used to test causal effects.[143]

In this brief address, I cannot do justice to such studies, but I would like to indicate reasons why major multilateral treaties containing obligations relating to prevention of atrocities or other wrongs are likely helpful in reducing such harms. First, incorporating such obligations in a major multilateral treaty does have the effect of stigmatizing the wrong in a highly public way. States and the bureaucracies in which they operate, spend a significant amount of time seeing a treaty through its negotiation and adoption phases, and then often engage deeply with more local constituencies for the ratification and implementation phases.[144] While it might seem that crimes against humanity are already sufficiently stigmatized such that actions of this kind are not necessary, in fact the concept of such crimes, in my experience, is not well- understood (for example, how they differ from genocide or war crimes), including the fact that they can be committed by non-State actors and in time of peace, and can consist of a range of actions other than just murder or extermination. Raising awareness through the vehicle of major multilateral treaties has the effect of "socializing" not just governments but other relevant actors, and indeed the average person, in a manner that would appear to serve preventive purposes.[145]

---

[140] *Id.* at 13, art. 4.

[141] *See id.* at 57.

[142] *See, e.g.*, Oona Hathaway, *Do Human Rights Treaties Make a Difference*?, 111 YALE L.J. 1935 (2002).

[143] *See* Gráinne de Búrca, *Human Rights Experimentalism*, 111 AM. J. INT'LL. 277 (2017); Katerina Linos & Tom Pegram, What Works in Human Rights Institutions?, 111 AM. J. INT'L L. 628 (2017); Valentina Carraro, *Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies*, 63 INT'L STUD. Q. 1079 (2019).

[144] *See, e.g.*, BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009).

[145] *See, e.g.*, RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2013).

Second, the overall thrust of most multilateral treaties (those setting up international courts or tribunals being an important exception) containing obligations relating to prevention of atrocities or other wrongs is to alter national laws, regulations, and policies. In so doing, the treaty harnesses the power of the national legal system, including national courts, in a manner that would appear to make the implementation and enforcement of preventive measures more likely.

Third, an important further element of most multilateral treaties containing obligations relating to prevention of atrocities or other wrongs is to provide a legal framework for inter-State cooperation and cooperation of States with international organizations. In doing so, the treaty harnesses the power of the global "community", opening up opportunities for cooperative efforts to detect the possible outbreaks of atrocities and to respond to them when necessary and possible.

Ultimately, we may never succeed in preventing all atrocities, any more than laws on murder over the centuries have prevented homicides today. But if one views law as a means for channeling power into a rules-based system, the more legal techniques we exploit in the international realm for doing so, the better off the world will be.

Appendix

Table of Provisions Relating to Prevention Found within the ILC 2019 Articles on Prevention and Punishment of Crimes against Humanity, With Examples of Comparable Provisions Found in Earlier Treaties

General Obligations and Obligations to Take Preventative Measures and to Cooperate
2019 ILC Article 3: General obligations 1. Each State has the obligation not to engage in acts that constitute crimes against humanity. 2. Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict. 3. No exceptional circumstances, whatsoever, such as armed conflict, internal political stability or other public emergency, may be invoked as justification of crimes against humanity. ***2019 ILC Article 4: Obligation of prevention*** Each State undertakes to prevent crimes against humanity, in conformity with international law, through: (a) effective legislative, administrative, judicial, or other appropriate preventative measures in any territory under its jurisdiction; and (b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

1948 Convention on the Prevention and Punishment of the Crime of Genocide (149 States Parties)	Article I The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish. Article V The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III. Article VIII Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.
1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (188 States Parties)	Article 10 1. Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1.
1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (180 States Parties)	Article 4 States Parties shall cooperate in the prevention of the crimes set forth in article 2, particularly by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories [. . .].

1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (109 States Parties)	Article IV States Parties to the present Convention undertake [. . .]: (a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime.
1979 International Convention against the Taking of Hostages (176 States Parties)	Article 4 States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages [. . .]
1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (165 States Parties)	Article 2 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
1985 Inter-American Convention to Prevent and Punish Torture	Article 1 The State Parties undertake to prevent and punish torture in accordance with terms of this Convention.

(18 States Parties)	Article 6 In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction. The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.
1994 Convention on the Safety of United Nations and Associated Personnel (94 States Parties)	Article 11 States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories [. . .]
1994 Inter-American Convention on Forced Disappearance of Persons (15 States Parties)	Article 1 The States Parties to this Convention undertake: to cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; to take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

1997 International Convention for the Suppression of Terrorist Bombings (170 States Parties)	Article 15 States Parties shall cooperate in the prevention of the offences set forth in article 2.
2000 United Nations Convention against Transnational Organized Crime (189 States Parties)	Article 9 In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions. Article 29 1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention. Article 31 1. States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime.

2000 Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (173 States Parties)	Article 9 1. States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization.
2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (88 States Parties)	Preamble Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures. Article 3 Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

	Article 23
2006 International Convention for the Protection of All Persons from Enforced Disappearance (59 States Parties)	1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.

<table>
<tr><th colspan="2">Non-refoulement</th></tr>
<tr><td colspan="2">2019 ILC Article 5: Non-refoulement

1. No State shall expel, return (refouler), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.</td></tr>
<tr><td>1951 Convention relating to the Status of Refugees

(145 States Parties)</td><td>Article 33

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country</td></tr>
</table>

1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (165 States Parties)	Article 3 No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant consideration, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
2006 International Convention for the Protection of All Persons from Enforced Disappearance (59 States Parties)	Article 16 No State Party shall expel, return ("*refouler*"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

<table>
<tr><th colspan="2">Criminalization under National Law</th></tr>
<tr><td colspan="2">2019 ILC Article 6: Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.
2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:
(a) committing a crime against humanity;
(b) attempting to commit such a crime; and
(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.</td></tr>
<tr><td>1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

(165 States Parties)</td><td>Article 4

1. Each State party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.</td></tr>
<tr><td>1998 Rome Statute of the International Criminal Court

(123 States Parties)</td><td>Article 25

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;</td></tr>
</table>

	(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
2006 International Convention for the Protection of All Persons from Enforced Disappearance (59 States Parties)	Article 4 Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law. Article 6 1. Each State Party shall take the necessary measures to hold criminally responsible at least: (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance; [. . .]

INTERNATIONAL LAW WEEKEND 2019

International Law Weekend 2019 was held at the House of the Association of the Bar of the City of New York on Thursday October 10, 2019, and Fordham University School of Law on Friday and Saturday, October 11-12, 2019. The Weekend, The Resilience of International Law, was organized by the American Branch of the International Law Association (ABILA) in collaboration with the International Law Students Association (ILSA). The Weekend featured thirty-five panels that discussed the resilience of international law in the face of growing nationalism, shifts in geo-political power, deepening economic inequality, climate change, a global migration crisis, and more. The keynote speakers were Ambassador Stephen Rapp (former U.S. Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice) and William Burke-White (Director of Perry World House, University of Pennsylvania Law School).

The opening panel was held on Thursday evening, October 10, 2019, and shared the same title as the Weekend: The Resilience of International Law. The panel was chaired by Leila Sadat, and included Judge Kimberly Prost, Miguel de Serpa Soares, and Christopher Ward.

On Friday morning, October 11, 2019, the panels were:

- Competition and Convergence in International Dispute Resolution (chaired by Robin Effron)
- Forcing a Convention for Crimes Against Humanity (chaired by Leila Nadya Sadat)
- Surveillance, Privacy, and Human Rights: Looking Ahead to 2020 (chaired by Peter Margulies)
- Hot Topics--Beyond Exceptionalism: The Unalienable Rights Commission and the Redefinition of International Human Rights
- Environmental Protection Before International Tribunals (chaired by Offlio Mayoraga)
- Corporate Families in International Law (chaired by Julian Arato)
- The United States and the International Criminal Court: Challenging Times (chaired by Jennifer Trahan)
- The Effectiveness of Human Rights Indicators and the Role of Indicators (chaired by Arlene S. Kanter)
- The Judiciary, Foreign Affairs, and International Law (chaired by Thomas Lee)
- Provisional Measures at the International Court of Justice: Possibilities for Plausibility (chaired by Donald Francis Donovan)

Ambassador Steven Rapp delivered the Keynote Address entitled "No Going Back: The Persistent Pressure for Accountability."

The Keynote Address was followed by panels entitled:

- The Fragmentation of International Law: Resolving the Conflict Between EU Law and International Investment Law (chaired by Ema Vidak Gojkovic)
- Failure to Notice or Noticeable Failure? Challenges to Instilling a Gender-Sensitive Approach to International Law (chaired by Akila Radhakrishnan)
- Criminalizing Asylum-Seekers: A Violation of International Law? (chaired by Thomas M. McDonnell)
- A Decline of the Liberal International Order? (chaired by David. L. Sloss)
- The Growing Risk of War in Outer Space: What Role Will International Law Play? (chaired by Jack M. Beard)
- Investment Law and Human Rights: Friends, Strangers, or Enemies? (chaired by Diora Ziyaeva)
- Women at International Tribunals (chaired by Milena Sterio)
- Strengthening International Law to Combat Trafficking-in-Persons in the 21st Century (chaired by Luke Dembosky)
- Pathways to Careers in International Law (chaired by Tessa Walker)
- The Resilience of the International Law of Outer Space in Light of Technology, Business, and Military Developments (chaired by Matthew Schaefer)

On Friday evening, October 11, 2019, the Permanent Mission of Singapore to the United Nations hosted a Gala Reception. The American Branch is grateful to the Singapore Mission for its hospitality and generosity.

Saturday October 12, 2019 opened with a Keynote Address entitled "How International Law Got Lost" by William W. Burke-White. It was followed by an array of panels:

- The European Union's Role in Shaping the Future of Investor-State Arbitration (chaired by M. Imad Khan)
- International Immunities in the Wake of Jam v. Int'l Fin. Corp.: What Comes Next? (chaired by David P. Stewart)
- Mercenaries or Private Military Contractors: Regulation of an Ever-Expanding Phenomenon (chaired by Gabor Rona)
- The Venezuela Crisis and the Resilience of International Law (chaired by John Berger)

- International Intellectual Property Law in the Age of Smart Technology and Intelligent Machines (chaired by Sean Flynn)
- The Resilience of Judgments Recognition Initiatives (chaired by Ronald A. Brand)
- Foreign Fighters and Their Families: How to Reconcile the Competing Demands of International Humanitarian Law, Human Rights and Refugee Law, and Domestic Law (debate moderated by Melanne A. Civic)
- Diverse Voices on the Use of Force (chaired by Daniel Stewart)
- At a Crossroads: Can Customary International Law Provide a Stabilizing Influence in a Fractious World? (chaired by Brian Lepard)
- Hitting a Boundary: Is the U.N. Convention on the Law of the Sea Still Fit for Its Purpose? (chaired by Catherine Amirfar)
- The Return of the State in International Trade and Investment Law (chaired by J. Benton Heath)
- Prosecutorial Discretion: Sword or Shield of the International Criminal Court (chaired by Natalie Reid)
- 2020 Jessup Compromis Panel (chaired by Leslie Benn)
- Hot Topics--Navigating the BBNJ Negotiations: Updates on the Third Intergovernmental Conference (chaired by Elizabeth Rodriguez-Santiago)
- Emerging Voices in International Law (chaired by Pamela Bookman)

The American Branch extends its gratitude to the 2019 ILW Program Committee composed of: William J. Aceves (Co-Chair, Dean Steven R. Smith Professor of Law, California Western School of Law); Margaret E. (Peggy) McGuinness (Co-Chair; Co-Director, St. John's Center for International and Comparative Law, St. John's School of Law); Ashika Singh (Co-Chair; Associate, Debevoise & Plimpton LLP); David P. Stewart (ex officio; Chair, Board of Directors, ABILA; Director, Center on Transnational Business and the Law, Georgetown University Law Center); Leila Nadya Sadat (ex officio; President, ABILA; Director, the Whitney R. Harris World Law Institute, Washington University School of Law); Isavella Vasilogeorgi (Associate Legal Officer, Office of Legal Affairs, United Nations); Tej Srimushnam (2019 ILW Administrative Officer); and Nelly N. Gordpour (Assistant 2019 ILW, Administrative Officer); Amity Boye (Director of Executive Projects, White & Case LLP); Martin S. Flaherty (Co-Director, Leitner Center for International Law and Justice, Fordham Law School); Alonso Gurmendi (Professor, Universidad del Pacífico Academic Department of Law); Milena Sterio (Associate Dean for Academic Enrichment, Cleveland-Marshall College of Law); Pamela Bookman (Associate Professor of Law, Fordham Law School); Kathleen Claussen (Associate Professor of Law, University of Miami School of Law); J. Janewa Osei-Tutu (Associate Professor of Law, Florida

International, University College of Law); Caline Mouawad (Partner, King & Spalding); and Michael A. Marelus (Senior Associate, DLA Piper).

The American Branch also gratefully acknowledges the generous support of the following sponsors of 2019 ILW: American Bar Association, Section of International Law; American Society of International Law; Benjamin N. Cardozo School of Law, Yeshiva University; Brill/Nijhoff Publishers; California Western School of Law; Case Western Reserve University School of Law; Columbia Law School; Dean Rusk International Law Center, University of Georgia School of Law; Debevoise & Plimpton LLP; The Fletcher School of Law and Diplomacy, Tufts University; Foley Hoag LLP; Fordham University School of Law, International and Non-J.D. Programs; George Washington University Law School; Georgetown University Law Center; Fordham University School of Law; The Hague Academy of International Law; The International Law Students Association; King & Spalding LLP; Leitner Center for International Law & Justice; Fordham University School of Law; New York City Bar Association; New York State Bar, International Law Section; Oxford University Press; Permanent Mission of the Republic of Singapore; Princeton University, James Madison Program in American Ideals and Institution; Princeton University, the Program in Law and Public Affairs; Seton Hall University School of Law; St. John's University School of Law; Transnational Dispute Management + OGEMID; University of Nebraska College of Law; University of Pittsburgh School of Law; Willkie Farr & Gallagher LLP; White & Case LLP; Whitney R. Harris World Law Institute, and Washington University School of Law.

III. AMERICAN BRANCH COMMITTEES

COMMITTEES OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

One of the unique features of the work of the International Law Association, including the national branches, is the work of the Committees. Currently, the American Branch has seventeen Committees headed by a Chair or Co-Chairs.

Although the American Branch as a whole does not take positions on current international law issues, the Branch's committees may. Committee projects are diverse, ranging from multi-year academic studies, to shorter academic analyses, to advocacy work. The work of the branch Committees is overseen by the Co-Directors of Studies, currently Peter K. Yu and Jennifer Trahan.

FORMATION OF RULES OF CUSTOMARY INTERNATIONAL LAW

Chair: Brian Lepard

INTERNATIONAL ARBITRATION

Chairs: Floriane Lavaud
Daniel Reich

INTERNATIONAL COMMERCIAL LAW

Chairs: Jessica R. Simonoff
Irene Calboli

INTERNATIONAL CRIMINAL COURT

Chairs: Jennifer Trahan
Megan Fairlie

INTERNATIONAL ENVIRONMENTAL AND ENERGY LAW

Chairs: Carolina Sales Cabral Arlota
Myanna Dellinger

INTERNATIONAL HUMANITARIAN LAW

Chair: Ashika Singh

INTERNATIONAL HUMAN RIGHTS

Chair: Aaron X. Fellmeth

INTERNATIONAL INTELLECTUAL PROPERTY

Chairs: Peter K. Yu
Sean Flynn

INTERNATIONAL INVESTMENT LAW

Chairs: David Attanasio
Diora Ziyaeva

INTERNATIONAL TRADE LAW

Chair: Richard H. Steinberg

ISLAMIC LAW AND SOCIETY

Chair: Sahar Aziz

LAW OF THE SEA

Chair: Coalter G. Lathrop

SPACE LAW

Chairs: Matthew Schaefer
Henry R. Hertzfeld

THREATS TO THE LIBERAL INTERNATIONAL ORDER

Chair: David Sloss

TEACHING OF INTERNATIONAL LAW

Chairs: Mark E. Wojcik
Milena Sterio

UNITED NATIONS LAW

Chairs: Christiana Ahlborn
Bart Smit Duijzentkuns

USE OF FORCE

Chair: Jack M. Beard

REPORTS OF THE DIRECTORS OF STUDIES
2014 THROUGH 2019

DIRECTOR OF STUDIES REPORT TO THE INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH) EXECUTIVE COMMITTEE/BOARD OF DIRECTORS

ANDREA K. BJORKLUND AND AARON X. FELLMETH

24 October 2014

Most of you know this already, but I (Andrea) am delighted to welcome Aaron Fellmeth as Co-Director of Studies. Aaron is the current Chair of the Human Rights Committee, and formerly was Chair of the International Intellectual Property Committee. He has some really terrific ideas and his willingness to take on the Co-Director of Studies position is a great boon for the Branch.

We have several new Committee chairs. Thanks to the good offices of John Noyes, Myanna Dellinger has become a co-chair of the International Environmental Law Committee. I am delighted to report that Amy Porges has agreed to chair the International Trade Committee. Thanks to Anibal Sabater, Isabel Fernandez Cuesta and Lucy Greenwood are the new co-chairs of the Feminism and International Law Committee. We also have new leadership on a few Committees. Thanks to Aaron's invitation, Andrea Harrison is the new International Humanitarian Law Committee chair. Steven Hill has resigned as Chair of the International Disability Law Committee, and he recommended Esmé Grant as his replacement. Matthew Hoisington and Noah Bialostozky have become the new co-chairs of the United Nations Law Committee at the suggestion of long-time Chair John Carey, who stepped down in late 2013.

Accountability of International Organizations (Chaired by Matthew Parish)

Osmat Jefferson resigned as co-chair of the Committee.

No report received.

Arms Control and Disarmament Committee (Co-Chaired by John Kim & Leo Lovelace)

Our Committee sponsored a workshop on the "Nuclear Non-Proliferation and Disarmament: US Policy and International Law" for the 2014 ILW. This panel will help us to finish our Committee report on the same topic in the coming months.

Bilateral Investment Treaty and Development (Chaired by Roberto Aguirre Luzi)

Greg Young resigned as co-chair of the Committee.

No report received.

International Commercial Arbitration (Chaired by Anibal Sabater)

During the last 12 months:

1. The Committee has added five new members.

2. There have been several Committee members, like Stanimir Alexandrov, who have contacted the Branch indicating their eagerness to contribute to our activities. Also, other Committee members such as Donald Donovan, Catherine Amirfar, or the Chair have recently reported professional developments and recent activities to the ABILA newsletter.

3. Most significantly, this year's ILW comprises a panel promoted and integrated by Committee members (Don Donovan's Investment Arbitration and the Rule of Law) and another one that touches on Committee matters (Cesare Romano's International Adjudication in the 21st Century).

Goals for next year include organizing and running more panels, not limited to the ILW.

Extraterritorial Jurisdiction (Chaired by Bruce Bean)

The ABILA Extraterritorial Jurisdiction Committee had one of its two proposals for the 2014 International Law Weekend selected. They are very pleased to be presenting a panel on the United States' Congress's most egregious example yet of its exercise extraterritorial jurisdiction - The Foreign Account Tax Compliance Act.

The panel is chaired by Bruce W. Bean, a professor at Michigan State Law School, and includes Professor Paul Stephan of the University of Virginia Law School, Professor Peter Spiro, from Temple Law School and Tom Firestone, formerly the Department of Justice Legal Advisor assigned to the Moscow Embassy, and now with Baker & McKenzie - London.

As the hesitation to exercise extraterritorial jurisdiction becomes less prominent, the Committee expects further significant activity in 2015.

Feminism and International Law (Co-chaired by Isabel Fernandez de la Cuesta & Lucy Martinez)

Thanks to the good offices of Anibal Sabater, we have two new co-chairs of the Feminism and International Law Committee. Each has been nominated to the ILA Committee on Feminism and International Law chaired by Patricia Conlon. They plan to organize their mandate to coordinate their project(s) with the ILA Committee.

Formation of Rules of Customary International Law (Chaired by Brian Lepard)

The Committee has no new activities to report for this year. Professor Lepard been preoccupied with some preexisting projects, including an edited book volume on customary international law. Once he finishes those projects, he will be able to devote more time to the contemplated study of customary law and human rights.

Settlement of Disputes Involving States (Co-chaired by Chiara Giorgetti and Rahim Moloo)

No report received.

International Commercial Law (Chaired by Jessica Simonoff)

Jessica Simonoff is the relatively new chair of the International Commercial Law Committee (she started just about a year ago), but she has had a hard time engendering interest from Committee members. She reached out to the Committee members, and none of them expressed any interest in participating in any activities. She also spent some time on her own networking to see if other organizations would like to work on panels or host events, but hasn't found anyone particularly excited about that either. She is open to a range of activities--research projects, newsletters/blogs, panels, really whatever people are interested in doing. She takes a broad view on what international commercial law should include.

International Criminal Court (Chaired by Jennifer Trahan)

The ABILA ICC Committee sponsored a panel at International Law Weekend 2013 ("Prosecuting Heads of State at the ICC: Bashir and Kenyatta") and is sponsoring one at International Law Weekend 2014 ("Update on the International Criminal Court's Crime of Aggression: Considering Crimea"). The Committee is also in the process of preparing documents for release at the upcoming International Criminal Court's Assembly of States Parties meetings, scheduled for December at the UN. The Committee's latest release was a letter in 2013 to all member states of the UN Security Council urging referral of the situation in Syria to the International Criminal Court.

International Disability Law (Chaired by Esmé Grant)

The Committee has a new co-chair – Esmé Grant. Steven Hill recommended her as his replacement. She will be working up a new mandate for the Committee.

International Environmental Law (Co-chaired by Wil Burns & Myanna Dellinger)

Thanks to the good offices of John Noyes, the Committee has a dynamic and active new co-chair, Myanna Dellinger. She is hosting a dinner with the group before this year's international law weekend. The Committee organized a session for ILA Law Weekend in 2013 that focused on the negotiations leading up to the 2015 meeting regarding the United Nations Framework Convention on Climate Change. The Committee established a Facebook page that currently has 97 members. The Committee Chairs are also planning to make a podcast series.

International Human Rights (Chaired by Aaron Fellmeth)

Per its agenda, a subcommittee of the Committee submitted a stakeholder report (approved by the Committee) to the U.N. Human Rights Council in September 2014 for the 2015 Universal Periodic Review of the United States of America. Technically, the report was on behalf of its authors, but the Committee as a whole participated in drafting process. The Committee also organized a panel for International Law Weekend 2014, entitled "'Hate Speech' and the Human Right to Freedom of Expression." The panel members were Molly Land (U. Conn.), Stanley Halpin (Southern U.), and Ruti Teitel (N.Y.L.S.). The Committee's next projects will be to identify pending U.S. cases

that would benefit from amicus filings and to help organize panels for International Law Weekend 2015, ILW-Midwest, and ILW-West 2015.

International Humanitarian Law (Chaired by Andrea Harrison)

Thanks to Aaron Fellmeth, the International Humanitarian Law Committee has a new co-Chair, Andrea Harrison of the International Committee of the Red Cross. She is working on a new mandate for the Committee.

International Intellectual Property (Chaired by Peter Yu)

The Committee on International Intellectual Property will continue the project under its biennial mandate, studying the interrelationship between intellectual property and human rights. The project focuses in particular on article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights -- the provision that has yet to be authoritatively interpreted by a general comment of the U.N. Committee on Economic, Social and Cultural Rights. That provision recognizes "the right of everyone ... [t]o enjoy the benefits of scientific progress and its applications."

At this year's International Law Weekend, the Committee will sponsor a panel on "Copyright and Human Rights in the Digital Environment." Coinciding with the Committee project, and building on last year's panel on "Intellectual Property and the Right to Science," this panel brings together leading commentators to examine the various tensions and conflicts precipitated by growing copyright protection and enforcement in the digital environment. Serving as panelists are Peter Yu (Drake), Ann Bartow (Pace), Sarah Hinchliffe (William & Mary), and David Levine (Elon).

International Judicial Integrity (Chair Selection Pending)

We have a feeler out to a potential Chair – we are waiting to hear back from him.

International Monetary Law (Co-chaired by Jeremy Pam & Jim Sobel)

The Chairs have no significant activities to report.

International Trade Law (Chaired by Amy Porges)

Amy Porges has agreed to chair the Committee. She already has an idea for a project which she will elaborate upon soon.

Islamic Law (Chaired by Robert E. Michael)

Last year saw some setbacks for the Committee. The Committee Secretary dropped out of law school and her replacement, the new Secretary, Nora Al-Taweel Alotaibi, had to return home to Saudi Arabia to help with her sick grandmother for 6 months. And once again, Mr. Michael's solicitation for thoughts, desires, and recommendations from the Committee members resulted in no response. But things are already looking up for this year. The Committee is hosting a panel on Islamic law at ILW on October 24, with panelists including an Adjunct Prof, at Fordham Law School who is a member of Egypt's Supreme Islamic Council; the Professor of Law at any metropolitan New York law school who has taught Islamic law for many years (and a Co-Rapporteur of the Committee), and a Saudi Arabian woman lawyer. Also, the new Secretary has returned to start her SJD studies at Pace, so the long-delayed Islamic law and courts database project should FINALLY get back on track. Since Mr. Michael is now the inaugural Chair of the newly formed Committee on Middle Eastern and North African Affairs of the NYCBA, he might see about having the two work together on this, since that MENA Committee has many members who are also lawyers in key countries in the Islamic world, and others with close ties to many more.

Law of the Sea (Chaired by George Walker)

The LOS Committee sponsored a panel at last year's Annual Meeting, "Oceans Law and the Practitioner," and will do so again this year, "Potential Chaos on the Oceans: Baselines Issues." Committee members attended and participated in law of the sea-related programs at the ILA Biennial in Washington in the spring of 2014. Also, my remarks at the 2013 panel, "The Interface of Admiralty Law and Oceans Law," have been published in 45 Journal of Maritime Law & Commerce 281 (2014). The Committee is considering topics for 2015.

Space Law (Co-chaired by Henry Hertzfeld & Matthew Schaefer)

The main activity this year for the Space Law Committee has been the sponsorship of the space law panel at the ILW. The session this year is devoted to issues of 3rd party liability for catastrophic incidents. Fortunately, these have not occurred in the environment of outer space, but liability regimes have an impact on space launch contract negotiations. The space treaties do not adequately address these issues, therefore analogies to civil nuclear and other high technology incidents need to be viewed as possible models for handling major space disasters.

A summary of these issues is proposed as a research topic for Committee for the coming year. In addition, the members of the Committee have been actively involved in studying and analyzing the issues of state supervision of on-orbit activities that are likely to present new legal challenges in space law. A report to the ABILA on these issues, both of which are interrelated, will be a continuing and ongoing project of the Committee. Further, with Congress potentially set to re-examine US national space legislation next year in a significant way, the Committee will be looking for ways to educate and make recommendations on issues studied by the Space Law Committee and featured in its ILW panels over the past several years.

Teaching of International Law (Chaired by Mark Wojcik)

No report received.

United Nations Law (Co-chaired by Noah Bialostozky and Matthew Hoisington)

We have two relatively new co-chairs of the United Nations Law Committee. In late 2013, John Carey stepped down as Chair of the United Nations Law Committee after numerous years of distinguished service, and Matthew Hoisington and Noah Bialostozky, both of the United Nations Office of Legal Affairs, took over as Co-Chairs of the Committee. In April 2014, the Committee convened a panel on "Treaty Survival" at the George Washington University Law School, in conjunction with the ILA-ASIL Joint Annual Meeting. The panel featured Professors Sean Murphy and Georg Nolte, who are both members of the International Law Commission, as well Professor Duncan Hollis. The discussion was moderated by Arnold Pronto of the United Nations and focused on the effectiveness of treaties over time, particularly the various mechanisms that enable a treaty to adapt to changing circumstances. At International Law Weekend 2014, the Committee will hold a panel on "Current Policy and Practice with respect to the Protection of Civilians by Peace

Operations." Mona Khalil and Col. Badreddine El Harti of the United Nations will be joined by Professor Ian Johnstone for a discussion moderated by Matthew Hoisington. The panel will explore challenges in the protection of civilians arising from, among other things, high-risk threat environments, the capacity of forces deployed on the ground, and interpretations of Security Council mandates by those tasked with their implementation.

DIRECTOR OF STUDIES REPORT TO THE INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH) EXECUTIVE COMMITTEE/BOARD OF DIRECTORS

CHIARA GIORGETTI AND PETER K. YU

November 2015

This report summarizes the status of all ABILA Committees for the 2015 calendar year, and their plans for 2016. The Co-Directors of Studies note that several Committees have become entirely inactive, and their missions appear to be fulfilled. In addition, several important Committees require new chairs (see below), and nominations from the Executive Committee would be welcome.

Arms Control & Disarmament (Chair vacant)

This Committee is awaiting appointment of a new chair. A call for volunteers has been put out in the fall 2015 newsletter.

Bilateral Investment Treaties (Chaired by Roberto Aguirre Luzi)

This Committee failed to submit its annual report and appears to have completed its mission. The Co-Directors of Studies are seeking a new chair to replace the current inactive one. In addition, we are considering changing the Committee's name and mandate to "Foreign Investment Law" to broaden its appeal.

Disputes Involving States (Chaired by Rahim Moloo)

This Committee failed to submit its annual report and appears to have completed its mission. The Co-Directors of Studies intend to dissolve it absent further guidance from the Executive Committee.

Extraterritorial Jurisdiction (Chaired by Bruce Bean)

This Committee failed to submit its annual report and appears to have completed its mission. The Co-Directors of Studies intend to dissolve it absent further guidance from the Executive Committee.

Feminism and International Law (Co-chaired by Lucy Greenwood and Isabel Fernandez de la Cuesta)

This Committee failed to submit its annual report and appears to have completed its mission. The Co-Directors of Studies intend to dissolve it absent further guidance from the Executive Committee.

Formation of Rules of Customary International Law (Chaired by Brian Lepard)

In the past two years interested members of the Committee have discussed launching a study of the status of international human rights law as customary international law, possibly in collaboration with the Committee on Human Rights. As mentioned in earlier reports, this would be a study of the customary law status of human rights, building on the study that Prof. Richard Lillich led at the Buenos Aires Conference of the International Law Association in 1994 on the status of the Universal Declaration of Human Rights in national and international law, and also on the 2000 study of the International Law Association, published at its London Conference, entitled "Statement of Principles Applicable to the Formation of General Customary International Law" (available at http://www.ila-hq.org/en/committees/index.cfm/cid/30). The study would also draw upon our Committee's own prior studies on the role of national court decisions as state practice and on the role of state practice in the formation of customary and jus cogens norms of international law (both available at http://heinonline.org).

A number of Committee members have volunteered to assist with various aspects of this project, which promises to be a multi-year effort. The Chair of the Committee, Brian Lepard, plans to meet with Committee members at International Law Weekend 2015 to work out a plan for making progress on the study.

International Commercial Arbitration (Chair vacant)

This Committee is awaiting appointment of a new chair. A call for volunteers has been put out in the fall 2015 newsletter.

International Commercial Law (Chaired by Jessica Simonoff)

The Committee has a new chair. It submitted multiple panel proposals for ILW 2015, but all were rejected. The Committee has proposed adding Viren Mascarenhas to serve as co-Chair, which the Co-Directors of Studies have approved. Viren has suggested that the Committee could put together a panel to be held in spring 2016 in New York regarding the overlap between corruption regulated by state authorities and corruption in investor-State arbitration decided by private adjudicators.

International Criminal Court (Chaired by Jennifer Trahan)

The ABILA International Criminal Court Committee sponsored a panel for ILW 2014. It was entitled "Update on the International Criminal Court's Crime of Aggression: Considering Crimea" (October 24, 2014), and featured Stefan Barriga (Deputy Permanent Representative, Lichtenstein Mission to the UN), David Donat-Cattin (Secretary-General, Parliamentarians for Global Action), and Benjamin Ferencz (Nuremberg Prosecutor, Einsatzgruppen Case); the Committee Chair moderated.

The Committee also released a document entitled "The Kenyan Cases at the International Criminal Court and the African Union's Positions As to Them: Questions & Answers" (ABILA, ICC Committee) (Dec. 8, 2014). The Committee Chair distributed the document at the annual meeting of ICC Assembly of States Parties at the UN in December 2014.

For 2015-2016, the Committee will again sponsor a panel for ILW. It is entitled "Accountability for Crimes in Syria and Iraq," and will feature Richard Dicker (Director, International Justice Program, Human Rights Watch), David Crane (former Prosecutor, Special Court for Sierra Leone), Mohammad al Abduallah (Syrian Justice and Accountability Center), Liechtenstein Ambassador Christian Wenaweser (invited). The Committee Chair will moderate. In addition, the Committee is polling its members to determine a Fall project that could become a document or two that the Committee distributes at the upcoming annual meeting of International Criminal Court Assembly of States Parties, slated to start November 16 in The Hague, Netherlands. When there is a new

U.S. Executive, the Committee plans to engage in additional advocacy as to how the US can strengthen its relationship with the ICC, or, depending upon the Executive selected, address why the US should not back-slide in that relationship.

International Disability Law (Chaired by Esme Grant)

This Committee failed to submit its annual report and appears to have completed its mission. The Co-Directors of Studies intend to dissolve it absent further guidance from the Executive Committee.

International Environmental Law (Chaired by Myanna Dellinger)

The Co-Directors of Studies have promoted William Burns to the position of Honorary Chair, and Myanna Dellinger will be assuming the leadership of the Committee in the future, possibly with a new co-chair.

In 2015, Dellinger organized "the Global Energy and Environmental Law Podcast" which is co-sponsored (in addition to her own work) by ABILA. ABILA covered the first year's podcast hosting fee (less than $100). This podcast series has turned out to be very successful. Between late December 2014 and today, the podcast website has been visited by 96,689 people ("hits") and 2,174 have played the podcasts in full ("total plays"). That is considered a lot for a new podcast. In short: no less than approximately 100,000 people have at least seen the ABILA logo and name via my podcast. In addition, the Committee sponsored a panel at ILW organized by Will Burns.

In the next year, the Committee intends to continue creating podcasts and will sponsor future panels at ILW 2015 and possibly regional meetings as well.

International Human Rights (Chaired by Aaron Fellmeth)

The Human Rights Committee sponsored a panel on "Hate Speech" and the Human Right to Freedom of Expression for International Law Weekend 2014. The Committee was largely dormant for 2015, but we plan to sponsor another panel on a topic to be determined for ILW 2016 and the coming ILW West at BYU. We also intend to take on a student volunteer to help us determine which U.S. appellate cases might benefit from an amicus brief illuminating the

requirements of international human rights law. Also, the Committee intends to coordinate with the Formation of Customary International Law Committee in its proposed study of customary human rights law.

Finally, the Committee intends to organize a large conference at Arizona State University in the next 1-2 years on the role and rights of individuals in public international law. This project is still in its planning stages.

International Humanitarian Law (Chaired by Andrea Harrison)

This year, the IHL Committee helped draft a report for an event co-hosted by Georgetown Law School's Military Law Society and the International Committee of the Red Cross (ICRC), entitled "Is It Time to Ratify AP I?" The panelists represented three governments, two of which had ratified Additional Protocol I (Canada and France) and another that had not (the U.S.), and they were joined by a legal advisor from the ICRC. The discussion that took place covered both the historical underpinnings of AP I, the ratification history in the U.S., how States who have ratified AP I handle interoperability issues with coalition partners, and the practical consequences of choosing whether to ratify AP I or not. The chair drafted the report, and feedback was provided by various members of the IHL Committee. The report can now be accessed on the IHL Committee's webpage.

Additionally, the IHL Committee organized a panel for ILW 2015, entitled "The Department of Defense Law of War Manual: The Tension between State and Non-State Expressions of Customary International Humanitarian Law." This panel will bring together a representative from the Department of Defense who worked on the Law of War Manual, an ICRC legal advisor with experience working on the ICRC's Customary Law Database, and other experts in the field to discuss the formation of customary international humanitarian law (CIHL), using such specific examples as the new DoD Law of War Manual or the ICRC Study on CIHL. The panelists will discuss how CIHL emerges and the weight to be given to differing assessments of the customary status of specific IHL topics.

Due to the lack of a confirmation of a legal adviser for the State Department, the IHL Committee decided not to go forward with a letter recommending certain IHL priorities for the legal advisor's term. However, the IHL Committee hopes that by 2016 a new legal advisor will be confirmed, in which case the IHL Committee will be in a better position to draft such a letter.

The IHL Committee also plans on organizing more IHL panels in 2016, including for ILW 2016. As the ICRC's Commentary to Geneva Convention I will be released at the end of 2015, there will also be an opportunity to possibly organize a panel based on the new commentary, or to organize a blog post series with IHL Committee members to be posted on various IHL blogs like Lawfare or Just Security.

International Intellectual Property Law (Chaired by Peter Yu)

The Committee will continue the project under its biennial mandate, which aims to study the interrelationship between IP and human rights. Specifically, the project focuses on article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights -- the provision that has yet to be authoritatively interpreted by a general comment of the U.N. Committee on Economic, Social and Cultural Rights. That provision recognizes "the right of everyone ... [t]o enjoy the benefits of scientific progress and its applications." Drawing on the panel discussions in the International Law Weekend in 2013 and 2014 and a conference on "Intellectual Property and Human Rights" at American University Washington College of Law, which the Committee cosponsored, the Committee's chair, Peter Yu, wrote an article on "The Anatomy of the Human Rights Framework for Intellectual Property," which is forthcoming from the Southern Methodist University Law Review. He also participated in an expert meeting organized by the U.N. Special Rapporteur in the Field of Cultural Rights and Yale Law School.

At ILW 2015, the Committee sponsored a panel on "TRIPS Agreement at 20." Commemorating the 20th anniversary of the entering into effect of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, this timely panel explores the Agreement's effectiveness, strengths and weakness as well as the future challenges in the international intellectual property field. Serving as panelists are Tahir Amin (I-MAK), Doris Long (John Marshall), Timothy Trainer (Global IP Strategy Center), and Peter Yu (Texas A&M).

International Monetary Law (Co-chaired by Jeremy Pam and James Lynch)

This Committee failed to submit its annual report and appears to have completed its mission. The Co-Directors of Studies intend to dissolve it absent further guidance from the Executive Committee.

International Trade Law (Chaired by Amy Porges)

This Committee failed to submit its annual report despite repeated requests. The Co-Directors of Studies are seeking a new chair to replace the current new but inactive one.

Islamic Law (Chaired by Haider Ala Hamoudi)

This Committee has a new chair, who has appointed Bernard Freamon as rapporteur. Its current plan is to prepare one or more position papers respecting Islamic law on various matters that are of some obvious salience around the globe. Issues, for example, would relate to Islamic law and slavery (given the ISIS practices), where Freamon has significant expertise, or Islamic financial issues, where the chair has some. These will be rigorous and legal, without being excessively academic, and therefore be relevant to various NGO and policy audiences.

In addition, the Committee intends to develop an edited volume to describe the role that Islamic law plays in different legal systems across the globe, including those of non-Muslim states. Obviously, it could not be entirely comprehensive and address every nation in the world, but it could try to span a broad variety to show how religious law interacts with state law in a multiplicity of ways, from Saudi Arabia to Egypt to India to the United Kingdom.

Law of the Sea (Chaired by George Walker)

The Law of the Sea Committee sponsored 2 panels at the ABILA Annual Meetings. At ILW 2014, it sponsored "Potential Chaos in the Oceans: Baselines Issues" and at ILW 2015, "Rising Seas, Baselines Issues: The Work of the ILA Baselines and Sea Level Rise Committees." In addition, Walker published his opening remarks at the joint 2013 Law of the Sea/Space Law panel in Oceans & Coastal Law Journal. The Committee is still formulating its future plans.

Space Law (Co-chaired by Henry Hertzfeld and Matthew Schaefer)

The Committee sponsored an ILW 2015 panel focused on one of the most controversial issues surrounding proposed amendments to US space legislation (HR 2262 & S1297) and the international reaction to such amendments. The theme is "Regulating On-Orbit Activities and Property Rights In Outer Space: Translating Broad, Open and (Sometimes) Conflicting Principles

of International Law into US and Other National Regimes." The panel will examine recent efforts by the US Congress to translate OST principles into national law in a fashion that allows "light" regulation of on-orbit activity and at least a limited recognition of property rights over extracted resources. In addition, the co-chairs have sponsored additional panels and research through our home institutions (University of Nebraska and George Washington University) that have featured government-industry.

In the future, the Committee plans to sponsor at least one session devoted to space law topics (either exclusively or addressing its inter-relationship with other analogous areas of international law) at ILW 2016 and/or jointly sponsor with other ABILA Committees another session on topics directly relevant to space law but have clear analogies to topics of interest to other Committees of ABILA. It also intends to organize research on unresolved several issues: (1) liability for accidents in space that would address possible changes to the current Liability Convention; (2) how to manage both the scientific and commercial utilization of resources in space as the technology of the 21st Century develops sufficiently to enable governments and companies to reach and use those resources that are found on the Moon, Asteroids, and other planets such as Mars; and (3) regulation of on-orbit or in-space activities, to include mining, on-orbit servicing of satellites, etc.

With Congress set to reexamine the Commercial Space Law Amendments Act in 2015, the Committee will consider preparing letters and/or short issue briefs to educate members of Congress on key issues, including those related to liability, on-orbit jurisdiction, and property rights that the Committee is or will be focusing on in its panels and research. In addition, it will consider sponsoring panels at ABILA regional conferences.

Teaching of International Law (Chaired by Mark Wojcik)

This Committee failed to submit its annual report and appears to have completed its mission. The Co-Directors of Studies are seeking a new chair to replace the current inactive one. In the event of failure to identify a new chair, the Co-Directors will dissolve the Committee.

United Nations Law (Co-chaired by Noah Bialostozky and Matthew Hoisington)

At ILW 2014, the Committee held a panel on "Current Policy and Practice with respect to the Protection of Civilians by Peace Operations." Mona Khalil and Col. Badreddine El Harti of the United Nations were joined by Professor Ian Johnstone of the Fletcher School of Law and Diplomacy at Tufts University for a discussion moderated by Matthew Hoisington. The panel explored challenges for peace operations in the protection of civilians arising from, among other things, high-risk threat environments, the capacity of forces deployed on the ground, and interpretations of Security Council mandates by those tasked with their implementation and execution. In preparation for ILW 2015, the Committee has organized a panel titled "The Challenges of Pandemic Response: Lessons from the Ebola Crisis and Future International Action." The panel featuring Laurie Garrett of the Council on Foreign Relations, Suerie Moon of the Harvard Global Health Institute, and Prof. Steven Hoffman of the University of Ottawa Faculty of Law will be moderated by Noah Bialostozky. In conjunction with the International Organizations Interest Group of the American Society of International Law, the Committee is also in the process of organizing an international organization-specific careers panel, to be held in early 2016.

Use of Force (Co-chaired by Jack M. Beard)

This Committee has a new chair, Jack M. Beard, who has appointed Daniel Joyner as deputy chair. The Committee's plans are to submit annual proposals to the Organizing Committee for panels at the ILW devoted to use of force law topics and, where appropriate, sponsor panels on these topics at ILW Midwest and ILW West. In addition, it will sponsor symposiums, workshops and/or podcasts at different law schools throughout the United States devoted to the use of force law topics and related legal subjects. Podcasts may be open to participation by remote access to panelists and other contributors. Topics will focus on Committee members' recent scholarship on the use of force and related legal subjects. Finally, the Committee intends to work in conjunction with contributors to major online legal blogs to advance participation in Committee activities and discussion of use of force legal issues and related topics.

DIRECTOR OF STUDIES REPORT TO THE INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH) EXECUTIVE COMMITTEE/BOARD OF DIRECTORS

CHIARA GIORGETTI AND PETER K. YU

October 2016

This report summarizes the status of all ABILA Committees for the 2016 calendar year, and their plans for 2017. The Co-Directors of Studies note that several Committees were discontinued this year because they had become entirely inactive, and their missions appeared to be fulfilled. In addition, several Committees require new chairs (see below), and nominations from the Executive Committee would be welcome.

Arms Control & Disarmament (Chaired by Dr. Leopold Lovelace)

The Arms Control & Disarmament Committee remains focused on the international law developments concerning nuclear arms issues –evolution of norms and regimes, policies, developments, control and proliferation prevention, and the overall disarmament goal—specifically as pursued by the United States, but also on the policies and responses by other major nuclear armed states, as well as the contextual conditions generated by geopolitical and transnational conflicts.

The immediate objective of the Committee Chair is to produce a new draft report on the state of the international law on nuclear weapons –primarily as practiced by the United States, though addressing elements of main comparative practice, in as much as it is interrelated with U.S. practice—in time to be debated by the Committee members, and the members at large of the Branch, by the time of the 2016 International Law Weekend.

International Investment Law (Chair vacant)

Seeking new chair.

Formation of Rules of Customary International Law (Chaired by Brian Lepard)

In the past three years interested members of the Committee have discussed launching a study of the status of international human rights law as customary international law, possibly in collaboration with the Committee on Human Rights. As mentioned in earlier reports, this would be a study of the customary law status of human rights, building on the study that Prof. Richard Lillich led at the Buenos Aires Conference of the International Law Association in 1994 on the status of the Universal Declaration of Human Rights in national and international law, and also on the 2000 study of the International Law Association, published at its London Conference, entitled "Statement of Principles Applicable to the Formation of General Customary International Law" (available at http://www.ila-hq.org/en/committees/index.cfm/cid/30). The study would also draw upon our Committee's own prior studies on the role of national court decisions as state practice and on the role of state practice in the formation of customary and jus cogens norms of international law (both available at http://heinonline.org).

A number of Committee members have volunteered to assist with various aspects of this project, which promises to be a multi-year effort. The Chair of the Committee, Brian Lepard, met with Committee members at International Law Weekend 2015 and plans to do so again at International Law Weekend 2016 to work out a more detailed plan for making progress on the study. Professor Lepard's research assistant prepared in early 2016 a preliminary outline of issues to be covered by the study. Professor Lepard intends to share a version of this outline with members of the Committee at International Law Weekend 2016 as a basis for beginning substantive research for the project.

International Arbitration (Chaired by Daniel Reich)

Note: New Chair and New Name of Committee

For the coming year, the International Arbitration Committee will pursue two key objectives.

The first objective would be to more actively engage the Committee as a voice in the arbitration community. In this respect, the Committee will facilitate discussions around discrete substantive issues that may not necessarily receive adequate attention in the current debates in the community. The Committee will aim to organize panels during the coming year, which may focus on themes such as the following:

- Reasoned decisions on arbitration challenges. There has been much discussion of this in recent years, and the ICC made a splash with its recent change in policy. However, the question remains as to whether the ICC change in policy has gone far enough, and there is also the related question of what other institutions are doing.

- Given the ABILA Committee's connection to the US arbitration community, the Committee may study the current status of U.S. court assistance to international arbitral tribunal tribunals under 28 U.S.C. s 1782. The law in the U.S. is not entirely clear on this subject, and some proposals for a way forward could be useful.

The Committee's second objective for the coming year is to create a sense of community and regular interaction among the Committee's members. Committee members will coordinate to achieve this objective, through various means. Options to be considered for implementation include creation of an online forum for Committee members to engage in occasional discussions, as well as conference calls once every few months on a substantive topic to be addressed by a Committee member.

International Commercial Law (Chaired by Jessica Simonoff)

Note: seeking new chair, as Simonoff wants to step down

No Report.

International Criminal Court (Chaired by Jennifer Trahan)

Over the past year, the International Criminal Court Committee published a document: "Libya & The International Criminal Court--Questions and Answers: The Libyan Death Sentences Against Saif Al-Islam Gaddafi and Abdullah Al-Senussi & The ICC's Admissibility Rulings," Nov. 2015, which the Committee Chair distributed at the ICC Assembly of States Parties meeting in The Hague, Netherlands, in Nov. 2015. The Committee also sponsored a panel at ILW 2015 entitled: "Accountability for Crimes in Syria and Iraq."

For the next year, the Committee hopes to produce an advocacy document for release at the November 2016 ICC Assembly of States Parties meeting in The Hague, Netherlands. Additionally,

the Committee is sponsoring a panel at ILW 2016 entitled: "Challenges for the International Criminal Court in a Changing World."

International Environmental Law (Chaired by Myanna Dellinger)

Past Activities:
This past year, I continued "the Global Energy and Environmental Law Podcast" which is co-sponsored by ABILA, see http://theglobalenergyandenvironmentallaw.podbean.com and now also the University of South Dakota School of Law. ABILA generously offered to pay for the first year's podcast hosting fee (less than $100) that I initially paid out of my personal funds. I hope this will be the case this coming year as well. (The fees are due in late November).

This podcast series is still very successful. Over the past year alone (August 2015 to August 2016), it saw 133,992 total hits and 4,062 total downloads. Over the entire existence of the podcast, there were almost 225,000 total hits and 4,300 total downloads, all featuring the ABILA logo).

All podcasts are announced to the IEL members individually via email.

Per the recommendations on select ABILA leaders at the 2015 International Law Weekend, I wrote a report on how I had reached the success I did with the podcast so that the model could be repeated by other interest groups. I had an IT person create detailed screenshots, etc., for the ease of use of potentially interested parties. I sent that to the ABILA leadership. I hope it was (well) received, distributed, and useful.

Planned Future Activities:
I plan to continue creating podcasts, possibly bearing the ABILA name and logo.

I will be speaking at the International Law Weekend 2016 on The Road from Paris: What Are the Implications of the Paris Agreement for Climate Policy in 2020 and Beyond.

The interest group is small and my physical location – South Dakota – makes it difficult to create many face-to-face opportunities. However, given the size of the IEL Committee, I am proud to be able to have created the above virtual opportunities and will continue to doing so, just as I plan to contribute to conferences with proposals for presentations and get-togethers as relevant and feasible.

International Human Rights (Chaired by Aaron X. Fellmeth)

The Committee chair traveled to the ILA Biennial in Johannesburg, where he attended the International Human Rights Law Committee's meeting (chaired by Christina M. Cerna) regarding its draft report on the domestic implementation of judgments of the International Court of Justice. The Chair then distributed the ILA Committee's 2014 report, 2016 draft report, and the accompanying resolution to the ABILA Committee.

In addition, the International Human Rights Committee sponsored a roundtable on "Bringing International Human Rights Home" to the United States for International Law Weekend 2016. The roundtable explores how international human rights law is currently enforced in the United States, and the desirability and feasibility of strategies—political, legal, and juridical—for improving U.S. conformity to IHRL norms. It will be chaired by Committee Chair Aaron X. Fellmeth and feature William Aceves, Dinah Shelton, Peter Spiro, and Beth Stephens as panelists.

In the coming year, the Committee intends to sponsor a panel at ILW 2017. In addition, in coordination with the ASIL International Legal Theory Interest Group, the Committee is planning a conference at Arizona State University for December 2017 on international law, with a focus on human rights and legal theory, to be co-sponsored by ASU, the Committee itself, and ASIL. We are still at the logistics and fundraising phase. Finally, the Committee expects to begin working on a white paper on the background conditions for the effective realization of international human rights in 2017.

International Humanitarian Law (Chaired by Andrea Harrison)

Report of Activities for 2015-2016

This year, the IHL Committee organized a panel for ILW 2015, entitled "The Department of Defense Law of War Manual: The Tension between State and Non-State Expressions of Customary International Humanitarian Law." The panel brought together a representative from the Department of Defense who worked on the Law of War Manual, an ICRC legal advisor with experience working on the ICRC's Customary Law Database, and other experts in the field to discuss the formation of customary international humanitarian law (CIHL), using such specific examples as the new DoD Law of War Manual or the ICRC Study on CIHL. The panelists discussed how CIHL emerges and the weight to be given to differing assessments of the customary status of specific IHL topics. A report of the panel was drafted and will be put on the IHL Committee homepage for future reference.

The IHL Committee is also organizing a panel for ILW 2016 entitled "The Legal & Policy Regulation of Armed Conflict in/from/thru/to Outer Space."

Agenda of Activities for 2016-2017

The IHL Committee anticipates that the presidential election and the changeover in administrations will provide an opportunity to send a letter to the new administration recommending IHL priorities for the next four years.

The IHL Committee also plans on organizing more IHL panels in 2017, including for ILW 2017.

International Intellectual Property Law (Chaired by Peter Yu)

In the past few years, the Committee on International Intellectual Property has been studying the interrelationship between intellectual property and human rights. Specifically, the project focuses on article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights -- the provision that has yet to be authoritatively interpreted by a general comment of the U.N. Committee on Economic, Social and Cultural Rights. That provision recognizes "the right of everyone... [t]o enjoy the benefits of scientific progress and its applications."

Although the Committee proposed to continue to explore the issue at the International Law Weekend 2015, it was advised to pick a different topic that will make the panel more suitable for CLE purposes. So, the Committee put together a panel on "TRIPS Agreement at 20,": which covered the twenty years of the WTO TRIPS Agreement as well as new TRIPS-related developments, such as the negotiation of the Trans-Pacific Partnership and the Transatlantic Trade and Investment Partnership.

At this year's International Law Weekend, the Committee-sponsored CLE panel will focus on "The Investment-Related Aspects of Intellectual Property Rights." The panel is particularly timely in light of the recent signature of the Trans-Pacific Partnership Agreement and the investor-state dispute settlement suits Philip Morris and Eli Lilly have filed to challenge plain packaging regulations in Uruguay and Australia and patent requirements in Canada. Speakers will include Sean Flynn (American), Burcu Kilic (Public Citizen), Barbara Lauriat (KCL), Meredith Kolsky Lewis (Buffalo), Bryan Mercurio (CUHK) and Peter Yu (Texas A&M).

International Trade Law (Chair vacant)

The Co-Directors of Studies are seeking a new chair.

Islamic Law (Chaired by Haider Ala Hamoudi)

Our section had planned two major activities over the course of the academic year. The first of them was to plan a conference and edited volume on the intersection of international humanitarian law and Islamic law. Both the Rapporteur for the Section, Bernard Freamon, as well as I, spent a fair amount of time canvassing names, dates and locations for this, and just as we had selected a venue and a date, the funding for our conference fell through. With that, the interest of a significant number of authors in the edited volume also lessened, and we did not have the material necessary for a volume.

In our view, while this development was certainly frustrating, the work we did was not entirely in vain. We did identify a number of good speakers, so much so that our intent is to submit a proposal next spring for International Law Weekend of 2017 focusing on Islamic law and international humanitarian law. While the ambition of a full conference and book must be set aside for now, we do hope that a panel at ILW will at least start to build the void of the dearth of scholarship in this area.

Separately, we had planned to commission and prepare position papers respecting Islamic law on various matters that are of some obvious salience around the globe. Issues, for example, would relate to Islamic law and slavery (given the ISIS practices), where my Rapporteur has significant expertise, or Islamic financial issues, where I have some. We imagined these as being rigorous and legal, without being excessively academic, of a length fit for a newsletter and therefore relevant to and hopefully read by various NGO and policy audiences. Due to our work on a conference which never came to fruition, we were unable to proceed with this part of the project. We hope to turn to it in the fall and early next year.

Law of the Sea (Chaired by George Walker)

The Committee sponsored a panel at the 2015 ABILA Annual Meeting on "Rising Seas, Baselines Issues: The Work of the ILA Baselines and Sea Level Rise Committees." Participants included: J.

Ashley Roach, LOS Committee member, also chair, ILA Baselines Committee, presenter; George Walker, LOS Committee chair, ILA Baselines Committee member, panel moderator.

The Committee will sponsor a panel at the 2016 ABILA Annual Meeting, titled "Change and Stability [or Instability] in the Edges of the Oceans: Coastal Baselines, Rising Seas: The Effect of Climate Change." Participants include: J. Ashley Roach, LOS Committee member, also chair, ILA Baselines Committee, presenter; George Walker, LOS Committee chair, ILA Baselines Committee member, panel moderator.

Also, Committee member Wil Burns is a presenter on the panel "The Road from Paris: Implications of the Paris Agreement for Climate Policy in 2020 and Beyond" at the 2016 Meeting.

Space Law (Co-chaired by Matthew Schaefer and Henry Hertzfeld)

Highlight for this period is the impact and influence that Space Law Committee Co-Chairs letter(s) on space resource property rights and that academic scholarship on liability provisions had on the first major Congressional revamping of commercial space legislation in the last decade – Public Law 114-90, signed into law Nov. 25, 2015. Details below.

2016-2018 Space Law Committee (ABILA) Work Plan

1) Sponsor at least one session devoted to space law topics (either exclusively or addressing its inter-relationship with other analogous areas of international law) at the ILW held in October in NYC and/or jointly sponsor with other ABILA Committees another session on topics directly relevant to space law but have clear analogies to topics of interest to other Committees of ABILA.
2) Space Law Research Activities:
   a. Continuing to research liability issues, space resource property rights, and on-orbit (or in-space jurisdiction)
   b. Adding research on space traffic management, space situational awareness, and impact on current licensing regimes, in particular as a result of new technologies and business models for commercial space.
3) Periodic reports as appropriate based on summaries of the panel presentations and discussions, additional research by members of the Committee, and notes on issues of current importance.

4) With Congress set to again reexamine the existing commercial space legislation in 2016-2017, the Committee will again be considering preparing letters and/or short issue briefs to educate members of Congress on key issues.
5) Committee will consider sponsoring panels at ABILA regional conferences as well.

Summary of Activities for 2016 (corresponding to work plan numbering):
1) We are sponsoring a panel at ILW again this year titled: "New Satellite Technologies and the Challenges for Space Law Evolution: Is Space Law Ready for Satellite 5.0?"

Many new satellite technologies are being developed, including large geostationary satellites with increased space situational awareness possibilities, large constellation, mass-produced smaller low-earth orbit satellites, vast numbers of cube and micro sats with increased capabilities and deployments from launch vehicles en mass, and technologies for on-orbit satellite servicing. Questions of what changes to address these new technologies, if any, will be needed to space law both internationally (treaties, codes of conduct, non-binding norms, ITU discussions, etc.) and trans-nationally in the form of new legislative and regulatory developments within national systems will be addressed.

(2/3) As co-chairs we have sponsored additional panels and research through our home institutions (University of Nebraska and George Washington University) that have featured government-industry roundtables on the issues we have looked at in our ILW panels the past several years (new technologies, liability, property rights, regulation of commercial space, etc.). University of Nebraska's 9th Annual DC Space Law Conference Oct. 17, 2016 is focused on New Technologies and Business Models in Commercial Space: Perspectives on Regulation. The discussion in DC will inform and advance the discussion for the ABILA panel two weeks later. Recommendations in Professor Schaefer's article "The Need for Federal Preemption and International Negotiations Regarding Liability Caps and Waivers of Liability in the US Commercial Space Industry" Vol. 33 Berkeley Journal of International Law 223-273 (2015) were adopted by the Congress in Public Law 114-90, signed into law November 25, 2015.

4) As co-chairs we have drafted and signed to influential letters to Congressional leaders on space law issues arising in the context of Congressional consideration of what became in late 2015 Public Law 114-90. The law adopted recommendations on space resource property rights provisions in the Schaefer/Hertzfeld letter to Congress of May 15, 2015. In 2016, we have been involved in discussions explaining the provisions of the law to interested persons.

5) We are open to sponsoring panels at ABILA regional conferences as opportunities arise.

Additional (re Membership): We will have an ABILA Space Law Committee sign up table at Nebraska Law's 9th Annual DC Space Law Conference on October 17.

United Nations Law (Co-chaired by Noah Bialostozky and Matthew Hoisington)

Note: new co-chairs for UN as of Sept 2016 (Dr. Bart Smit Duijzentkunst serves as Associate Legal Officer at the Codification Division of the United Nations Office of Legal Affairs and Christiane Ahlborn, UN Office of Legal Affairs)

In 2015-2016, the UN Law Committee organized a panel titled "The Challenges of Pandemic Response: Lessons from the Ebola Crisis and Future International Action." The panel explored pathways to securing increased compliance with the World Health Organization's International Health Regulations, as well as the feasibility and advisability of establishing a reserve corps of medical health professionals, under the aegis of an international organization, to be deployed in response to global health emergencies.

Use of Force (Co-chaired by Jack M. Beard and Dan Joyner)

Dan Joyner and Jack M. Beard agreed to chair this new Committee last year, which has the following mandate: (1) To advance the discussion and analysis of international legal issues pertaining to the use of force, broadly defined, including efforts to prevent recourse by states to the use of armed force such as arms control efforts; and (2) To advance the discussion of scholarship in the field and conduct assessments of contemporary state practice.

Toward these ends, the Committee hopes to engage in a variety of activities, including: (1) Submitting annual proposals to the Organizing Committee for panels at the ILW (held in October in NYC) devoted to current international legal issues in the field and sponsoring panels on these topics at ILW Midwest and ILW West; (2) Sponsoring symposiums, workshops and/or podcasts at different law schools throughout the United States devoted to international legal issues in the field (podcasts may be open to participation by remote access to panelists and other contributors). Topics will focus on Committee members' recent scholarship, research or other work on relevant international legal subjects; and (3) Working in conjunction with contributors to major online legal blogs to advance participation in Committee activities and discussion of relevant international legal issues.

Although the Committee was only recently established and has not had sufficient time to embark on its full agenda, we commenced our first project this summer: a series of podcasts which will feature the work of different authors and practitioners in the field of arms control and the international use of force. This series will serve as a vehicle for interviews and discussions with people doing interesting work in this field. Each podcast will feature a discussion with a different author or practitioner, focusing on their current work or most recent publications or research. Hopefully, this will be a great way for people to learn about interesting work going on in the area, through a highly accessible medium.

Our inaugural podcast, which took place at the University of Alabama School of Law, is now posted on the ABILA Committee Use of Force page, at http://www.ila-americanbranch.org/CommitteeDetail.aspx?CommitteeID=229. All podcasts will also be available at their home on Arms Control Law at https://armscontrollaw.com. We hope that ABILA members and all others interested in international legal issues related to the use of force will find this podcast series valuable. We welcome input from Committee members, and suggestions for additional Committee projects.

Committee on Arms Control & Disarmament (Chaired by Leopoldo Lovelace)

Report not received.

DIRECTOR OF STUDIES REPORT TO THE INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH) EXECUTIVE COMMITTEE/BOARD OF DIRECTORS

CHIARA GIORGETTI AND PETER K. YU

2017

Committee on Arms Control and Disarmament (Chair vacant)

This Committee is currently dormant, with the selection of a new Committee Chair pending.

Committee on Formation of Rules of Customary International Law (Chaired by Brian Lepard)

This Committee will sponsor a panel at International Law Weekend 2017 entitled "The Role of Customary International Law in Challenging Times." The panel will explore the role that customary international law can play in today's turbulent world. Customary international law is assuming increasing relevance in regulating many issues of global concern. The International Law Commission is also engaged in a major project on the identification of customary international law. The panel will investigate both the current work of the Commission in clarifying customary international law's foundations and customary law's current and potential role in responding to contemporary global challenges, including those involving women's rights, environmental rights, and the settlement of investment-related disputes.

The Committee Chair will moderate the panel. The following panelists will participate: Michael Wood, Special Rapporteur of the International Law Commission on the Identification of Customary International Law; Anna Williams Shavers, Cline Williams Professor of Citizenship Law, University of Nebraska College of Law; and Kabir Duggal, Adjunct Professor, Columbia Law School and Senior Associate, Baker McKenzie.

In addition, interested members of the Committee have discussed launching a study of the status of international human rights law as customary international law, possibly in collaboration with the Committee on International Human Rights. A number of Committee members have volunteered to assist with various aspects of this project.

Committee on International Arbitration (Chaired by Daniel Reich)

During the past year, the International Arbitration Committee has organized two panels on international arbitration topics for International Law Weekend 2017:

(1) "Ethical Challenges: Evolving Norms and Practices for Arbitrator Disqualifications"

Panelists: Prof. W. Michael Reisman (Yale Law School), Prof. Margaret Moses (Loyola University Chicago School of Law), and Robert Sills (Partner, Orrick). Moderator: Daniel Reich (Counsel, Shearman & Sterling).

(2) "From Crisis to Opportunity: International Arbitration in the Financial Sector After the Global Financial Crisis"

Panelists: Prof. William W. Park (Boston University School of Law), Claudia Salomon (Partner, Latham & Watkins), Edward Turan (Counsel, Paul, Weiss, Rifkind, Wharton & Garrison), and Henry Weisburg (Partner, Shearman & Sterling). Moderator: Daniel Reich (Counsel, Shearman & Sterling).

For the coming year, the Committee Chair intends to work with a co-chair (to be nominated) to more actively engage the Committee as a voice in the arbitration community. In this respect, the Committee will facilitate discussions around discrete substantive issues that may not necessarily receive adequate attention in the current debates in the community. Building on the momentum from the panels to be held during the International Law Weekend, the Committee will aim to organize two panels in the coming year—one in New York City and a second panel in a location to be determined. In addition, the Committee will work to create a greater sense of community and regular interaction among Committee members.

Committee on International Commercial Law (Chaired by Jessica R. Simonoff)

This Committee did not provide a report.

Committee on International Criminal Court (Chaired by Jennifer Trahan)

At International Law Weekend 2016, this Committee sponsored a panel entitled "Challenges for the International Criminal Court in a Changing World," which featured Committee Chair Jennifer Trahan; Karen Mosoti, Head, Liaison Office at the International Criminal Court (ICC); Jelena Pia-Comella, Program Director, Coalition for the International Criminal Court (CICC); Elise Keppler, Associate Director, International Justice Program, Human Rights Watch; and Benjamin Ferencz, Chief Prosecutor for the United States, The Einsatzgruppen Case, IMT, and Nuremberg (by video link). David Donat-Cattin, Secretary-General, Parliamentarians for Global Action, moderated the panel.

In November 2016, the Committee released two documents, which it distributed at the ICC's Assembly of States Parties meeting in The Hague, The Netherlands: (1) "The Death Penalty Under the International Criminal Court's Complementarity Regime: Questions and Answers" (November 14, 2016); (2) "The First Cultural Heritage and Al Qaeda Case Before the International Criminal Court: Questions and Answers" (November 5, 2016).

On June 1, 2017, the Committee submitted a letter to Secretary of State Rex W. Tillerson and Acting Legal Adviser Richard C. Visek concerning the importance of the U.S. Office of Global Criminal Justice and U.S./ICC policy.

At International Law Weekend 2017, this Committee will sponsor a panel entitled "The Next Step for the ICC? A Crime of Aggression Primer," featuring Ambassador Christian Wenaweser, Permanent Representative of Liechtenstein to the U.N.; Ambassador Jurg Lindenmann of Switzerland; Roger S. Clark, Board of Governors Professor, Rutgers Law School; and David Donat-Cattin, Secretary-General, Parliamentarians for Global Action, with the Committee Chair moderating.

For the next year, the Committee plans to produce a document discussing the ICC's approach to reparations in recent cases.

Committee on International Environmental Law (Chaired by Myanna Dellinger)

Past Activities

The Committee Chair continued "The Global Energy and Environmental Law Podcast" (http://theglobalenergyandenvironmentallaw.podbean.com), which is co-sponsored by ABILA

and the University of South Dakota School of Law. ABILA generously offered to pay for the first year's podcast hosting fee (less than $100). The Committee hopes this will be the case this coming year as well.

This podcast series is more successful than ever before. It now has more than 400,000 total hits and 5,000 total downloads. All podcasts are announced to members of the Committee individually via email.

Planned Future Activities

The Committee Chair plans to continue creating podcasts, possibly bearing ABILA's name and logo.

She will discuss with Professor Wil Burns about how the Committee might be able to hold a physical meeting or an event during 2018. The interest group is small and the Committee Chair's physical location—South Dakota—makes it difficult to create many face-to-face opportunities. However, given the Committee's size, the Committee Chair is proud to be able to have created the above virtual opportunities and will continue to do so.

Committee on International Human Rights (Chaired by Aaron X. Fellmeth)

This Year's Activities

This Committee has been at a zenith of activity in the last year. At the beginning of the year, it formed a Subcommittee on U.S. Compliance with International Human Rights Law with thirty-four members. The Subcommittee immediately began monitoring U.S. executive orders and legislative measures that threatened to put the United States in violation of its international human rights obligations. Within a week of Executive Order 13,769 of January 27, 2017 (the first Muslim immigration ban), the Subcommittee began fundraising to challenge the ban and coordinated action with the American Civil Liberties Union to file an amicus brief on behalf of eighty-one international law scholars and thirteen nongovernmental organizations in Darweesh v. Trump. This brief aimed to explain U.S. obligations under international treaties respecting nondiscrimination on the basis of religion and national origin in immigration policy; its obligation to observe due process of law respecting visa holders and applicants; its obligation to comply with the 1967 Protocol relating to the status of refugees; and its duties under customary international law. That case ultimately settled favorably for the plaintiffs in September.

On March 6, the President rescinded the order and issued a new ban, Executive Order 13,780, raising some of the same human rights issues as the first ban. The Subcommittee quickly filed a similar but abbreviated brief in the U.S. District Court for the District of Hawaii in Hawaii v. Trump in collaboration with the law firm Damon Key Leong Kupchak Hastert. At the same time, the Subcommittee filed the amicus brief in the U.S. District Court for the Western District of Washington in Washington v. Trump in collaboration with Jonathan Hafetz of Seton Hall Law School and counsel at Perkins Coie Seattle. That case quickly went to appeal to the Ninth Circuit, where the Committee filed another amicus brief. Meanwhile, in Maryland, the International Refugee Assistance Project challenged the ban as well. When that case was heard at the Fourth Circuit, the Subcommittee filed a similar amicus brief there in collaboration with Perkins Coie's D.C. office. (Hafetz had to step down after being appointed to a position at the ACLU, which was a party to the Ninth Circuit case.)

In every one of these cases, the courts found the travel ban either contrary to the Immigration and Naturalization Act or to be unconstitutional religious discrimination. In August 2017, the United States Supreme Court granted certiorari and consolidated the Fourth and Ninth Circuit cases. The Subcommittee filed an amicus brief with the Court on September 12, 2017, representing eighty-five international law scholars and fourteen nongovernmental organizations, including Amnesty International. The outcome of that case is still pending.

In addition, this Committee is sponsoring two panels at International Law Weekend 2017. One panel is moderated by Prof. Paul R. Dubinsky and entitled "The Alien Tort Statute and Corporate Liability: Take Two." It will feature Prof. Beth van Schaack, Kristin Linsley Esq., and Kathryn Lee Boyd Esq. The other panel, entitled "Human Rights After Trump: Survival and Resistance," is led by Prof. Barbara Stark and Jonathan Hafetz of the ACLU.

Future Plans

The Subcommittee will continue to closely monitor a variety of U.S. government measures, including the proposed defunding of civil rights enforcement in the Department of Justice and proposals to eliminate health insurance for millions of U.S. citizens. The action required, if any, is unpredictable at this time, but may involve testimony before Congress, referral to the Inter-American Commission on Human Rights, communication with the Committee on the Elimination of Racial Discrimination, or more participation as an amicus in lawsuits in which the Committee's expertise might be helpful to a court.

In addition, this Committee as a whole is undertaking recruitment efforts to build the membership of ABILA in general and the Committee in particular, mostly through personal communications from the Chair to international lawyers and scholars.

Finally, the Committee intends to sponsor one or possibly two panels or roundtables at International Law Weekend 2018 and, if possible, International Law Weekend—West 2018.

Committee on International Humanitarian Law (Chaired by Andrea Harrison and Ashika Singh)

Report of Activities from Fall 2016 to Fall 2017

This Committee organized a panel for International Law Weekend 2016, entitled "The Legal and Policy Regulation of Armed Conflict in/from/thru/to Outer Space." The panel brought together government officials, civil society, and academics to discuss their perspectives regarding operations affecting space assets during an armed conflict.

The Committee Co-Chairs, along with Committee Members Gabor Rona, Rachel VanLandingham, and Aaron Fellmeth, drafted a letter to be sent to the new U.S. State Department Legal Adviser, recommending international humanitarian law priorities for the next four years. The nomination for the State Department Legal Adviser was announced on September 2, 2017. The Committee hopes to be able to send the letter by the end of the year once the nomination is confirmed.

This Committee has also organized two panels for International Law Weekend 2017: (1) "Habeas, PRBs, and Military Commissions: What Legal Redress Would New Captures Sent to Guantanamo Have?" (2) "The Future of the Law of Naval Warfare: The Launch of the ICRC's Updated Commentary to the Second Geneva Convention."

Agenda of Activities from Fall 2017 to Fall 2018

This Committee plans on organizing more panels on international humanitarian law in 2018, including for International Law Weekend 2018.

Committee on International Intellectual Property (Chaired by Peter K. Yu)

At International Law Weekend 2016, this Committee sponsored a CLE panel focusing on "The Investment-Related Aspects of Intellectual Property Rights." The panel is particularly timely in light of the then-recent signature of the Trans-Pacific Partnership Agreement and of the investor-state dispute settlement complaints filed by Philip Morris and Eli Lilly to challenge tobacco plain packaging regulations in Uruguay and Australia and patent requirements in Canada. Speakers included Prof. Sean Flynn (American University), Burcu Kilic (Public Citizen), Prof. Barbara Lauriat (King's College, London), Prof. Meredith Kolsky Lewis (University of Buffalo), and the Committee Chair.

At International Law Weekend 2017, this Committee will sponsor a panel on "Fair Use and Global Copyright Reform." This timely roundtable will feature discussion among copyright law experts who have been involved in copyright reform in Australia, Brazil, Canada, Hong Kong, Israel, and the United States. Speakers will include Jonathan Band (Jonathan Band PLLC), Prof. Sean Flynn (American University), Prof. Ariel Katz, Professor (University of Toronto), Prof. Niva Elkin-Koren (University of Haifa), Prof. Allan Rocha de Souza (Federal University of Rio de Janeiro and Federal Rural University of Rio de Janeiro), and the Committee Chair.

As to the future, the Committee Chair has proposed to add Prof. Sean Flynn (American University) as a Committee Co-Chair. For International Law Weekend 2018, the Committee also plans to propose another panel on international intellectual property law and policy. Possible topics include copyright, e-Commerce, pharmaceuticals, and intellectual property and international trade.

With the ILA Committee on Intellectual Property and Private International Law, this Committee is also exploring the possibility of cohosting a panel that will allow Branch members to provide feedback on the Guidelines on Intellectual Property in Private International Law that are being drafted by the ILA Committee. It is anticipated that the Guidelines will be proposed for adoption at the 2020 ILA Biennial Meeting in Kyoto, Japan.

On June 1–2, 2017, the Committee Chair and Professor Marketa Trimble (UNLV), a member of this Committee, participated in the annual meeting of the ILA Committee on Intellectual Property and Private International Law at the Max Planck Institute for Innovation and Competition in Munich, Germany. Other Branch members who currently sit on this ILA Committee include Jane Ginsburg (Columbia) and Rochelle Dreyfuss (New York University).

Committee on International Investment Law (Chaired by David Attanasio)

This Committee is currently in the phase of planning a new set of activities and expanding membership after a period of relative inactivity. The Committee Chair has been working with four active Committee members to develop a slate of activities designed to attract new Committee members and to advance the goals of the Committee. The Committee has recently approved the formation of an Events Subcommittee, dedicated to organizing an ongoing series of public seminars, and a Study Group, dedicated to developing a focused study of a topic in investment law.

International Law Weekend

At International Law Weekend 2017, this Committee will sponsor a panel entitled "NAFTA: What Does the Future Hold?" The panel's description is as follows:

> The Trump Administration has evinced skepticism—even hostility—for the North American Free Trade Agreement (NAFTA) and has suggested that the United States may withdraw from or seek to renegotiate the terms of the treaty. Understanding the perspectives of the United States, Canada and Mexico in this environment is critical for international investment practitioners. This panel will aim to provide diverse perspectives from panelists with unique insights into the U.S., Mexican and Canadian positions based on prior or present experience working for each of those states. Although panelists will be encouraged to shape the discussion in light of their expertise, questions to be considered may include what would happen if the United States withdrew from NAFTA? Would another treaty come into force? Is the American position really a break with past administrations, or more of the same just in different packaging? What is the likelihood that any of these proposals go through?

The Committee is very optimistic that the panel will be of interest to the ABILA membership, especially given its timely nature. The Events Subcommittee plans to make another submission for International Law Weekend 2018.

Seminar Series

The Events Subcommittee is also in the process of developing an ongoing Seminar Series, with a goal of having approximately three events per year, with one each fall (in addition to the International Law Weekend) and two each winter/spring. The Committee's first event will likely be during winter 2018, to be followed by a second event in spring 2018.

One event the Committee is in the process of planning will be "Investment Law and Human Rights: Friends, Enemies, or Strangers?" It will focus on the influence these bodies of law should or should not have on one another. A second event the Committee is developing will focus on counterclaims in investment law and specifically whether they pose a threat to investors. These events will serve as an opportunity for community-building among international law practitioners and scholars and also to expand the Committee's membership.

Study Group

This Committee just approved the formation of a Study Group that will undertake a study, with a written report, of a topic in international investment law. Although the Committee intends to wait until after the International Law Weekend to make a final decision, the current proposal is to conduct a survey of the legal materials on due process standard in investment law. The Committee considers that the standard is important but under-analyzed in the available secondary materials, and that there are limited efforts to organize the relevant legal materials analytically. The Study Group will undertake to provide a comprehensive account of these materials, especially those materials whose contributions to the due process standard have not been specified. During 2018, the Study Group will begin to implement the study.

Committee on International Trade Law (Chair vacant)

This Committee is currently dormant, with the selection of a new Committee Chair pending.

Committee on Islamic Law (Chaired by Haider Ala Hamoudi)

This past year, this Committee prepared for the panel at International Law Weekend 2017, which will address the need for international humanitarian law and Islamic law to engage more deeply with each other. The Committee's original plan had been to work on an edited book in connection with this program, but it took us a fair amount of time to locate speakers, a commenter, and a moderator. Thus, the Committee was unable to make as much progress on the idea of an edited book.

Next year the Committee hopes to make the book a major focus of its efforts, with the ambition of having it serve as a leading comparative authority on the subject of Islamic humanitarian law. The

Committee also hopes to arrange and prepare another International Law Weekend panel. It, however, has not begun to consider potential topics, except in the most preliminary fashion.

Committee on Law of the Sea (Chaired by George K. Walker)

This Committee sponsored a panel during International Law Weekend 2016 on developments in the ILA Committees related to the law of the sea. The Committee Chair moderated the panel. Other panelists included Ashley Roach, Retired Captain, U.S. Navy Judge Advocate General's Corps and Retired Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State; Davor Vidas, Research Professor, Director of the Law of the Sea Programme, The Fridjof Nansen Institute, Norway; David Freestone, Visiting Scholar and Professional Lecturer, George Washington University School of Law and Co-Rapporteur, ILA International Law and Sea Level Rise Committee.

Committee on Space Law (Chaired by Henry R. Hertzfeld and Matthew Schaefer)

2017–2019 Work Plan

(1) Sponsor at least one session devoted to space law topics (either exclusively or addressing its inter-relationship with other analogous areas of international law) at the International Law Weekend held in October in New York and/or jointly sponsor with other ABILA Committees another session on topics directly relevant to space law but have clear analogies to topics of interest to other ABILA Committees.

(2) Space Law Research Activities: (a) continuing to research liability issues, space resource property rights, and on-orbit (or in-space) authorization; (b) adding research on space traffic management, space situational awareness, and the impact on current licensing regimes of new technologies and business models, as well as beginning to look at security issues in space.

(3) Periodic reports, as appropriate, based on summaries of the panel presentations and discussions, plus additional research by members of the Committee and their programs.

(4) With Congress currently reexamining the existing commercial space legislation, the Committee will be considering preparing letters and/or short issue briefs and/or holding discussions to educate members of Congress on key issues.

(5) The Committee will consider sponsoring panels at ABILA regional conferences.

Summary of Activities from August 31, 2016 Through September/October 2017

We sponsored a panel at International Law Weekend 2016 that drew fifty to fifty-five attendees. The panel's title and description were as follows:

"New Satellite Technologies and the Challenges for Space Law Evolution: Is Space Law Ready for Satellite 5.0?"

Many new satellite technologies are being developed, including large geostationary satellites with increased space situational awareness possibilities, large constellation, mass-produced smaller low-earth orbit satellites, vast numbers of cube and micro satellites with increased capabilities and deployments from launch vehicles en masse, and technologies for on-orbit satellite servicing. Questions of what changes to address these new technologies, if any, will be needed to space law both internationally (treaties, codes of conduct, non-binding norms, and ITU discussions) and transnationally in the form of new legislative and regulatory developments within national systems will be addressed.

At International Law Weekend 2017, this Committee will cosponsor with the Committee on Use of Force a space law panel, which is entitled and described as follows:

"Outer Space Regulation in the New Administration and Beyond: Commercial, Civil, and Growing Security Challenges"

Outer space is increasingly commercialized, congested and contested. Commercial actors are going beyond traditional remote sensing and communications satellites to invest and plan in asteroid mining, on-orbit satellite servicing, and private on-orbit and lunar research facilities, and yet a regulatory gap over these activities persists in the United States, in part due to debate over the requirements of the Outer Space Treaty. Civil plans for space activities raise the challenges of possible public-private partnerships and the need to reduce any conflict between civil programs and commercial ones. National security challenges abound—from the proliferation of smaller, less-maneuverable and less-trackable small satellites to weapons programs of major space powers and worries over close proximity operations. This panel will look at the challenges of regulating both internationally and nationally the Outer Space Domain in light of the new commercial, civil, and national security activities within the outer space domain.

The Committee Co-Chairs have sponsored additional panels and research through their home institutions (University of Nebraska and George Washington University) that have featured government-industry roundtables on the issues the Committee has looked at on its International Law Weekend panels in the past several years (new technologies, liability, property rights, and regulation of commercial space).

The University of Nebraska's 9th Annual Washington D.C. Space Law Conference, which was held on October 17, 2016, focused on "New Technologies and Business Models in Commercial Space: Perspectives on Regulation." The discussion in Washington, D.C. helped inform and advance the discussion for the Committee's panel at International Law Weekend 2016 two weeks later. The 10th Annual Washington D.C. Space Law Conference, which was held on September 15, 2017, focused on "Outer Space as a Commercial Domain and Warfighting Domain." Discussions at that conference will help inform the Committee's panel at International Law Weekend 2017, which will be co-sponsored with the Use of Force Committee.

Professor Schaefer's article entitled "The Contours of Permissionless Innovation in the Outer Space Domain," forthcoming in fall 2017 from the University of Pennsylvania Journal of International Law, was circulated and read widely throughout industry and the government in spring 2017. That article formed the basis of his testimony on May 23, 2017 before the Space Subcommittee of the Senate Commerce Committee (in his capacity as Professor of Law at the University of Nebraska and the Co-Chair of this Committee).

The Committee Co-Chairs have previously drafted and signed two influential letters to Congressional leaders on space law issues arising in the context of Congressional consideration of what became Public Law 114-90 in late 2015. The law adopted recommendations on space resource property rights provisions in the Schaefer/Hertzfeld letter to Congress of May 15, 2015. In 2016, the Committee was involved in informal discussions explaining the provisions of the law to interested persons as well as reporting requirements on future issues Congress might tackle. In 2017, the Committee has been involved in informal discussions with industry, Executive Branch officials, and Congressional staff (as well as the formal Senate testimony above) on how the U.S. government can best meet its Article VI obligations in the Outer Space Treaty to authorize and supervise new on-orbit activities, such as satellite servicing, lunar research facilities and rovers, and asteroid mining. The Committee is also exploring another letter to Congressional leaders on this topic.

This Committee is open to sponsoring panels at ABILA's regional conferences as opportunities arise.

Committee on Teaching Public International Law (Chaired by Mark E. Wojcik)

Committee Activities 2016–2017

This Committee co-sponsored the 12th Global Legal Skills Conference, held at the Facultad Libre de Derecho de Monterrey (Mexico) in March 2017 (http://glsc.jmls.edu/2017/). The event included a meeting for persons interested in joining ABILA and the Committee.

Committee Activities 2017–2018

This Committee plans to distribute membership information for the Branch and the Committee at the 2017 Faculty Recruitment Conference for the Association of American Law Schools, being held in Washington, D.C. on November 2–4, 2017. The faculty candidates attending this conference are largely new professors who are unfamiliar with ABILA and the Committee. So, there may be a good response in recruiting new members.

This Committee will contact members whose ABILA membership has lapsed. It believes that most of these members have simply overlooked or have not received renewal information and that they would welcome reminders to renew their membership.

This Committee will distribute membership information for ABILA and the Committee at the 2018 annual meeting of the Association of American Law Schools in San Diego on January 3–6, 2018. Membership information will be available in rooms for internationally focused sections such as the AALS Section on International Law, the AALS Section on International Legal Exchange, the AALS Section on North American Cooperation, and the AALS Section on Graduate Programs for Non-U.S. Lawyers. The focus of this membership pitch will be twofold: one for professors and one as a resource that professors can share with their students of international law.

This Committee is planning a Midwest (Chicago) standalone meeting for Spring 2018 for teachers of international law. It will hold an afternoon event at a law school in Chicago for local teachers of international law to gather and discuss teaching methods and materials for international law.

This Committee will submit a program proposal for International Law Weekend 2018. The proposal will be on how to land a job teaching international law or a related international law course, either full-time or as an adjunct professor. The Committee believes that there would be tremendous interest in such a program and that holding such a program would have a beneficial

side-effect of reinvigorating the Committee by drawing new members and ideas for Committee programs and publications.

This Committee is co-sponsoring the 13th Global Legal Skills Conference, to be held at Melbourne Law School in Australia on December 9–12, 2018. It will hold a meeting during that conference for U.S. law professors teaching international law. It would also welcome any opportunity to meet with its counterpart in the Australian Branch of the International Law Association.

Committee on United Nations Law (Co-chaired by Christiane Ahlborn and Dr. Bart L. Smit Duijzentkunst)

Committee Co-Chairs aim to organize at least two substantive events a year on a theme relating to the United Nations, one in spring and one in fall.

Past Activities (2017)

"The Future of International Organization"

On March 10, 2017, this Committee convened a well-attended panel discussion on "The Future of International Organization" at the premises of and in cooperation with the New York City Bar Association. The event, which attracted more than ninety participants, featured editors of and contributors to the recently published Oxford Handbook of International Organizations (Oxford University Press 2016). Panelists included Ian Johnstone, Fletcher School of Law and Diplomacy, Tufts University; Jacob Katz Cogan, University of Cincinnati College of Law; Ian Hurd, Northwestern University; Thomas G. Weiss, City University of New York; and Anjali Dayal, Fordham Law School. The event was moderated by Mona Khalil of Independent Diplomat (and formerly the United Nations). After individual presentations and a discussion between panelists, the floor was opened for Q&A with the audience.

Thanks to the generous support of Oxford University Press and the International Law and United Nations Committees of the New York City Bar Association, the discussion was followed with a complimentary reception to celebrate the launch of the Handbook. This Committee is also grateful to the International Organizations Interest Group of the American Society of International Law and the Fletcher Club of New York for co-sponsoring the event.

"Accountability for International Crimes in Syria and Beyond: A New UN Approach"

At International Law Weekend 2017, this Committee will convene a panel entitled "Accountability for International Crimes in Syria and Beyond: A New UN Approach." The panel will examine the mandate and operations of the International, Impartial and Independent Mechanism for Syria (IIIM), which was established by the General Assembly in December 2016 to prepare possible prosecutions in national, regional, and/or international courts. Featuring diplomats, officials, and activists directly involved in the IIIM's creation and operation, the panel also asks whether the IIIM serves as a model for a new generation of accountability mechanisms.

Panelists will include Stephen Rapp, former U.S. Ambassador-at-Large for War Crimes Issues; Catherine Marchi-Uhel, Head of the International, Impartial and Independent Mechanism for Syria; Christian Wenaweser, Permanent Representative of Liechtenstein to the United Nations; Alexander Whiting, Professor of Practice, Harvard Law School and former ICC prosecutor; and Mona Khalil, Legal Advisor, Independent Diplomat. The panel will be moderated by Larry D. Johnson of Columbia Law School, formerly United Nations Assistant-Secretary-General for Legal Affairs.

Agenda (2018)

"70th Anniversary of the International Law Commission"

In 2018, the International Law Commission will be celebrating its seventieth anniversary. The Commission will hold the first part of its seventieth session in New York, from April 30 to June 1, 2018. This Committee aims to take advantage of the presence of the International Law Commission in New York by organizing an event featuring members of the Commission, on its work and organization. Details about the nature and timing of the event are yet to be determined.

Committee on Use of Force (Chaired by Jack M. Beard)

Annual Report

In cooperation with the Committee on Space Law, this Committee is jointly sponsoring a panel at International Law Weekend 2017 entitled "Outer Space in the New Administration and Beyond: Commercial, Civil, and Growing Security Challenges."

Agenda for 2017–2018

With respect to the agenda for 2017–2108, the Committee plans to again sponsor a panel at International Law Weekend 2018, sponsor an additional panel at an event in Washington, D.C., and conduct more podcasts in the Committee's series featuring discussions with various international legal scholars and practitioners relating to the international use of force broadly defined, including arms control and non-proliferation initiatives and efforts to prevent recourse by states to the use of armed force.

DIRECTOR OF STUDIES REPORT TO THE INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH) EXECUTIVE COMMITTEE/BOARD OF DIRECTORS

CHIARA GIORGETTI AND PETER K. YU

2018

Committee on Arms Control and Disarmament (Chair vacant)

This Committee is currently dormant, with the selection of a new Committee Chair pending.

Committee on Formation of Rules of Customary International Law (Chaired by Brian Lepard)

This Committee sponsored a panel at International Law Weekend 2017 entitled "The Role of Customary International Law in Challenging Times." The panel explored the role that customary international law can play in today's turbulent world. The panel investigated both the current work of the International Law Commission in clarifying customary international law's foundations and customary law's current and potential role in responding to contemporary global challenges, including those involving women's rights and the settlement of investment-related disputes.

Committee Chair Brian Lepard moderated the panel. Panelists included Michael Wood, Special Rapporteur of the International Law Commission on the Identification of Customary International Law; Anna Williams Shavers, Cline Williams Professor of Citizenship Law, University of Nebraska College of Law; and Kabir Duggal, Adjunct Professor, Columbia Law School and Senior Associate, Baker McKenzie.

At International Law Weekend 2018, this Committee will sponsor another panel entitled "How Customary International Law Matters in Protecting Human Rights." The panel will explore why and how customary international law matters in protecting human rights. In particular, it will empirically analyze the use of customary international law by national and international courts to safeguard human rights. It will critically examine recent judicial decisions involving attempts to hold business corporations accountable for violations of customary human rights law, including

Jesner v. Arab Bank PLC, decided by the U.S. Supreme Court in April 2018, and Araya v. Nevsun Resources Ltd., decided by the British Columbia Court of Appeal in November 2017. The panel will also investigate whether negotiations for a Global Compact on Refugees and other global standards on refugees may be contributing to the development of norms of customary international law relevant to the protection of refugees. Finally, the panel will also look at the practical role that customary international law has played in defining and protecting the right to religious freedom.

Committee Chair Brian Lepard will moderate the panel. Panelists will include Niels Petersen, Professor of Public Law, International Law, and European Union Law at the University of Münster; Alan Franklin, Managing Director of Global Business Risk Management and Faculty, Athabasca University and Diplo Foundation; Dana Schmalz, Visiting Scholar at the Zolberg Institute on Migration and Mobility at The New School; and Mark Janis, William F. Starr Professor of Law at the University of Connecticut.

In addition, interested members of the Committee have discussed launching a study of the status of international human rights law as customary international law, possibly in collaboration with the Committee on International Human Rights. A number of Committee members have volunteered to assist with various aspects of this project. The Committee hopes that the forthcoming panel at International Law Weekend 2018 will help further the aims of the project.

Committee on International Arbitration (Daniel Reich)

At International Law Weekend 2018, this Committee will sponsor two panels on international arbitration topics (and the Committee Chair was pleased to see that several additional panels on these topics have been planned for this year's International Law Weekend).

The first panel is entitled "Imposing Obligations on Foreign Investors: An Emerging Trend in International Investment Law." This panel will be moderated by Andrea Bjorklund, Full Professor, McGill University. Panelists will include Lisa Sachs, Director, Columbia Center on Sustainable Investment, Columbia Law School; Floriane Lavaud, Counsel, Debevoise & Plimpton LLP; Jean-Michael Marcoux, Postdoctoral Fellow, McGill University; Simon Batifort, Counsel, Curtis, Mallet-Prevost, Colt & Mosle LLP; and Yarik Kryvoi, Senior Research Fellow in International Economic Law, Director, Investment Treaty Forum, British Institute of International and Comparative Law. The panel's abstract is as follows: "After decades marked by efforts to protect foreign investment, numerous calls for reform now seek to ensure that international investment law promotes responsible investment that do not conflict with human rights, environmental

protection, and the prohibition of corruption. Rather than considering the imposition of obligations on private actors as a distant aspiration, this panel posits that it constitutes an emerging trend. This trend can be observed in international investment agreements, decisions from investment arbitration tribunals, counterclaims, and the reliance on transnational public policy."

The second panel is entitled "Smart Contracts and Blockchain: Where Will Disputes Arise and How Should They Be Resolved?" This panel will be moderated by Daniel Reich, Partner, Shearman & Sterling LLP. Panelists will include Rebecca Bratspies, Professor of Law, City University of New York School of Law; David Earnest, Associate, Shearman & Sterling LLP; Robert A. Schwinger, Norton Rose Fulbright U.S. LLP; and Aaron Wright, Associate Clinical Professor of Law, Founder/Director, Cardozo Blockchain Project and Tech Startup Clinic, Cardozo School of Law. The panel's abstract is as follows: "The advantages of smart contracts and blockchain technology is rapidly gaining popularity in a broad range of industry sectors. This panel will discuss the current advantages and disadvantages of the smart contract and blockchain technologies in the context of international transactions. The panel will also consider the most effective way of resolving disputes that may arise, focusing on the potential of international arbitration and other alternative dispute resolution forums to best align with and support these new technologies and ways of transacting."

For the coming year, the Committee Chair intends to work with a co-chair (to be nominated) to more actively engage the Committee as a voice in the arbitration community. In this respect, the Committee will facilitate discussions around discrete substantive issues that may not necessarily receive adequate attention in the current debates in the community. Building on the momentum from the multiple international arbitration-focused panels to be held during the International Law Weekend, the Committee will aim to organize two panels in the coming year—one in New York City and a second panel in a location to be determined. In addition, the Committee will work to create a greater sense of community and regular interaction among Committee members.

Committee on International Commercial Law (Chaired by Jessica R. Simonoff)

This Committee did not provide a report.

Committee on International Criminal Court (Chaired by Jennifer Trahan)

This Committee sponsored a panel at International Law Weekend 2017 entitled "The Next Step for the ICC? A Crime of Aggression Primer." The panel featured Liechtenstein Ambassador Christian Wenaweser, Rutgers Law School Professor Roger S. Clark, and Secretary-General of Parliamentarians for Global Action David Donat-Cattin. Committee Chair Jennifer Trahan organized and moderated the panel.

The Committee also released a document entitled "The International Criminal Court's Inquiry as to Crimes in Afghanistan: Questions and Answers," dated December 2, 2017. The document was released at the International Criminal Court's Assembly of States Parties meeting at the United Nations on December 4–14, 2017.

At International Law Weekend 2018, this Committee will sponsor a panel entitled "The Rome Statute at 20." Marking the twentieth anniversary of the International Criminal Court's Rome Statute, the panel is dedicated to the memory of M. Cherif Bassiouni, the "father" of international criminal law and the International Criminal Court. Branch President-Elect Leila Sadat will moderate the panel. Panelists will include Michael Newton, Director, Vanderbilt-in-Venice, Vanderbilt Law School; Kim Prost, Judge, International Criminal Court; Stephen Rapp, The Hague Institute and former U.S. Ambassador for War Crimes; Beth Van Schaack, Professor, Stanford Law School; and Elizabeth Evenson, Human Rights Watch.

Committee on International Environmental Law (Chaired by Myanna Dellinger)

The Committee Chair continues "The Global Energy and Environmental Law Podcast" (http://theglobalenergyandenvironmentallaw.podbean.com). Co-sponsored by the Branch and the University of South Dakota School of Law, this podcast series is more successful than ever before. The series now has twenty-three episodes and over 17,000 total downloads.

Committee on International Human Rights (Chaired by Aaron X. Fellmeth)

This Year's Activities

The Subcommittee on U.S. Compliance with International Human Rights Law of this Committee has continued to file amicus briefs in the U.S. Court of Appeals for the Fourth and Ninth Circuits

and the U.S. Supreme Court regarding the third revision of Donald Trump's ban on the entry into the United States of Muslims from certain countries. After the Supreme Court upheld the ban in Trump v. Hawaii, the Subcommittee began preparing a petition to the Inter-American Commission on Human Rights seeking a declaration that the policy violates international human rights law. The petition will be filed by the end of 2018 on behalf of the Trump v. Hawaii plaintiffs.

At International Law Weekend 2018, this Committee will sponsor a roundtable entitled "Planting Grassroots Human Rights." Committee Chair Aaron Fellmeth will moderate the panel. Panelists will include Prof. Ruth Wedgwood of Johns Hopkins University, Prof. Kendall Thomas of Columbia University, Prof. Arzoo Osanloo of the University of Washington, and Prof. Diane Amann of the University of Georgia. The panel's abstract is as follows: "In recent years in many countries, and the United States especially, reports of public and private discrimination abound. News accounts of egregious incidents of popular bigotry, police violence against blacks, devaluation of Latinos, Islamophobia, and sexual harassment and exploitation are daily in the news. Whether bigotry is actually resurgent or is merely receiving greater media attention recently, one thing is clear: international human rights law bears directly on the issues, yet it is rarely part of the public debate. This panel will address the question of why international human rights law is not always a standard part of the discussion and how that can be changed."

The Subcommittee has also drafted an amicus brief for the Ninth Circuit in Ms. L v. Immigration & Customs Enforcement, regarding the separation of immigrant children from their parents at the border. The amicus brief is being filed on behalf of eight international human rights nongovernmental organizations, including Amnesty International USA.

Future Plans

The Subcommittee on U.S. Compliance with International Human Rights Law will continue to monitor U.S. government policies that threaten or violate human rights, and its members will take appropriate action to inform courts, Congress, or international human rights authorities about the international human rights law relevant to such policies.

This Committee also intends to sponsor a panel or roundtable at International Law Weekend—West and International Law Weekend 2019, if possible.

Committee on International Humanitarian Law (Chaired by Andrea Harrison and Ashika Singh)

This Committee did not provide a report.

Committee on International Intellectual Property (Chaired by Sean Flynn and Prof. Peter K. Yu)

This Committee sponsored a panel on "Fair Use and Global Copyright Reform" at International Law Weekend 2017. This timely roundtable featured discussion among copyright law experts who have been involved in copyright reform in Australia, Brazil, Canada, Hong Kong, Israel, and the United States. Committee Co-Chair Peter Yu moderated the panel. Panelists included Jonathan Band (Jonathan Band PLLC), Prof. Sean Flynn (American University), Prof. Ariel Katz (University of Toronto), Prof. Niva Elkin-Koren (University of Haifa), and Prof. Allan Rocha de Souza (Federal University of Rio de Janeiro and Federal Rural University of Rio de Janeiro).

At International Law Weekend 2018, this Committee will sponsor two panels. The first panel is entitled "Do Multilateral Intellectual Property Negotiations Still Matter in the Age of Plurilaterals?" Conducted in roundtable style, this panel will bring together intellectual property scholars from different parts of the world to explore the future of the international intellectual property regime. Committee Co-Chair Sean Flynn will moderate the panel. In addition to Professor Flynn, panelists will include Prof. Irene Calboli (Texas A&M University School of Law), Prof. J. Janewa OseiTutu (Florida International University College of Law), and Committee Co-Chair Peter Yu.

The second panel is entitled "Will the Treaty in Genetic Resources and Traditional Knowledge Provide Meaningful Protection to Indigenous Communities?" This panel critically examines the text-based negotiations on genetic resources, traditional knowledge, and traditional cultural expressions that are being undertaken at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization. Committee Co-Chair Peter Yu will moderate the panel. Panelists will include Prof. Jane Anderson (Anthropology and Museum Studies, New York University), Bassem Awad (Centre for International Governance Innovation in Canada), Preston Hardison (Tulalip Tribes of Washington), and Sue Noe (Native American Rights Fund).

As to the future, this Committee plans to hold a joint panel with the ILA Committee on Intellectual Property and Private International Law at International Law Weekend 2019. This panel aims to

enable Branch members and other interested participants to provide feedback on the Guidelines on Intellectual Property in Private International Law that are being drafted by the ILA Committee. It is anticipated that the Guidelines will be proposed for adoption at the 2020 ILA Biennial Meeting in Kyoto, Japan.

The Committee will also consider review and endorsement of the proposed Treaty on Education and Research Activities, which was endorsed by Education International and dozens of other civil society and academic organizations at the 5th Global Congress on Intellectual Property and the Public Interest in Washington, D.C. in September 2018.

Committee on International Investment Law (Chaired by David Attanasio)

This Committee continues to develop public events in collaboration with its active members, and to seek new members through those events. This year the Committee has contributed three sponsored panels to the International Law Weekend and a conference on counterclaims in investment arbitration.

The Events Subcommittee continues to program its ongoing Seminar Series, with a goal of having approximately two or three events per year, including significant contributions to the International Law Weekend in fall and a standalone event in winter or spring.

International Law Weekend

This Committee will host three panels at International Law Weekend 2018 on timely issues in investment law. The first panel is entitled "Is Investment Arbitration at Serious Risk?" The panel's abstract is as follows: "The past two years have seen a series of momentous events for investor-state arbitration. These have included attacks on NAFTA, attempts to create a standing investment court, bilateral exclusion of investment arbitration in the revived Trans-Pacific Partnership, and the ECJ's Achmea judgment declaring intra-EU investment arbitration incompatible with EU law. Investment arbitration appears to be under fire. This panel will consider what this moment portends for the future of investment arbitration and whether the system as it is exists is at serious risk."

The second panel is entitled "Imposing Obligations on Foreign Investors: An Emerging Trend in International Investment Law." The panel's abstract is as follows: "After decades marked by efforts to protect foreign investment, numerous calls for reform now seek to ensure that international investment law promotes responsible investment that do not conflict with human

rights, environmental protection, and the prohibition of corruption. Rather than considering the imposition of obligations on private actors as a distant aspiration, this panel posits that it constitutes an emerging trend. This trend can be observed in international investment agreements, decisions from investment arbitration tribunals, counterclaims, and the reliance on transnational public policy."

The third panel is entitled "Is Investment Law Harmonious with the Rule of Law?" The panel's abstract is as follows: "Since 2015, the ILA Rule of Law and International Investment Law Committee has explored whether investment law is harmonious with the rule of law and whether the rule of law is even an appropriate ideal for the field. Prof. Andrea Bjorklund, the Co-Rapporteur for the ILA Committee, will present the Committee's recent advances from its interim report, followed by comments from active practitioners and academics regarding whether and how rule of law principles may contribute to international investment law."

In 2019, the Committee would like to offer a similarly broad array of panels, with the hopes of establishing a critical mass of panels on topics of interest to practitioners in the investment law field. With the support of the Branch leadership, the Committee would like to make a concerted effort to draw more practitioners to the International Law Weekend through relevant offerings and outreach.

Independent Conferences

On February 13, 2018, this Committee co-organized a conference on Practical and Strategic Dimensions of Counterclaims in Investor-State Arbitration with the Georgetown University International Arbitration Society. Hosted at Dechert LLP's Washington office, the conference explored the role of counterclaims in the effective resolution of disputes between sovereign states and foreign investors.

Leading lawyers from both the public and private sectors shared their perspectives on state counterclaims with practitioners, embassy officials, professors, and students. These panelists expressed general enthusiasm toward bringing counterclaims in the right case and considered that counterclaims can broaden the lens through which an investment tribunal considers a dispute. However, the panelists converged on the view that the potential success of counterclaims often remains constrained by hurdles from the limited jurisdiction of certain investment tribunals.

This Committee has already begun the process of organizing a similar event in February 2019.

Committee on International Trade Law (Chaired by Richard Steinberg)

This Committee has been dormant for a while. Prof. Richard Steinberg of the UCLA School of Law recently agreed to chair the Committee and help revive it. At International Law Weekend 2018, he will be involved in a panel entitled "The Demise of the WTO Appellate Body?" Amelia Porges, a member of the ILA Committee on Sustainable Development and the Green Economy in International Trade Law, will moderate the panel. Panelists will include Dean Merit Janow (School of International and Public Affairs, Columbia University and former member of the WTO Appellate Body), Prof. Kathleen E. Claussen (University of Miami School of Law), Juan A. Millan (Assistant United States Trade Representative, Monitoring and Enforcement), and Committee Chair Richard Steinberg.

Committee on Islamic Law (Chaired by Haider Ala Hamoudi)

This Committee did not provide a report.

Committee on Law of the Sea (Chaired by George K. Walker)

This Committee did not provide a report.

Committee on Space Law (Co-chaired by Henry R. Hertzfeld and Matthew Schaefer)

2018–2020 Work Plan

1. Sponsor at least one session devoted to space law topics (either exclusively or addressing its inter-relationship with other analogous areas of international law) at the International Law Weekend and/or jointly sponsor with other Branch Committees another session on topics directly relevant to space law but have clear analogies to topics of interest to other Branch Committees.

2. NEW: Integrate NASA Space Law Pilot Grant (awarded to Nebraska) into Branch activities in an effort to grow this Committee and the Branch generally, as well as to strengthen and diversify nationwide space law network.

3. Space Law Research Activities:

(a) Continuing to research liability issues, space resource property rights, on-orbit (or in-space) authorization, space traffic management, space situational awareness, impact on current licensing regimes of new technologies and business models, and security issues in space.

(b) Adding research on international competitiveness impacts of commercial space law reform efforts.

4. Periodic reports, as appropriate, based on summaries of the panel presentations and discussions, plus additional research by members of the Committee and their programs.

5. With Congress currently reexamining the existing commercial space legislation, the Committee will again be considering preparing letters and/or short issue briefs and/or holding discussions to educate members of Congress on key issues.

6. The Committee will consider sponsoring panels at the regional Branch conferences.

Summary of Activities from August 2017 to October 2018

Item 1 (from Work Plan)

This Committee and the Use of Force Committee co-sponsored a space law panel at International Law Weekend 2017. Entitled "Outer Space Regulation in the New Administration and Beyond: Commercial, Civil, and Growing Security Challenges," the panel's abstract is as follows: "Outer space is increasingly commercialized, congested, and contested. Commercial actors are going beyond traditional remote sensing and communications satellites to invest and plan in asteroid mining, on-orbit satellite servicing, and private on-orbit and lunar research facilities, and yet a regulatory gap over these activities persists in the United States, in part due to debate over the requirements of the Outer Space Treaty. Civil plans for space activities raise the challenges of possible public-private partnerships and the need to reduce any conflict between civil programs and commercial ones. National security challenges abound—from the proliferation of smaller, less-maneuverable, and less-trackable small satellites to weapons programs of major space powers and worries over close proximity operations. This panel will look at the challenges of regulating both internationally and nationally the Outer Space Domain in light of the new commercial, civil, and national security activities within the outer space domain."

At International Law Weekend 2018, the Committee will sponsor a space law panel entitled "Free Form Treaty Interpretations' Last Stand: Why Vienna Convention Treaty Interpretation Rules

Matter More than Ever in the Outer Space Domain." The panel's abstract is as follows: "In a new era of expanded commercial space activities, debates in space law are too frequently taking place with use of free form treaty interpretation, and rare citation to or acknowledgement of the rules under the Vienna Convention on the Law of Treaties (VCLT). Outer Space Treaty obligations are broad principles yielding flexible results in many instances but still must be interpreted under the VCLT. This roundtable will explore current debates regarding asteroid mining, space debris removal, and authorization of new commercial space activities and the role of treaty interpretation in these debates, along with a comparison to the prominence of the VCLT in other international law regimes, particularly the global trade and investment law regimes." Committee Co-Chair Matthew Schaefer will moderate the panel. Panelists will include Committee Co-Chair Henry Hertzfeld; Gabriel Swinney, Attorney-Advisor, U.S. State Department Legal Adviser's Office; Margaret Vernal, Content Manager, Lexis/Nexis; and Barry Appleton, Appleton & Associates, Toronto, Canada.

Items 2 and 3

This Committee is integrating the quarter-million-dollar NASA Space Law Pilot Grant (awarded to Nebraska) into the Committee's activities. International Law Weekend 2018 is the first conference in which students throughout the country are receiving travel stipends to attend space law panels and other international law panels. The Committee will be hosting lunches for the NASA grant student travel stipend award winners to introduce them to space law as well as space law careers during lunches at the event. Sixteen students from thirteen states received travel stipends representing the following schools: Arizona, Arkansas, Boston College, Case Western, Florida, George Mason, George Washington, Loyola L.A., Mississippi, Notre Dame, Oklahoma City, Pepperdine, Tennessee, U.C. Irvine, Wisconsin, and U.C. Berkeley. Additional local (NYC) students, not needing travel reimbursement, will participate in the grant activities and International Law Weekend 2018.

Professor Schaefer is a Co-Investigator on the grant, and Professor Hertzfeld serves on the Cooperation Council set up to help implement the grant. Together, they have sponsored additional panels and research through their home institutions (University of Nebraska and George Washington University) that have featured government-industry roundtables on the issues the Committee looked at in past International Law Weekend panels (new technologies, liability, property rights, and regulation of commercial space).

The University of Nebraska's 10th Annual Washington D.C. Space Law Conference, which was held on September 15, 2017, focused on "Outer Space as a Commercial Domain and Warfighting

Domain." Discussions at that conference helped inform the Committee's panel at International Law Weekend 2017 that was co-sponsored with the Use of Force Committee. The 11th Annual Washington D.C. Space Law Conference, which was recently concluded on September 21, 2018, focused on "Intersections of Commercial and National Security Space Law and Policy." The event featured this Committee as a no-funding-required co-sponsor. Discussions at the 2018 Conference will help inform the Committee's panel at International Law Weekend 2018 focusing on the use of the VCLT in current space law debates.

Professor Schaefer's article entitled "The Contours of Permissionless Innovation in the Outer Space Domain," which was published in volume 33 of the University of Pennsylvania Journal of International Law, was circulated and read widely throughout industry and the government in 2017 and 2018. That article formed the basis of his testimony on May 23, 2017 before the Space Subcommittee of the Senate Commerce Committee (in his capacity as Professor of Law at the University of Nebraska as well as the Co-Chair of this Committee). The article also formed the basis of his recent remarks at the annual conference of the ABA Annual Air and Space Law Forum in Chicago on September 27, 2018.

Item 4

In 2017 and 2018, the Committee Co-Chairs have been involved in informal discussions with industry, Executive Branch officials, and Congressional staff (as well as the formal Senate testimony above) on how the U.S. government can best meet its Article VI obligations in the Outer Space Treaty to authorize and supervise new on-orbit activities, such as satellite servicing, lunar research facilities and rovers, and asteroid mining. Professors Schaefer and Hertzfeld are keeping open another letter to Congressional leaders on this topic, but it appears that informal discussions are having an impact without the need of a formal letter at this time. (Professors Schaefer and Hertzfeld have previously drafted and signed two influential letters to Congressional leaders on space law issues arising in the context of Congressional consideration of what became Public Law No. 114-90 in late 2015. The law adopted recommendations on space resource property rights provisions in the Schaefer/Hertzfeld letter to Congress of May 15, 2015.)

Item 5

This Committee is open to sponsoring panels at the American Branch's regional conferences as opportunities arise.

Committee on Teaching Public International Law (Chaired by Mark E. Wojcik)

This Committee did not provide a report.

Committee on United Nations Law (Co-chaired by Christiane Ahlborn and Dr. Bart L. Smit Duijzentkunst)

Co-chaired by Christiane Ahlborn and Bart Smit Duijzentkunst, both Associate Legal Officers in the Codification Division of the United Nations Office of Legal Affairs, this Committee aims to organize at least two substantive events a year on a theme relating to the United Nations—one in spring and one in fall.

Past Activities (2017–2018)

1. At International Law Weekend 2017, this Committee convened a panel entitled "Accountability for International Crimes in Syria and Beyond: A New UN Approach." The panel examined the mandate and operations of the International, Impartial and Independent Mechanism for Syria (IIIM), which was established by the General Assembly in December 2016 to prepare possible prosecutions in national, regional, and/or international courts. Featuring diplomats, officials, and activists directly involved in the IIIM's creation and operation, the panel also asked whether the IIIM could serve as a model for a new generation of accountability mechanisms.

Panelists included Stephen Rapp, former U.S. Ambassador-at-Large for War Crimes Issues; Catherine Marchi-Uhel, Head of the International, Impartial and Independent Mechanism for Syria; Christian Wenaweser, Permanent Representative of Liechtenstein to the United Nations; Alexander Whiting, Professor of Practice, Harvard Law School and former ICC prosecutor; and Mona Khalil, Legal Advisor, Independent Diplomat. The panel was moderated by Larry D. Johnson of Columbia Law School, formerly United Nations Assistant-Secretary-General for Legal Affairs.

2. On May 14, 2018, this Committee convened a panel on "The Codification of International Law: Back to the Future?" at the New York City Bar Association. The event, which attracted about fifty participants, featured members of the International Law Commission, a delegate to the Sixth (Legal) Committee of the United Nations General Assembly, and law professors from Europe and the United States.

Marking the seventieth session of the International Law Commission, the panel took stock of the past achievements and future challenges of the codification movement. It assessed the lofty objectives and practical results of two centuries of codification, paying special attention to the role of the International Law Commission. The panel asked, inter alia, to what extent the Commission had fulfilled its mission, whether the codification efforts by the Commission and others have contributed to a more peaceful world, and what the future of codification in the twenty-first century may hold.

Panelists included Sean Murphy, George Washington School of Law, President of the American Society of International Law (ASIL), and Member of the International Law Commission; Patricia Galvão Teles, Universidade Autónoma de Lisboa and Member of the International Law Commission; Hélène Tigroudja, Faculté de droit d'Aix-en-Provence and Global Hauser Fellow, New York University; and Patrick Luna, Legal Adviser of the Permanent Mission of Brazil to the United Nations. The event was moderated by Kristen Boon of Seton Hall Law School. After individual presentations and a discussion between panelists, the floor was opened for Q&A with the audience, which featured a large number of members of the International Law Commission.

Thanks to the generous support of the event's co-sponsors, the International Law and United Nations Committees of the New York City Bar Association, the ASIL International Organizations Interest Group, and Seton Hall Law School, the discussion was followed with a complimentary reception.

3. At International Law Weekend 2018, the United Nations Law Committee will convene a panel entitled "The Use of Force in Peace Operations." The roundtable will consider when peacekeepers may or should use force. How can the right level of force in light of legal and operational requirements be calibrated? Is current doctrine on the principles of peacekeeping adequate in light of changing circumstances? Or does the United Nations need to change the way it is doing business, as a recent report argues? The panel, consisting of policy-makers, military experts and academics will discuss the legal, political, and operational dimensions of these and other questions.

Panelists will include Nannette Ahmed, United Nations Department of Peacekeeping Operations; Adam Day, United Nations University; and Aditi Gorur, Stimson Center. Co-sponsored by the ASIL International Organizations Interest Group, the panel will be chaired by Ian Johnstone of the Fletcher School, Tufts University.

Agenda (2019)

This Committee is planning to co-organize a work-in-progress workshop in early 2019, in cooperation with the ASIL International Organizations Interest Group. A call for papers will be circulated in fall 2018.

Committee on Use of Force (Chaired by Prof. Jack M. Beard)
This Committee did not provide a report.

DIRECTOR OF STUDIES REPORT TO THE INTERNATIONAL LAW ASSOCIATION (AMERICAN BRANCH) EXECUTIVE COMMITTEE/BOARD OF DIRECTORS

PETER K. YU
(WITH ASSISTANCE FROM STUDENT AMBASSADOR KATHERINE BLAKE)

2019

Committee on Arms Control and Disarmament (Chair vacant)

This Committee is currently dormant, with the selection of a new Committee Chair pending.

Committee on Formation of Rules of Customary International Law (Chaired by Brian Lepard)

This Committee sponsored a panel at International Law Weekend 2018 entitled "How Customary International Law Matters in Protecting Human Rights." The panel explored why and how customary international law matters in protecting human rights. In particular, it analyzed the use of customary international law by national and international courts to safeguard human rights. It critically examined recent judicial decisions involving attempts to hold business corporations accountable for violations of customary human rights law, including Jesner v. Arab Bank PLC, decided by the U.S. Supreme Court in April 2018, and Araya v. Nevsun Resources Ltd., decided by the British Columbia Court of Appeal in November 2017. The panel also investigated whether negotiations for a Global Compact on Refugees and other global standards on refugees may be contributing to the development of norms of customary international law relevant to the protection of refugees. Finally, the panel looked at the practical role that customary international law has played in defining and protecting the right to religious freedom.

The panelists included Brian Lepard, who chaired the panel; Niels Petersen, Professor of Public Law, International Law, and European Union Law at the University of Münster; Alan Franklin, Managing Director of Global Business Risk Management and Faculty, Athabasca University and Diplo Foundation; Dana Schmalz, Visiting Scholar at the Zolberg Institute on Migration and Mobility at The New School; and Mark Janis, William F. Starr Professor of Law at the University of Connecticut.

Following the International Law Weekend, most of the panelists contributed blog posts based on their presentations to a symposium on the panel theme. Published on Voelkerrechtsblog, the symposium can be found at https://voelkerrechtsblog.org/category/symposium/customary-international-law-symposium/.

This Committee will sponsor a panel at International Law Weekend 2019 entitled "At a Crossroads: Can Customary International Law Provide a Stabilizing Influence in a Fractious World?" The panel will examine the challenges posed by rising nationalism and factionalism to the ability of customary international law to generate consensus-based norms that can effectively regulate politically charged problems, such as the use of outer space, international investment, and human rights. It will explore whether customary international law can meet this challenge, and how it can provide a stabilizing influence in a fractious world.

Committee Chair Brian Lepard will serve as the panel moderator. The other panelists are Frans G. von der Dunk, Harvey and Susan Perlman Alumni/Othmer Professor of Space Law, University of Nebraska College of Law; Mélida N. Hodgson, Partner, Jenner & Block LLP; Jocelyn Getgen Kestenbaum, Assistant Professor of Clinical Law, Benjamin N. Cardozo School of Law; Panos Merkouris, Professor of Public International Law, University of Groningen; and Tonya L. Putnam, Associate Professor, Department of Political Science, Columbia University.

In addition, interested members of the Committee have discussed launching a study of the status of international human rights law as customary international law, possibly in collaboration with the Committee on International Human Rights. A number of Committee members have volunteered to assist with various aspects of this project. A research assistant of the Committee Chair is now helping to prepare a prospectus for the project.

Committee on International Arbitration (Co-chaired by Daniel Reich and Floriane Lavaud)

This Committee did not provide a report.

Committee on International Commercial Law (Chaired by Jessica R. Simonoff)

This Committee did not provide a report.

Committee on International Criminal Court (Chaired by Jennifer Trahan)

This Committee will sponsor a panel at International Law Weekend 2019 entitled "The United States and the International Criminal Court: Challenging Times." The panel will feature Todd Buchwald, formerly Ambassador for Global Criminal Justice, U.S. Department of State; Michael A. Newton, Professor of the Practice of Law, Vanderbilt Law School, Professor of the Practice of Political Science, and Director, Vanderbilt-in-Venice Program; Ambassador Stephen J. Rapp, former U.S. Ambassador-at-Large for War Crimes Issues and former Head of the Office of Global Criminal Justice, U.S. Department of State; and Beth Van Schaack, Leah Kaplan Visiting Professor in Human Rights, Stanford Law School and former Deputy to the Ambassador-at-Large for War Crimes Issues, Office of Global Criminal Justice, U.S. Department of State.

On March 25, 2019, the Committee published a Statement by the American Branch of the International Law Association International Criminal Court Committee: The United States and the ICC. This statement, inter alia, expressed concern about U.S. Secretary of State Michael Pompeo's announcement regarding a travel ban against International Criminal Court officials working on the Afghanistan situation.

Committee on International Environmental Law (Chaired by Myanna Dellinger)

This Committee did not provide a report.

Committee on International Human Rights (Chaired by Aaron X. Fellmeth)

This Year's Activities

At International Law Weekend 2018, this Committee sponsored a roundtable called "Planting Grassroots Human Rights," which was described in last year's annual report and agenda.

Following the U.S. Supreme Court's decision in Trump v. Hawai'i upholding President Trump's ban on immigration from certain Muslim countries, members of the Subcommittee on U.S. Compliance with International Human Rights Law submitted a petition to the Inter-American Commission on Human Rights on behalf of the private plaintiffs in that case, seeking a declaration that the U.S. immigration ban violates U.S. obligations under international human rights law. The petitioners await the scheduling of the hearing.

This Subcommittee also prepared an amicus brief for the U.S. Court of Appeals for the Ninth Circuit in Ms. L v. Immigration & Customs Enforcement, regarding the separation of immigrant children from their parents at the border. The amicus brief was to be filed on behalf of eight international human rights nongovernmental organizations, including Amnesty International USA, but the plaintiffs settled the case before the appeal was heard. However, the appeal was stayed, not dismissed, and the ACLU has reactivated the litigation based on the following: (a) the U.S. government's failure at trial to disclose the full extent of its child separation and detention program; (b) its failure to reunite all children with their families as required by the settlement agreement; and (c) its continuation of the child separation policy. The Subcommittee continues to monitor the litigation and will file the brief at the appropriate time, if a new appeal is filed.

Members of this Subcommittee will also submit a stakeholder report to the U.N. Human Rights Council for the 2020 Universal Periodic Review of the United States. Authors of the report are Aaron Fellmeth, Madaline M. George, Dr. Thomas Obel Hansen, Leila Sadat, and Kristin Smith. The report deals with discrimination based on religion in immigration policy, gun violence, U.S. attempts to undermine international criminal justice, and inadequate remedies for violations of international human rights law.

In 2018, this Committee also formed a Subcommittee on Gun Violence, chaired by Leila Sadat. The Subcommittee testified before the Inter-American Committee on Human Rights on the subject of U.S. gun violence in early 2018. Then under the leadership of the Whitney R. Harris World Law Institute, the Inter-American Committee on Human Rights convened a conference at Washington University entitled "Interdisciplinary and Human Rights Approaches to the Gun Violence Crisis in the United States" in November 2018. The event was co-sponsored by this Committee. On January 14, 2019, the Harris Institute submitted information to the U.N. Human Rights Committee on the subject, authored by Leila Sadat and Madaline M. George and supported by the Subcommittee on Gun Violence members as well as other human rights lawyers and experts in gun violence.

In addition, this Committee formed a Task Force on U.S. Immigration Policy, headed by Professor Stella Elias. The task force is now preparing a Universal Periodic Review submission on the U.S. child detention policy, the Department of Homeland Security's harassment of immigration lawyers and journalists, and other issues.

This Committee has also formed a twelve-person Working Group on Consumer Protection and Human Rights, under the leadership of Dr. Alexandra Harrington and Tej Srimushnam. The

Working Group is drafting a white paper on the relationship between consumer protection and human rights.

Finally, in collaboration with the International Humanitarian Law Committee, this Committee will hold a debate panel entitled "Foreign Fighters and Their Families: How to Reconcile the Competing Demands of ICL, IHL, Human Rights and Refugee Law" at International Law Weekend 2019.

Future Plans

The Subcommittee on U.S. Compliance with International Human Rights Law continues to monitor Ms. L v. ICE and will file an amicus brief in the Ninth Circuit as necessary. In addition, the Subcommittee intends to submit an amicus brief in California v. McAleenan, regarding the U.S. government's announced intention to abrogate a judicially supervised agreement to limit the period of time during which the U.S. government may detain immigrant children, should the case be appealed to the Ninth Circuit. It has already prepared an amicus brief relating to the relevance of international human rights law to the case and will once again represent a group of nongovernmental organizations.

Members of the Subcommittee on U.S. Compliance also await the scheduling of the hearing on the Muslim immigration ban by the Inter-American Human Rights Committee, and they will prepare and present the case of their clients at the appropriate time.

The Subcommittee on Gun Violence is planning next steps on addressing the U.S. gun violence crisis and issues relating to small arms trade and human rights, particularly as they involve violence in Mexico and Brazil.

The Working Group on Consumer Protection and Human Rights will continue its plans to coordinate and draft a white paper for approximately the next year. Depending on the report, this Committee will decide how to proceed on the recommendations of its authors, such as sponsoring an initiative at the United Nations, proposing the formation of an international committee in the International Law Association or other options.

Finally, as usual, this Committee plans to sponsor one or more panels at International Law Weekend 2020.

Committee on International Humanitarian Law (Co-chaired by Andrea Harrison and Ashika Singh)

Report of Activities for 2019

This Committee will co-sponsor two panels at International Law Weekend 2019: (1) "Mercenaries or Private Military Contractors?: Regulation of an Ever-Expanding Phenomenon"; and (2) "Foreign Fighters and Their Families: A Debate Regarding How to Reconcile the Competing Demands of ICL, IHL, Human Rights, and Refugee Law."

Agenda of Activities for 2020

This Committee plans to co-organize several panels at International Law Weekend 2020.

Committee on International Intellectual Property (Co-chaired by Sean Flynn and Peter K. Yu)

This Committee sponsored two panels at International Law Weekend 2018. The first panel was entitled "Do Multilateral Intellectual Property Negotiations Still Matter in the Age of Plurilaterals?" Conducted in roundtable style, this panel brought together intellectual property scholars from different parts of the world to explore the future of the international intellectual property regime. Committee Co-Chair Sean Flynn moderated the panel. In addition to Flynn, panelists included Prof. Irene Calboli (Texas A&M University School of Law), Prof. J. Janewa OseiTutu (Florida International University College of Law), and Committee Co-Chair Peter Yu.

The second panel was entitled "Will the Treaty in Genetic Resources and Traditional Knowledge Provide Meaningful Protection to Indigenous Communities?" This panel critically examined the text-based negotiations on genetic resources, traditional knowledge, and traditional cultural expressions that were being undertaken at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization. Committee Co-Chair Peter Yu moderated the panel. Panelists included Bassem Awad (Centre for International Governance Innovation in Canada), Preston Hardison (Tulalip Tribes of Washington), and Sue Noe (Native American Rights Fund).

At International Law Weekend 2019, the Committee will sponsor a roundtable on "International Intellectual Property Law in the Age of Smart Technology and Intelligent Machines." This timely roundtable will bring together experts from around the world to explore the resilience of the international intellectual property regime and the tensions and conflicts posed by rapid technological change. Committee Co-Chair Sean Flynn will moderate the panel. Panelists will include Committee Co-Chair Peter Yu, Cheryl Foong (Curtin Law School in Australia), Doris Estelle Long (UIC John Marshall Law School), and Michal Shur-Ofry (The Hebrew University of Jerusalem in Israel).

On June 21–22, 2019, the ILA Committee on Intellectual Property and Private International Law met at Humboldt University Faculty of Law in Berlin, Germany for a productive discussion of the draft Guidelines on Intellectual Property in Private International Law and the accompanying comments. Three Branch members (Professors Rochelle Dreyfuss, Jane Ginsburg, and Marketa Trimble) participated in the meeting. The ILA Committee intends to present the Guidelines with a proposal for an ILA Resolution at the ILA 79th Biennial Conference in Kyoto in 2020. The work of the ILA Committee is particularly important now that intellectual property matters have been excluded from the scope of the new Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

In the near future, this Committee has plans to consider efforts relating to the development of the proposed Treaty on Education and Research Activities, which was endorsed by Education International and dozens of other civil society and academic organizations at the 5th Global Congress on Intellectual Property and the Public Interest in Washington, D.C. in September 2018.

Committee on International Investment Law (Co-chaired by David Attanasio and Diora Ziyaeva)

This Committee continues to develop public events in collaboration with its active members, and to seek new members through those events. At International Law Weekend 2019, the Committee will sponsor a panel and has also organized broader exposure of the conference among members of the international dispute resolution field. The Committee has separately organized a conference on corruption in investment arbitration, a conference on artificial intelligence in arbitration, and a conference focused on a prominent investment arbitrator's perspective on the field.

The Events Subcommittee continues to program its ongoing Seminar Series, with a goal of having approximately two or three events per year, including significant contributions to the International Law Weekend in fall and one or more standalone events in winter or spring.

International Law Weekend

This Committee will host a panel entitled "Investment Law and Human Rights: Friends, Strangers, or Enemies?" at International Law Weekend 2019. The panel's abstract is as follows: "The last few years have seen investment tribunals summarily reject alleged conflicts between investor rights and the human rights, and have even been reluctant to exchange ideas with human rights for a. This panel will consider why, even though both seek to protect individual interests—whether of humans or of businesses—against excesses of state power, the cross-pollination is so rare and the tensions are so common."

In addition, the Committee Co-Chairs have undertaken a concerted effort to work with the International Law Weekend Organizers to publicize the event in the international dispute resolution field. This effort involved establishing a dedicated international dispute resolution track of programming, advertising in the major investment arbitration for a, and organizing live summary posts of each panel for those for a.

In 2019, the Committee would like to continue these efforts to ensure that the International Law Weekend offers a similarly broad array of panels geared towards international dispute resolution. It would also like to continue the outreach efforts. In addition, with the support of the American Branch's leadership, the Committee would like to include a keynote address on international dispute resolution as part of the International Law Weekend programming.

Independent Conferences

On February 19, 2018, this Committee co-organized a conference, "What to Do about Corruption Allegations? Debating the Options for Investment Law," with the Georgetown International Arbitration Society. Hosted at the Washington office of Dechert LLP, the conference explored the role of counterclaims in the effective resolution of disputes between sovereign states and foreign investors. Leading lawyers and academics in the field debated how investment tribunals should resolve corruption allegations in investment arbitration, focusing both on how they should assess the often limited evidence of corruption and how they should craft an appropriate remedy for any positive finding of corruption.

On April 4, 2019, the Committee co-organized an event entitled "A Conversation with Carolyn Lamm Interviewed by Professor Michael Waibel." Hosted at Harvard Law School in collaboration with the Harvard International Arbitration Law Student Association, the talk focused on Ms. Lamm's lengthy and distinguished career as a pioneer in the field of international investment arbitration. Harvard Law students and professors engaged with Ms. Lamm and heard her exceptional "war stories" from acting as counsel in high-stake and cutting-edge investment cases.

On May 8, 2019, this Committee co-organized a conference on "International Arbitration and Human Rights in the Age of Artificial Intelligence." Hosted at the New York office of Dechert LLP, the panel discussion considered the implications and consequences for human rights and international arbitration of the use of artificial intelligence. Leading academics and lawyers in the field debated on state responsibilities in the context of international arbitration for privacy and data protection.

For the upcoming year, the Committee is in the process of organizing a closed roundtable on climate change and investment law in fall, to be followed by a public event. It is also working on another event with the Georgetown International Arbitration Society for February 2020, as well as at least one other event in spring.

Committee on International Trade Law (Chaired by Richard Steinberg)

The main activity in the past year was to work with Professor David Sloss to brainstorm and help organize a panel and study group, "The Decline of the Liberal International Order?" International trade law is, of course, one dimension of the liberal order. The panel and study group will consider the following: how to define the "liberal international order"; whether it is in decline; if so, why; what, if anything, can be done to reverse that decline; and other related questions. The panel will be held on Friday at International Law Weekend 2019 and will feature David Sloss, James Gathii, Oona Hathaway, Jaya Ramji-Nogales, and the Committee Chair. The Study Group will meet on Saturday at International Law Weekend 2019 and will include the panelists from Friday, as well as Jeremy Rabkin, Leila Sadat, Wayne Sandholtz, Paul Stephan, and Allen Weiner. The Committee Chair worked with Professor Sloss to help specify the terms of the inquiry and identify speakers. Together they met with other ABILA members, including Leila Sadat, for that purpose. Professor Sloss then formally proposed the panel and the study group to the American Branch.

In the past year, the Committee Chair spoke individually with other members of the Committee about trade law matters and whether they would be interested in any other initiatives through the

American Branch. They were not interested in any new engagements or initiatives this year. The Committee did not meet formally as a group.

Over the past year, the membership of this Committee has increased from five to ten members.

For next year, there is interest in proposing a panel for International Law Weekend 2020. The Committee Chair has discussed with other Committee members various possible topics for such a proposal, including international trade law in the 2020 election, US–China trade relations, developments at the WTO, or other topics. The Chair will be working with other members of the Committee with a view to submitting an international trade law panel proposal for International Law Weekend 2020.

Committee on Islamic Law (Chaired by Haider Ala Hamoudi)

This Committee is currently dormant, with the selection of a new Committee Chair pending.

Committee on Law of the Sea (Chaired by Coalter G. Lathrop)

This Committee will hold its first Committee meeting under the new chairmanship at International Law Weekend 2019.

Committee on Space Law (Co-chaired by Henry R. Hertzfeld and Matthew Schaefer)

1. This Committee sponsored a space law panel at International Law Weekend 2018 entitled "Free Form Treaty Interpretations' Last Stand: Why Vienna Convention Treaty Interpretation Rules Matter More than Ever in the Outer Space Domain." The panel's abstract is as follows: "In a new era of expanded commercial space activities, debates in space law are too frequently taking place with use of free form treaty interpretation, and rare citation to or acknowledgement of Vienna Convention on the Law of Treaties (VCLT) rules. Outer Space Treaty obligations are broad principles yielding flexible results in many instances but still must be interpreted under the VCLT. This roundtable will explore current debates regarding asteroid mining, space debris removal, and authorization of new commercial space activities and the role of treaty interpretation in these debates, along with a comparison to prominence of the VCLT in other international law regimes, particularly the global trade and investment law regimes." Committee Co-Chair Matthew Schaefer

served as the panel's moderator. Panelists included Committee Co-Chair Henry Hertzfeld; Gabriel Swinney, Attorney-Advisor, U.S. State Department Legal Adviser's Office; Margaret Vernal, Content Manager, Lexis/Nexis; and Barry Appleton, Appleton & Associates, Toronto, Canada.

At International Law Weekend 2019, the Committee will sponsor a panel entitled "The Resilience of the International Law of Outer Space in Light of Technology, Business, and Military Developments." The panel's abstract is as follows: "Is the hard and soft international law governing the increasingly competitive, congested and contested outer space domain resilient enough for new developments? Can national legislation (and gradual harmonization of such legislation) combined with diplomacy and non-governmental initiatives, and the disciplines of finance and insurance, adequately fill gaps and ambiguities and provide the minimal standards necessary to ensure space will continue to provide benefits to countries, their economies, and their citizens?" Committee Co-Chair Matthew Schaefer served as the panel's moderator. Panelists included Committee Co-Chair Henry Hertzfeld; Chris Kunstadter, Global Head of Space, AXA XL; Kelsey McBarron, Associate, Schroeder Law Firm, Washington, D.C.; Blake Gilson, Associate, Transportation and Space Group, Milbank Tweed, New York; and Jessica Tok, Senior Space Policy Analyst, U.S. Department of Defense.

2. The Committee Co-Chairs integrated the quarter-million-dollar NASA Space Law Pilot Grant (awarded to Nebraska) into the Committee's activities. International Law Weekend 2018 was the first conference in which students throughout the country received travel stipends to attend space law panels and other international law panels. The Committee hosted lunches for the NASA grant student travel stipend award winners to introduce them to space law as well as space law careers during lunches at the International Law Weekend, including discussion with Gabriel Swinney, the Legal Adviser's Office of the U.S. State Department. The Committee received eighty-one applications from around the country and selected sixteen students from thirteen states for travel stipends representing the following schools: U.C. Berkeley, U.C. Irvine, Loyola L.A., Pepperdine, Arizona, Oklahoma City, Florida, Arkansas, Wisconsin, Mississippi, Notre Dame, Case Western, Tennessee, Boston College, George Washington, and George Mason. Additional local (New York City) students, not needing travel reimbursement, participated in the grant activities and the International Law Weekend.

Professor Schaefer is a Co-Investigator on the grant, and Professor Hertzfeld serves on the Cooperation Council set up to help implement the grant. Together, they have sponsored additional panels and research through their home institutions (University of Nebraska and George Washington University) that have featured government-industry roundtables on issues the Committee looked at in past International Law Weekend panels (new technologies, liability,

property rights, and regulation of commercial space). The University of Nebraska recently held its 11th Annual Washington D.C. Space Law Conference on September 21, 2018, with this Committee serving as a no-funding-required co-sponsor. The conference focused on "Intersections of Commercial and National Security Space Law and Policy." Discussions at that conference helped inform the Committee's panel at International Law Weekend 2018 on the use of the VCLT in current space law debates.

On October 18, 2019, the University of Nebraska hosted its 12th Annual Washington D.C. Space Law Conference. Focusing on "Global Perspectives on Space Law and Policy," the conference built on the presence of the International Astronautical Congress/International Institute of Space Law annual colloquium in Washington, D.C. on October 21–25, 2019. Professor Schaefer will present a paper regarding the harmonization of national space law at the event.

Professor Schaefer's article, "The Contours of Permissionless Innovation in the Outer Space Domain," was published in volume 33 of the University of Pennsylvania Journal of International Law. The article formed the basis of his recent remarks at the annual conference of the ABA Annual Air and Space Law Forum in Chicago on September 27, 2018.

3. In 2018 and 2019, the Committee Co-Chairs have been involved in informal discussions with industry, Executive Branch officials, and Congressional staff on space resources, COSPARS planetary protection standard reform, and how the U.S. government can best meet its Article VI obligations in the Outer Space Treaty to authorize and supervise new on-orbit activities, such as satellite servicing, lunar research facilities and rovers, and asteroid mining.

4. This Committee is open to sponsoring panels at the American Branch's regional conferences as opportunities arise.

Committee on Teaching Public International Law (Chaired by Mark E. Wojcik)

This Committee did not provide a report.

Committee on United Nations Law (Co-chaired by Christiane Ahlborn and Dr. Bart L. Smit Duijzentkunst)

Co-chaired by Christiane Ahlborn and Bart Smit Duijzentkunst, both Legal Officers at the United Nations Office of Legal Affairs, this Committee aims to organize at least two substantive events a year on a theme relating to the United Nations—one in spring and one in fall.

Past Activities (2018–2019)

1. At International Law Weekend 2018, this Committee convened a roundtable entitled "The Use of Force in Peace Operations." The roundtable considered when peacekeepers may or should use force. How to calibrate the right level of force in light of legal and operational requirements? Is current doctrine on the principles of peacekeeping adequate in light of changing circumstances? Or does the United Nations need to change the way it is doing business, as a recent report argues? The panel, consisting of policymakers, military experts and academics, discussed the legal, political and operational dimensions of these and other questions. The panelists included Nannette Ahmed, United Nations Department of Peacekeeping Operations; Colonel Vincent de Kytspotter, Permanent Mission of France to the United Nations; Adam Day, United Nations University; and Aditi Gorur, Stimson Center. The panel was chaired by Ian Johnstone of the Fletcher School, Tufts University. It was co-sponsored by the ASIL International Organizations Interest Group of the American Society of International Law.

2. On March 15, 2019, this Committee co-sponsored a work-in-progress workshop on the law of international organizations, organized by the International Organizations Interest Group of the American Society of International Law. Both co-chairs participated as discussants in the workshop, which took place at the Faculty Library of Seton Hall Law School. Eight papers by scholars from the United States, Europe, and Asia were discussed by about twenty participants from academia and legal practice, including remote participants. The Committee is grateful to Professor Kristen Boon of Seton Hall Law School for generously hosting the workshop and providing lunch and refreshments during the event.

The following papers were discussed: "The Limits of Article IX of the Genocide Convention—and an Alternative" (Sebastian Bates, Yale Law School); "The Foundation and Scope of Immunities of International Organizations under General International Law" (Fernando Bordin, University of Cambridge); "Domestic Jurisdiction from the Covenant to the Charter: Building on the League's Experience" (Basak Etkin, University Paris II Panthéon-Assas); "The Autonomy of Law of International Civil Service: The Love and Hate Relationship with Other Legal Systems"

(Negar Mansouri, Graduate Institute Geneva); "The Bases of the Duty to Cooperate: Atrocity Prevention by United Nations Security Council" (Erika Nakamura, Hitotsubashi University, Graduate School of Law); "The Development of the Law and Practice of International Organizations by the International Law Commission" (Paola Patarroyo, Freshfields Bruckhaus Deringer); "The Dynamism of Treaties" (Andrea Wang, Stanford Law School); and "Do States Listen to International Human Rights Recommendations? Empirical Analysis on the Follow-up Procedure of the Human Rights Committee" (Yoomin Won, Stanford Law School).

Agenda (2019–2020)

Together with the International Organizations Interest Group of the American Society of International Law, this Committee is planning to co-sponsor a panel on recent developments in the law and practice of legal offices of international organizations. The panel is scheduled for November 7, 2019 at the Permanent Mission of the Netherlands and will feature staff from legal offices of various New York–based international organizations, such as UNICEF, UNDP, and the United Nations.

Committee on Use of Force (Chaired by Jack M. Beard)

This Committee will organize a panel of distinguished international experts at International Law Weekend 2019. The title of the panel is "The Growing Risk of War in Outer Space: What Role Will International Law Play?" Dramatic advances in space technology, increasing geo-political tensions, and the critical strategic importance of military assets in space present a growing risk of armed conflicts extending to outer space. This panel will explore this threat and the role that international law may play in maintaining international peace and security in space, as well as the role that international humanitarian law may play if an armed conflict does occur. Focusing on this year's theme of the "Resilience of International Law," the panel will be moderated by the Committee Chair.

Study Group on Threats to the Liberal International Order (Chaired by David L. Sloss)

Earlier this year, the American Branch approved the creation of a new Study Group on Threats to the Liberal International Order. Study Group Chair David Sloss has recruited thirteen other leading scholars to participate.

This new Study Group will pursue three main goals:

1. identify the key threats to the continued viability of the existing rules-based international order;

2. evaluate the magnitude of those threats, with the aim of assessing which developments, if any, could potentially destroy the liberal international order, and which ones are properly viewed as threats of lesser magnitude; and

3. consider and assess a range of possible policy responses, focusing on threats of the greatest magnitude and on policy options for a new (post-Trump) U.S. president who is committed to preserving the liberal international order.

The Study Group will adopt an interdisciplinary approach, drawing on insights from law, economics, political science, and international relations. It will hold its first meeting on the margins of International Law Weekend 2019. A follow-up meeting has been scheduled in February 2020 at Santa Clara University.

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 REPORTS

I. LIBYA & THE INTERNATIONAL CRIMINAL COURT: QUESTIONS & ANSWERS

II. THE FIRST CULTURAL HERITAGE & AL QAEDA CASE BEFORE THE INTERNATIONAL CRIMINAL COURT: QUESTIONS & ANSWER

III. LETTER TO SECRETARY OF STATE REX W. TILLERSON AND ACTING LEGAL ADVISER RICHARD C. VISEK

LIBYA & THE INTERNATIONAL CRIMINAL COURT: QUESTIONS & ANSWERS

THE LIBYAN DEATH SENTENCES AGAINST SAIF AL-ISLAM GADDAFI AND ABDULLAH AL-SENUSSI & THE ICC'S ADMISSIBILITY RULINGS

November 3, 2015

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

Yes. On February 26, 2011, the United Nations ("U.N.") Security Council decided unanimously to refer the situation in Libya, for events occurring after February 15, 2011, to the ICC, thereby creating ICC jurisdiction over the situation.[1]

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

Yes. The International Criminal Court ("ICC") issued warrants on June 27, 2011 covering: Saif Al-Islam Gaddafi ("Saif Gaddafi"), and Abdullah Al-Senussi ("Al-Senussi").[2] The warrants allege that Saif Gaddafi exercised control over crucial parts of the state apparatus, including finances and logistics and had the powers of a de facto Prime Minister, and that Al-Senussi served as a Colonel in the Libyan Armed Forces and head of Military Intelligence.[3] The crimes alleged in the warrants are crimes against humanity, including murder and persecution of civilians across Libya committed through the state apparatus and security forces from February 15, 2011 until at least February 28, 2011.[4]

---

*This document is primarily the work of the Drafting Subcommittee, consisting of Jennifer Trahan, Linda Carter, John Cerone, and Matthew Charity. Erin Lovall additionally provided research assistance, as did Robert Murtfeld. This document does not necessarily represent the views of the American Branch of the International Law Association a whole.

[1] S.C. Res. 1970, U.N. DOC. S/RES/1970 (Feb. 26, 2011).

[2] A third warrant, against Muammar Mohammed Abu Minyar Gaddafi, was issued, but later, terminated on November 22, 2011, after his death on October 20, 2011.

[3] Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Warrant of Arrest (June 27, 2011) (hereinafter, "Warrant of Arrest")

[4] *Id. See also* Zach Zagger, *ICC Issues Arrest Warrants for Libya Leader Gaddafi, His Son, Head of Intelligence*, JURIST (June 27, 2011, 8:43 AM ET), http://jurist.org/paperchase/2011/06/icc-issues-arrest-warrants-for-libya-leader-gaddafi,-his-son-head-of-intelligence.php.

WHAT HAS THE ICC RULED AS TO WHERE SAIF AL-ISLAM GADDAFI SHOULD BE TRIED?

Under article 17 of the Rome Statute, a case will be "inadmissible" before the ICC if national courts are "willing" and "able" to try the accused.

As to Saif Gaddafi, after Libya's challenge to the admissibility of the case, ICC Pre-Trial Chamber I ruled that he should be tried in The Hague – that the case was "admissible" before the ICC. Specifically, the Pre-Trial Chamber was not convinced that proceedings starting in Libya covered the same conduct as was at issue at the ICC,[5] and secondly, because Gaddafi was held by the Zintan militia, and not the Government, and the Government continued to face substantial challenges regarding exercising its judicial powers across the nation, the Pre-Trial Chamber found the national judicial system to be "unavailable."[6]

The Appeals Chamber affirmed, dismissing Libya's appeal,[7] holding that the Pre-Trial Chamber did not err in its finding that Libya had failed to demonstrate that it was investigating the same – or substantially the same conduct[8] – as was covered by the ICC warrant. Because of that ruling, the Appeals Chamber did not reach the second question as to the "availability" of the national judicial system.[9] Hence, the originally ICC request for Saif Gaddafi's arrest and surrender to the Court[10] remains in effect.[11]

---

[5] The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi ¶¶ 136-37 (May 31, 2013) (hereinafter, the "Gaddafi Admissibility Decision").

[6] Id., ¶ 205.

[7] The Defence requested the Appeals Chamber dismiss Libya's arguments. The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Appeals Chamber, Judgment on the Appeal of Libya Against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled 'Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi,' ¶¶ 24-29 (May 21, 2014) (hereinafter, the "Gaddafi Admissibility Appeals Decision").

[8] The Appeals Chamber applied the test of whether "substantially the same conduct" was at issue, as had been used by the Appeals Chamber in the Ruto Admissibility Judgment. See Gaddafi Admissibility Appeals Decision, ¶ 59, citing Ruto Admissibility Judgment, ¶ 40.

[9] Gaddafi Admissibility Appeals Decision, ¶¶ 213-14.

[10] Situation in the Libya Arab Jamahiriya, Case No. ICC-01/11, Pre-Trial Chamber I, Request to the Libyan Arab Jamihiriya for the Arrest and Surrender of Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abduallah Al-Senussi (May 16, 2011) (The request for arrest and surrender is no longer in effect as to Muammar Gaddafi due to his death; the request for Al-Senussi also is no longer in effect given the ruling he could be tried in Libya.)

[11] Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Non-Compliance by Libya with Requests for Cooperation by the Court and Referring the Matter to the United Nations Security Council, ¶ 3 (December 10, 2014) (hereinafter, the "Gaddafi Non-Compliance Decision") ("The case against Saif Al-Islam Gaddafi remains before the Court since . . . it was declared by the Chamber admissible before the Court.").

WHAT HAS THE ICC RULED AS TO WHERE AL-SENUSSI SHOULD BE TRIED?

By contrast, as to Al-Senussi, again after Libya's challenge to the admissibility of the case, ICC Pre-Trial Chamber I ruled that he could be tried in Libya – that the case was "inadmissible" before the ICC. Specifically, the Pre-Trial Chamber found that Libya was investigating/prosecuting the "same" case as the ICC and that domestic authorities were not "unwilling" or "unable" to conduct the domestic proceedings.[12]
The Appeals Chamber affirmed this finding,[13] holding that in evaluating whether Libyan courts were "willing" and "able" to try the accused, generally "due process rights of the suspect were not relevant," as article 17 was primarily concerned with the accused "evading justice."[14] At that point in time, one of the key arguments as to whether Libya was "willing" and "able" to try Al Senussi related to Al-Senussi's lack of counsel in early phases of his Libya [15] (as well as ICC) proceedings.[16] Other issues, such as whether Al-Senussi would be unable to call witnesses in the Libya proceedings, were deemed at that point to be "speculative."[17]

As a result, "[p]roceedings against Abdullah Al-Senussi before the ICC came to an end on 24 July 2014 when the Appeals Chamber confirmed Pre-Trial Chamber I's decision declaring the case inadmissible before the ICC."[18]

WHY HAS SAIF GADDAFI NOT BEEN TRANSFERRED FOR TRIAL IN THE HAGUE?

Under current court rulings, Saif Gaddafi should long ago have been transferred to the ICC to stand trial. However, complicating that result is the fact that (as noted above) he is held, not by any governmental authority in Libya, but by the Zintan militia, which has not transferred him to The

[12] The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, ICC-01/11-01/11, Pre-Trial Chamber I, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, ¶¶ 311-12 (Oct. 11, 2013) (hereinafter, the "Al-Senussi Admissibility Decision").
[13] The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, ICC-01/11-01/11, Appeals Chamber, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled 'Decision on the Admissibility of the Case Against Abdullah Al-Senussi' (July 24, 2014 (hereinafter, the "Al-Senussi Admissibility Appeals Decision").
[14] Al-Senussi Admissibility Appeals Decision, ¶ 2 & 218.
[15] Id., ¶¶ 133 et seq.
[16] Id., ¶¶ 26 et seq.
[17] Id., ¶ 244 (i).
[18] Situation in the Libya Arab Jamahiriya, Case No. ICC-01/11, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/Pages/situation%20index.aspx.

Hague, and refuses to hand him over to any Libyan authorities.[19] He has been held by this group in the northwestern city of Zintan, since his capture in November 2011.
(This document refers to "governmental authorities" because, in the chaotic situation in Libya, there are two competing de facto governments.)[20]

DOES THE U.S. HAVE A WAR CRIMES REWARDS PROGRAM?

Yes. The U.S. has a War Crimes Rewards Program ("WCRP") through which persons who provide information leading to the arrest or conviction of a foreign national charged by an international or hybrid tribunal can receive monetary payments of up to $5 million.[21] The Department of State's Office of Global Criminal Justice manages the WCRP.[22]

COULD SAIF GADDAFI BE COVERED UNDER THE U.S. WAR CRIMES REWARDS PROGRAM, THEREBY INCENTIVIZING HIS SURRENDER TO THE ICC?

Yes. The U.S. could help incentivize transfer of Saif Gaddafi from the Zintan militia to the ICC by designating him as covered under this program.[23] This would not involve an amendment to any legislation, but a simple designation by the Secretary of State, as the Program already permits rewards covering: "[information leading to] the arrest or conviction in any country, or the transfer to or conviction by an international criminal tribunal including a hybrid or mixed tribunal), of any foreign national accused of war crimes, crimes against humanity, or genocide . . . ."[24]

---

[19] Colin Freeman, Saif Gaddafi Asks for Trial to Be Heard in Zintan Rather than Tripoli, THE TELEGRAPH, (Sept. 21, 2015), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/10321188/Saif-Gaddafi-asks-for-trial-to-be-heard-in-Zintan-rather-than-Tripoli.html ("the Zintan militia commanders have refused requests to hand [Gaddafi] over to the central government in Tripoli . . .").

[20] "The hostilities have led to the emergence of two de facto governments, an internationally recognized government based in Tobruk and al-Bayda that nominally controls much of eastern Libya, and a rival self-declared authority based in Tripoli that controls swathes of western Libya, where the trial took place." Human Rights Watch, Libya: Flawed Trial of Gaddafi officials, (July 28, 2015), https://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials. This document takes no position on which is the de jure government.

[21] See United States State Department, War Crimes Rewards Program, http://www.state.gov/j/gcj/wcrp/index.htm.

[22] Id.

[23] See, e.g., Beth van Schaak, ICC Fugitives: The Need for Bespoke Solutions (Santa Clara Univ. Legal Studies Research Paper No. 06-14), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1856&context=facpubs (2014) ("In April 2013, Secretary of State John Kerry designated the ICC's LRA defendants into the expanded program").

[24] Department of State Rewards Program Update and Technical Corrections Act of 2012, Pub. L. 112-283, 112th Congress, http://www.gpo.gov/fdsys/pkg/PLAW-112publ283/html/PLAW-112publ283.htm (emphasis added). The legislation expanding the Arrest Rewards Program also states that the designation should serve the "national interests of the United States." Id. Here, the designations of Libya accused would serve US national interests by furthering justice in a situation where the U.S. voted for ICC referral, and where the U.S. was militarily engaged.

SHOULD SAIF GADDAFI BE TRANSFERRED FOR TRIAL IN THE HAGUE?

Yes. The ICC's ruling that the case is admissible in The Hague, and its outstanding arrest warrant, and request for arrest and surrender,[25] should be respected.

The Court has also made a formal finding of non-cooperation with respect to the case against Saif Gaddafi – namely the failure by Libya to surrender him to the Court, which finding has been referred to the U.N. Security Council.[26] Rome Statute article 87(7) specifically permits the Court to make a finding of non-cooperation and refer the matter to the ICC's Assembly of States Parties ("ASP"), or "where the Security Council referred the matter to the Court, to the Security Council."[27] The U.N. Security Council responded in Resolution 2238, adopted in September 2015, calling upon Libya to cooperate fully with the ICC and ICC Prosecutor.[28]

Since the U.S. was a member of the U.N Security Council that referred the situation in Libya to the ICC, U.S. assistance by designating any ICC Libyan accused as covered by the WCRP would be particularly helpful and appropriate.

However, all members of the U.N. Security Council, and the Council as a whole, still need to work to ensure that situations that the Council refers to the ICC are able to proceed.[29] Calling upon Libya to cooperate fully, as the Security Council has done, has not achieved the desired results.

To start with, it would be helpful if the Security Council would change its policy from simply referring situations to the ICC to a policy of using its Chapter VII powers to provide effective support and prompt states to assist the ICC in executing arrest warrants.[30]

---

[25] ICC Warrant, supra note 25.

[26] Gaddafi Non-Compliance Decision, supra note 11, ¶ 4. The finding of non-cooperation also covered the failure to return certain documents that were seized in Zintan by the Libyan authorities from former Defense counsel.

[27] Rome Statute of the International Criminal Court, U.N. DOC. A/CONF. 183/9; 2187 UNTS 90, art. 87(7) (hereinafter, the "Rome Statute"). As a non-State Party, Libya has a duty to cooperate based on the Security Council's referral resolution. U.N. SC Res. 1970, supra note 1 ("Libya shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.").

[28] S.C. Res. 2238, U.N. DOC. S/RES/2238 (Sept. 10, 2015).

[29] See Jennifer Trahan, The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices, 24 CRIM. L. F. 417 (2013) (calling for Security Council follow up on situations that it refers to the International Criminal Court).

[30] See ICC Forum, "The Arrest Question – Comments," at http://iccforum.com/forum/arrest, [viewed 10/20/15], citing Elizabeth Minogue, "Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court," 61 Vand. L. Rev. 647, 6755 (2008).

HAVE SAIF GADDAFI AND AL-SENUSSI NOW BEEN SENTENCED TO DEATH IN LIBYA?

On July 28, 2015, Tripoli's Court of Assize handed down a verdict sentencing both Saif Gaddafi and Al-Senussi to death by firing squad, as part of a trial against 32 Gaddafi-era officials for a wide variety of charges related to attempted suppression of the 2011 uprising.[31] As part of the group trial, a total of nine were sentenced to death.[32] While the verdict is still subject to some form of appeal in Libya,[33] should the trial verdict be affirmed, there is a substantial chance of both Saif Gaddafi and Al-Senussi being executed. (Because Saif Gaddafi is not in the hands of governmental authorities, it is unknown whether he would be transferred for execution, or the sentence would be carried out by the Zintan militia.)

WERE THE PROCEEDINGS IN LIBYA CONDUCTED FAIRLY, RESPECTING THE DUE PROCESS RIGHTS OF THE ACCUSED?

Concerns that the trials were unfair and violated due process protections have been expressed by: the Office of the U.N. High Commissioner for Human Rights,[34] the U.N. Support Mission in Libya ("UNSMIL"), [35] Human Rights Watch, [36] Amnesty International, [37] the International Bar

[31] See HRW, supra note 20 ("Tripoli's Court of Assize convicted 32 defendants, sentencing nine of them to death and 23 to prison terms ranging from five years to life imprisonment.").
[32] Id.
[33] The case is set to go to "cassation chamber" review, but this appears limited to questions of law. See HRW, supra note 20 ("Under Libyan law, the cassation chamber's consideration of verdicts issued by the Court of Assize appears limited to questions of law. However, to guarantee a genuine examination, the higher court should be competent to consider elements of both fact and law . . . ."); , Concerns About Verdict in Trial of Former Qadhafi-era Officials (July 29, 2015) ("the next step in the judicial process is only cassation – a review of the application of Libyan law, not of questions of fact – rather than a proper appeal as required by international standards."); International Commission of Jurists, Libya: Unfair Trial of Saif Al-Islam Gadhafi and Others a Missed Opportunity to Establish Truth, Violates Right to Life, (July 28, 2015) (similar).
[34] UN Human Rights Officials Seriously Concerned by Verdicts in Trial of Former Members of Qadhafi Regime, U.N. NEWS CENTER (July 28, 2015) ("the UN High Commission for Human Rights . . . told reporters that her Office (OHCHR) is 'deeply disturbed' at the verdicts and sentences handed down today.").
[35] UNSMIL, supra note 33; see also Chris Stephen, Gaddafi's Son Saif al-Islam Sentenced to Death by Court in Libya, THE GUARDIAN (July 28, 2015) ("Claudio Cordone, from the UN mission [UNSMIL], said: 'Given these shortcomings, it is particularly worrisome that the court has handed down nine death sentences.'").
[36] HRW, supra note 20.
[37] Amnesty International, Libya: Flawed Trial of Al-Gaddafi Officials Leads to Appalling Death Sentences (July 28, 2015) ("Today's convictions of more than 30 al-Gaddafi-era officials, including the imposition of nine death sentences, follow a trial marred with serious flaws, that highlight Libya's inability to administer justice effectively in line with international fair trial standards. . . . ").

Association,[38] International Commission of Jurists,[39] No Peace Without Justice,[40] and Lawyers for Justice in Libya.[41]

Observer accounts[42] suggest there were numerous due process/ fair trial rights violations associated with the trial in Libya. Human Rights Watch has concluded: "This trial has been plagued by persistent, credible allegations of fair trial breaches that warrant independent and impartial judicial review."[43] Specifically, observer and NGO concerns include - for those accused present at the trial:

- inadequate assistance of counsel;[44]
- lack of adequate time and facilitates to prepare the defense;[45]
- lack of an opportunity to present sufficient defense witnesses;[46]
- lack of an opportunity to cross-examine prosecution witnesses;[47]
- lack of impartial and transparent proceedings;[48] and

[38] International Bar Association, Libya's Trial of Former Regime Members Prompts Serious Concern (July 28, 2015).
[39] ICJ, supra note 33.
[40] No Peace Without Justice, Libya's Missed Opportunity: Flawed Penalties Follow Flawed Trials (July 28, 2015).
[41] Lawyers for Justice in Libya, LFJL is Concerned that the Absence of Fair Trial Standards During Gaddafi Official Trials Will Jeopardise the Right of Victims to Justice (July 29, 2015).
[42] The ABILA ICC Committee has no independent knowledge of the due process/fair trial rights violations, but refers to and relies on numerous publicly available and independent sources in its analysis.
[43] See HRW, supra note 20 ("Tripoli's Court of Assize convicted 32 defendants, sentencing nine of them to death and 23 to prison terms ranging from five years to life imprisonment.").
[44] UNSMIL, supra note 33 ("During their pre-trial detention defendants were denied access to lawyers . . ."); id. ("Defence lawyers said they faced challenges in meeting their clients privately or accessing the full case file, and some said they received threats.").
[45] Id. According to the International Bar Association:
The IBA has also collected information that defence attorneys may not have been able to perform their professional duties during the trial fully. The IBA has corroborated reports that lawyers' private access to their clients may have been circumvented by security forces, and that lawyers may also have had undue difficulty in receiving access to essential trial documents, such as the prosecution's case file.
IBA, supra note 38.
[46] UNSMIL, supra note 33 (defendants "were constrained by the court to two or three witnesses per defendant and some said that witnesses were reluctant to appear in court due to fears about their safety.").
[47] Id. ("The prosecution did not present any witnesses or document in court, confining itself entirely to the written evidence available in the case file . . . ."); id. ("The court did not respond to defence counsel requests to examine prosecution witnesses.").
[48] Heba Saleh, Gaddafi's Son Sentenced to Death in Libya, FINANCIAL TIMES (July 28, 2015) ("Al-Mabrouk Ghraira Omran, the Beida government's justice minister, was quoted in the Libya media condemning the trial as illegal and saying that the judges were acting under duress. He called on the international community to refuse to recognise the verdict . . . ."); Tarek El-Tablawy, Libya Court Sentences Son of Qaddafi to Death, BLOOMBERG NEWS (July 28, 2015) ("Judges in the capital faced pressure from the Islamists to reach a guilty verdict, the Tobruk government's justice

- lack of a reasoned ruling—the failure to make individualized determinations as to individual criminal responsibility.[49]

Additional fair rights violations are thought to include denial of the right "to remain silent, to be promptly informed of the charges against [one], [and] to challenge the evidence brought against [one]." [50]

WAS SAIF GADDAFI PRESENT FOR HIS TRIAL?

No. Saif Gaddafi was tried and sentenced in absentia. While trials in absentia are not necessarily illegitimate, and are permitted under Libyan law, under Libyan law there were certain procedural protections that should have been followed, but were not.[51] In fact, Saif Gaddafi was only able to have video access to (according to some accounts) 3 of 24 sessions[52] – so that he was unable to follow most of the trial. In these circumstances, many of Saif Gaddafi's fair trial rights were violated – as he was not able to meaningfully participate in the proceedings.

The International Bar Association concludes:

> Reports confirm that Mr. Gaddafi was never physically present during the trial and that he was not connected via video link for at least 17 of the 24 court sessions. This strongly indicates that his right to be present at trial, which is protected under international law, was violated by his continuing absence. Furthermore, despite the court appointing a lawyer on Mr. Gaddafi's behalf, it remains uncertain if the accused was able to consult properly with his lawyer and, if so, whether the nature

---

minister said in comments carried by the Libya Herald. . . . Rights groups have also criticized the proceedings as biased and lacking due process."); Libyan Court Sentences Gaddafi Son Saif, 8 Other Ex-Officials to Death, REUTERS (July 29, 2015) ("The trial process and outcome drew condemnations abroad, with Human Rights Watch and a prominent international lawyer saying it was riddled with legal flaws and carried out amid widespread lawlessness undermining the credibility of the judiciary."); id. ("legal experts and rights advocates said the proceeding was tainted and politicised from the start."); Stephen, THE GUARDIAN, supra note 35 ("Senussi's London-based lawyer, Ben Emmerson QC, said 'extreme fear, insecurity and intimidation' had dominated the trial."); ICJ, supra note 33 ("The ICJ is concerned that political and security instability in Libya continues to undermine the ability of the judiciary to function and administer justice independently and impartially."); IBA, supra note 38 ("of particular concern are the restrictions placed on trial observers, journalists, family members and others on attending the trial proceedings. . . ." "Despite the general lack of information, a picture has emerged suggesting public access to the proceedings has been systematically compromised by the unsupervised security situation that continues to prevail throughout the country."); id. ("The trial proceedings raise substantial concern regarding transparency.").

[49] UNSMIL, supra note 33 ("The evidence of criminal conduct was largely attributed to the defendants in general, with little effort to establish individual criminal responsibility.").

[50] Amnesty International, supra note 37 (also noting "[i]n some cases, detainees were held incommunicado and in unofficial detention places for extended periods.").

[51] Id.

[52] HRW, supra note 20.

> of the contact was sufficient to enable him to engage his right to participate in his own defence fully.[53]

WERE THERE ALLEGATIONS OF ILL-TREATMENT OF THE ACCUSED?

Yes. There are also concerns whether Saif Gaddafi and Al-Senussi were subjected to torture or ill-treatment while in detention.[54]

ARE DEATH SENTENCES INCREASINGLY DISFAVORED INTERNATIONALLY?

Yes. While certain countries still utilize the death penalty (such as Libya), no current international tribunal authorizes death as a sentence, and there is growing consensus to abolish the death penalty at the national level. It is not an available punishment before the ICC, nor was it an option at the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone, or the Extraordinary Chambers in the Courts of Cambodia ("ECCC"). The U.N. General Assembly and the African Commission on Human and Peoples' Rights have issued resolutions calling for a moratorium on the death penalty.[55] Amnesty International reports that there are presently 140 countries that do not use the death penalty either by law or by practice.[56] Of the 123 States-Parties to the Rome Statute, 73 have abolished the death penalty entirely and another 22 states do not actively impose it.[57]

---

[53] IBA, supra note 38. (Any numerical inconsistency between the HRW and IBA figures is from those sources.)

[54] UNSMIL, supra note 33 (some defendants "reported that they were beaten or otherwise ill-treated"); David. D. Kirkpatrick, Son of Muammar el-Qaddafi Sentenced to Death in Libya, NY TIMES (July 28, 2015) (Rodney Dixon, one of Mr. Senussi's lawyers at the International Criminal Court, said by telephone that they had information that Mr. Senussi had been mistreated while in prison and had photos showing bruising on his head and face. Mr. Dixon said he had tried numerous times to see his client but had been refused."); HRW, supra note 20.

[55] UNGA Res. 186, U.N. DOC. A/RES/69/186 (Dec. 18, 2014) (the General Assembly renews this resolution every two years); Resolution Urging States to Envisage a Moratorium on Death Penalty, African Commission on Human and Peoples' Rights (1999), http://www.achpr.org/sessions/26th/resolutions/42/.

[56] Death Penalty Information Center, Abolitionist and Retentionist Countries [viewed 10/20/15], at http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140. Of the 140 countries, 98 prohibit the death penalty by law for all crimes; 7 prohibit the death penalty for ordinary crimes, retaining it for crimes such as treason; and 35 are abolitionist in practice, which means that they have not had an execution in the last 10 years and probably have established a practice against using the death penalty. Only 58 countries retain the death penalty.

The majority of executions internationally occur in China, Iran, Saudi Arabia, Iraq, and the United States. Amnesty International, Death Sentences and Executions 2014, at http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2014?page=show [viewed 10/24/15]. Even in the United States, where 31 states and the federal government retain the death penalty, executions have decreased. http://www.deathpenaltyinfo.org/executions-year. Moreover, there continues to be reconsideration of the death penalty. For example, within only the last six years, five states have abolished it, bringing the total today of 19 states in the U.S. with no death penalty. Death Penalty Information Center, States with and without the Death Penalty [viewed 10/24/15], at http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

[57] Of the 123 States-Parties: 24 are retentionist countries (active death penalty including for ordinary crimes); 73 are abolitionist for all crimes; 4 are abolitionist for ordinary crimes (but would still have it for crimes such as treason or

DOES CASE LAW SUPPORT IMPOSITION OF THE DEATH PENALTY WHERE THERE WERE SYSTEMATIC DUE PROCESS VIOLATIONS?

No. Imposition of the death penalty against an accused whose fair trial rights appear to have been systematically violated or who was not even present at his trial appears wholly unwarranted.[58] It violates, or is inconsistent with, accepted international human rights, such as the provisions of the International Covenant on Civil and Political Rights that guarantees no arbitrary deprivation of life.[59]

The Inter-American Commission on Human Rights[60] has repeatedly found human rights violations to exist where the death penalty is imposed after a trial with due process violations.[61]

Similarly, mandatory death sentences without the ability to consider mitigating circumstances have been repeatedly held to be in violation of treaties and national constitutions.[62] In the United States, for example, death penalty sentences have been overturned for due process violations, such as ineffective assistance of counsel and failure to provide the defense with exculpatory evidence.[63]

---

military crimes); 22 are "abolitionist in practice," which means they have the death penalty for ordinary crimes, but "have not executed anyone during the last 10 years and are believed to have a policy or established practice of not carrying out executions." On the basis of these numbers, only 24 of 123 States Parties are actively using the death penalty. See Death Penalty Information Center, Abolitionist and Retentionist Countries, supra note 56.

[58] IBA, supra note 38 (in the circumstances, "the court's imposition of the death penalty is wholly unwarranted.").

[59] All major human rights treaties prohibit the arbitrary deprivation of life, such as the International Covenant on Civil and Political Rights (ICCPR), with 168 States Parties. ICCPR, 999 U.N.T.S. 171, 6 I.L.M.368, art. 6(1) (Mar. 23, 1976). It provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Similar provisions exist in the Universal Declaration of Human Rights, the American Convention on Human Rights, the European Convention on Human Rights, and the African Charter on Human and Peoples' Rights. The European Convention goes further in its Protocols 6 and 13, requiring the abolition of the death penalty both in peace and in war time. The Second Optional Protocol to the ICCPR also effectively calls for the abolition of the death penalty. There are presently 81 States Parties to the Protocol. See L. CARTER, E. KREITZBERG, & S. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 445-447 (LexisNexis 3d ed. 2012) and http://indicators.ohchr.org/ (updated statistics).

[60] The Inter-American Commission can hear individual complaints against members of the Organization of American States.

[61] It has held the American Convention on Human Rights violated by imposition of the death penalty where there has been undue delay in bringing the person to trial, failure to provide an impartial tribunal, incompetent counsel, failure to provide notice of consular assistance to foreign nationals, racial bias in the proceedings, or inhuman conditions on death row. See The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition, Inter-American Commission on Human Rights (2012), at http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf.

[62] See Carter, supra note 59 (noting national decisions and decisions from the Human Rights Committee and the Inter-American Court of Human Rights).

[63] See, e.g., Wiggins v. Smith, 539 U.S. 510 (2003) (ineffective assistance of counsel in investigating mitigation); Williams v. Taylor, 529 U.S. 362 (2000) (ineffective assistance of counsel in investigating and presenting mitigation); Smith v. Cain, 132 S. Ct. 627 (2012) (disclosure of exculpatory evidence violation).

Additionally, the Human Rights Committee,[64] interpreting the International Covenant on Civil and Political Rights (ICCPR), has found that a State without the death penalty violates the prohibition on the arbitrary deprivation of life if the State extradites an individual to a country with the death penalty unless assurances are obtained that death will not be imposed as a punishment.[65]

This Committee takes no position on whether or not it is appropriate for the ICC to rule a case "inadmissible" and thereby implicitly sanction a domestic court trial in a death penalty imposing country—a position that warrants further consideration. Certainly, the existence of a domestic death penalty ought to be a concern for the Court in any admissibility proceedings, and the ICC's standards for deferring to such a domestic court process should be even-the-more exacting in such circumstances.

DID THE ICC CORRECTLY RULE THAT AL-SENUSSI SHOULD BE TRIED IN LIBYA?

An argument could be made that, in its original admissibility rulings, the ICC was insufficiently concerned with the potential due process rights of the accused, as to the trial that might occur in Libya, when the Libyan judiciary was in a state of turmoil.

As noted above, under article 17, the ICC will not hear a case where the national court is "willing" or "able" to do so. Article 17 is somewhat problematic in that it appears not to recognize a third category – where the national court, is "all too willing" to convict, without adherence to due process concerns.[66]

[64] The Human Rights Committee monitors implementation of the ICCPR and can hear individual complaints about compliance with the treaty.

[65] Judge v. Canada, Hum. Rts. Comm., Communications No. 829/1998, Decision (Aug. 5, 2003). The ICC—while admittedly not a State and thus unable to become a party to human rights treaties—by contrast, obtained no such assurances after it ruled that Al-Senussi could be tried in Libya (that his case was "inadmissible" at the ICC).

[66] See Jennifer Trahan, Is Complementarity The Right Approach For The International Criminal Court's Crime of Aggression? Considering the Problem of 'Overzealous' National Court Prosecutions, 45 Cornell J. of Int'l L 569 (2012).

Alternatively, at least one scholar has written (albeit regarding a different context) that the language of Article 17 is not an exclusive list of what constitutes "unwilling." See Darryl Robinson, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, 14 Eur. J. Int'l L. 481, 500 (2003) ("The test arising from [article 17(2)-(3)] is a rigorous one, although the list of criteria should not be interpreted as a closed list: the open-ended wording 'shall consider whether' was deliberately chosen, as opposed to language imposed a fixed requirement (e.g. 'means' or 'must conclude that'), thus indicating that terms such as 'intent to shield' are illustrative."). (emphasis in original.)

AREN'T DUE PROCESS CONCERNS INHERENTLY A CONCERN OF THE ICC?

The sources of law that the ICC applies are first, the "[Rome] Statute, Elements of Crimes and its Rule of Procedure and Evidence."[67] Yet, it also applies "where appropriate, applicable treaties and the principles and rules of international law."[68]

Due process norms are enshrined in article 14 of the International Convention on Civil and Political Rights[69] – as well as many other sources, including Article 67 of the Rome Statute. They require numerous due process protections be observed in order for fair trial rights not to be violated.

In addition to article 17 (or in interpreting article 17), an argument could be made that article 21 of the Rome Statute requires that the Court interpret the Rome Statute (thus, Article 17) "consistent with internationally recognized human rights." Article 17 requires "genuine" proceedings, an independent and impartial proceeding, and repeatedly refers to whether the proceedings are "inconsistent with an intent to bring the individual to justice." All of these terms could, and should, be interpreted to take into account the rights of the accused.

As noted above, concerns about due process appear to be particularly warranted where the death penalty is an available punishment in national court proceedings.

DID THE AL-SENUSSI APPEALS CHAMBER HAVE ANY CONCERNS HE MIGHT NOT RECEIVE DUE PROCESS IN LIBYA?

Yes. The Appeals Chamber did leave an opening in its July 24, 2014 ruling, suggesting that it would not utterly ignore due process violations by a national court:

> It is clear that regard has to be had to 'principles of due process recognized by international law' for all three limbs of article 17(2), and it is also noted that whether proceedings were or are 'conducted independently or impartially' is one of the considerations under article 17(2)(c). . . . As such, human rights standards may assist the Court in its assessment of whether the proceedings are or were conducted 'independently or impartially' within the meaning of article 17(2)(c).[70]

To the extent the Appeals Chamber also suggested the national proceedings would have to be "completely lack[ing in] fairness" such that they fail to provide "any genuine form of justice,"[71] before the ICC can be the proper venue, the Judges are setting the threshold too high.

[67] Rome Statue, art. 21.1(a).
[68] Id., art. 21.1(b).
[69] ICCPR, supra note 59.
[70] Al-Senussi Admissibility Appeals Decision, ¶ 220.
[71] Id. ¶¶ 190 and 229.

Alternatively, it is conceivable that, given the proceedings in Libya, even that very high threshold may have been met. (Presciently, Al-Senussi's defense counsel at the ICC predicted that he would be "convicted and sentenced to death in proceedings [in Libya] falling well below any acceptable standard [of due process]."[72])

HAVE CONDITIONS IN LIBYA BECOME MUCH MORE CHAOTIC AND UNSTABLE SINCE THE AL-SENUSSI APPEALS CHAMBER RULING?

Yes. To the extent that the Appeals Chamber perceived that Libya was "willing" and "able" to prosecute through its national courts, the Appeals Chamber was ruling at a different period of time.

Since that ruling, the situation in Libya has become much more chaotic and unstable. The internationally recognized Government was forced to retreat to the Eastern Libyan town of Beida, and the Al-Senussi et al. trials have been held in the militia-controlled areas beyond the reach of the Government. To the present day, the Government has no control over the trial process or the defendants and the Justice Minister openly condemned the continuation of the proceedings in Tripoli.[73] Already at the time of the Pre-Trial Chamber ruling in October 2013, Judge van den Wyngaert issued a declaration stating that she worried whether Libya's security problem compromised the ability of the state to prosecute Al-Senussi through its national courts.[74]

Indeed, concerns expressed in the Saif Gaddafi admissibility challenge as to whether the State could exercise its judicial power over his trial—which was part of the logic for finding the Libya judicial system "unavailable" in his case[75]—has applied equally to Al-Senussi, since the Government has not been able to exert control over his trial either.

---

[72] Id., ¶ 234.

[73] Stephen, THE GUARDIAN, supra note 35.

[74] She stated:

> I cannot help but note the widely reported abduction and release of Libyan Prime Minister Ali Zeidan on 10 October 2013. It is unclear, at this point in time, what effect these events might have on the already precarious security situation in Libya. Further deterioration of the security situation could extend to Mr Al-Senussi's legal proceedings and, accordingly, affect Libya's ability to carry out those proceedings.
>
> . . . Prior to ruling on the present challenge, I would have preferred to seek submissions from the parties and participants as to whether Libya's security situation remains sufficiently stable to carry out criminal proceedings against Mr Al-Senussi.

Al-Senussi Admissibility Decision, Declaration of Judge Christine Van den Wyngaert, ¶¶ 2-3 (Oct. 11, 2013).

[75] Gaddafi Admissibility Decision, ¶ 205.

WERE THE DUE PROCESS CONCERNS AT ISSUE DURING THE AL-SENUSSI ADMISSIBILITY CHALLENGE MUCH MORE LIMITED THAN THE VIOLATIONS THAT OCCURRED?

Yes. As noted above, when the Appeals Chamber affirmed the Pre-Trial findings, key issues included: (1) whether Al-Senussi's lack of counsel during investigation stages of proceedings in Libya,[76] or (2) the anticipation that he might not be able to call defense witnesses due to lack of adequate witness protection measures,[77] would render Libya "unwilling" or "unable" to conduct proceedings.

As detailed above, the due process violations that occurred appear to have been far more extensive than those that the Pre-Trial Chamber and Appeals Chamber considered. While it was then speculative whether Al-Senussi would be able to call defense witnesses, or how the proceedings in Libya would be conducted, there is now no need to speculate, as there is actual information that could be the basis of a more informed ruling.

WHO COULD REQUEST REVIEW OF THE ADMISSIBILITY ISSUE IN THE AL-SENUSSI CASE?

Article 19(10) of the Rome Statute provides that "[i]f the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17."[78] Thus, the Prosecutor clearly could, and should, request review of the admissibility issue.

Potentially, Al-Senussi's counsel also could challenge the inadmissibility finding. Rome Statute Article 19(4) states that "[t]he admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State . . . ." But "in exceptional circumstances, the Court may grant leave for a challenge to be brought more than once . . . ." Thus, Al-Senussi would need to demonstrate that "exceptional circumstances" warrant bringing a second admissibility challenge (since the first admissibility challenge was already brought by Libya).[79]

---

[76] See, e.g., Al-Senussi Admissibility Appeals Decision, ¶ 191 (examining the lack of defense counsel and finding it would not reach the "high threshold" for finding Libya unwilling genuinely to investigate or prosecute).

[77] Id. ¶ 244.

[78] Rome Statute, art. 19 (10) (emphasis added).

[79] One authority interprets Article 19(4) as inapplicable, because technically Senussi would be challenging "inadmissibility" – so his is an "inadmissibility" challenge, not an "admissibility" challenge, see Kevin Jon Heller, It's Time to Reconsider the Al-Senussi Case. (But How?) OPINIO JURIS, http://opiniojuris.org/2014/09/02/time-reconsider-al-senussi-case/. However, it is unclear that such a hyper-technical reading of the Rome Statute is warranted. See also id. ("To be sure, it's possible to read 'admissibility' more generally, as encompassing any challenge involving the admissibility or inadmissibility of a case. That's probably the better reading, given that the

WOULD NE BIS IN IDEM (THE PROHIBITION AGAINST DOUBLE-JEOPARDY) PREVENT ICC TRIALS SUBSEQUENT TO TRIALS IN LIBYA?

No. It is true that a defendant may not be prosecuted twice for the same conduct by two different courts.[80] However, the Rome Statute provides an exception to double-jeopardy (ne bis in idem) in article 20(3)(b) if the initial trial was not "conducted independently or impartially in accordance with the norms of due process recognized by international law and [was] conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concern to justice." While this language could be read narrowly as concerned only with national court proceedings that are too lenient on the accused, it need not be read so restrictively. Arguably, an overzealous national court trial that violates due process protections is also "inconsistent with an intent [genuinely] to bring a person concerned to justice."

SHOULD THIS ISSUE ONLY BE REVIEWED WHEN THE DEATH SENTENCES ARE FINALIZED?

While ideally review would happen after appellate proceedings[81] in Libya are finalized, because of the substantial risk of execution, there is reason to raise this issue now. Time might simply be too short, between finalization of Libyan sentences for the ICC to receive submissions and rule upon them. Given the obviously irreversible nature of the death penalty, and the limited ability of the Court to control events in the chaotic situation in Libya (i.e., a request to stay execution during pending ICC proceedings might or might not be respected), these particular circumstances merit current attention and resolution.

COULD THE ICC EXPAND ITS WARRANTS TO COVER ADDITIONAL CRIMES COMMITTED IN LIBYA RELATED TO 2011 EVENTS?

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

---

drafters of the Rome Statute could easily have imagined a situation in which a suspect would prefer to be prosecuted by an international tribunal than by a domestic court.").
Under that author's reading, because Senussi's challenge would be brought subsequent to the commencement of his domestic trial in Libya, Senussi should bring a challenge under Article 20 (ne bis in idem) – the prohibition on double-jeopardy. This author thinks a better reading is to first reopen admissibility and then examine double-jeopardy. In other words, the case has to be admissible, and, if it is, the Court would also need to ensure that double-jeopardy would not bar it.

[80] See Rome Statute, art 20 (ne bis in idem).

[81] See supra note 33 (concerns with the limited cassation chamber review that may occur).

The Office of the Prosecutor ("OTP"), under its prior Prosecutor, chose to issue only three warrants related to the 2011 uprising.[82] It is possible in light of what is currently known, that more of the Libyans who were sentenced to death should also be tried at the ICC.

ARE THERE ADDITIONAL CRIMES BEING PERPETRATED IN LIBYA TODAY – INCLUDING CRIMES BY THE SO-CALLED "ISLAMIC STATE" — THAT THE ICC COULD OR SHOULD EXAMINE?

Reports suggest that a wave of murders, including beheadings, have been committed by members of the so-called "Islamic State" (ISIS). There are also reports of indiscriminate shelling, and targeting of residential communities and hospitals.[83] Human Rights Watch maintains that over the last year attacks by armed groups on civilians and civilian property in some cases amount to war crimes, and that arbitrary detention, torture, forced displacement, and unlawful killings may amount to crimes against humanity.[84]

These crimes, as well as any other instances of war crimes, crimes against humanity, or genocide perpetrated in Libya subsequent to the U.N. Security Council's referral, are subject to ICC jurisdiction.

CAN THE ASSEMBLY OF STATES PARTIES PLAY A ROLE IN ENSURING THE AL-SENUSSI AND SAIF GADDAFI TRANSFERS?

Yes, as to Saif Gaddafi. That he has not been transferred is a failure of cooperation. Thus, it is quite appropriately an issue for the ASP and the U.N. Security Council to address. The U.N. Security Council —which so far has called for Libya to cooperate — could expressly call for the accused's transfer to The Hague; the ASP could do likewise. The ASP could also encourage the help of non-States Parties, such as the U.S., by noting the U.S.'s ability to cover Saif Gaddafi in the expanded WCRP, and/or encourage other states to develop similar programs vis-à-vis ICC fugitives (or those subject to transfer to the ICC). While the Court, to date, has referred Libya's non-cooperation to the UNSC, not the ASP, that would not preclude the ASP from taking action "so long as it does not conflict with a Security Council decision."[85]

---

[82] See Warrant of Arrest, supra note 3; see also note 2.

[83] Lawyers for Justice, Lawyers for Justice in Libya Calls for Accountability and Caution in Response to the Ongoing Violence in Sirte (Aug. 19, 2015) ("between 12 and 15 August 2015. 57 individuals have died, 12 of whom were allegedly crucified and beheaded by actors affiliated with ISIS.").

[84] HRW, supra note 20.

[85] COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OBSERVERS' NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., Nomos Verlagsgesellschaft, Baden-Baden, 1999), p. 1068, marginal note 36.

The ASP should not intervene in the Al-Senussi situation at present, as it is a judicial matter where he should be tried. (As noted above, the current ICC proceedings came to an end after the decision of inadmissibility was affirmed.)[86] Rather, it would be for the OTP or Al-Senussi's counsel to reopen the admissibility challenge, and the Court to expeditiously rule on it. Should the ICC rule that his case – given the state of proceedings in Libya – now has become "admissible" in The Hague (and is not barred by ne bis in idem), it would then be for States Parties, as well as non-States Parties, and/or members of the U.N. Security Council to similarly call for his immediate transfer and ensure that it occurs (including, at that point, through his designation into the U.S. WCRP).

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

[86] Gaddafi Non-Compliance Decision, supra note 11, ¶ 3.

THE FIRST CULTURAL HERITAGE & AL QAEDA CASE BEFORE THE INTERNATIONAL CRIMINAL COURT: QUESTIONS & ANSWERS

November 5, 2016

On September 27, 2016, Trial Chamber VIII ("Chamber") of the International Criminal Court ("ICC") issued its judgment and sentence in Prosecutor v. Ahmad Al Faqi Al Mahdi ("Al Mahdi").[87] The judgment and sentence came at the conclusion of evidence presented by the Prosecutor, Defendant, and representatives of the victims.[88] As part of the proceedings, Al Mahdi entered a plea of guilty to the charges of war crimes under Article 8(2)(e)(iv) of the Rome Statute.[89] During presentation of evidence, the Prosecutor offered evidence relating to the crimes committed in the Timbuktu region of Mali, Al Mahdi's involvement in the planning and execution of the acts of destruction that formed the crux of the crimes, and the cultural and religious importance of the cultural heritage sites destroyed.[90] Evidence was also given as to Al Mahdi's character and standing in the Timbuktu community before and after the acts of destruction, and his contrition.[91]

WHAT IS THE SIGNIFICANCE OF THE AL MAHDI JUDGMENT AND SENTENCE?

The Al Mahdi judgment and sentence are significant for several reasons. This case was the first in which issues of crimes against cultural heritage under the Rome Statute were adjudicated. As a member of Ansar Dine/Al Qaeda in the Islamic Maghreb ("Ansar Dine/Al Qaeda"), Al Mahdi was also the first member of Al Qaeda to come before the ICC. Additionally, Al Mahdi was the first case at the ICC in which a defendant entered a guilty plea and the Trial Chamber was required to make an assessment of what is required to enter into a guilty plea under the Rome Statute.

---

* This document is primarily the work of the Drafting Subcommittee, consisting of Alexandra Harrington and Jennifer Trahan. This document does not necessarily represent the views of the American Branch of the International Law Association as a whole. One committee member chose not to be associated with the document.

[87] Situation in the Republic of Mali in the Case of Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016).

[88] *Id.* at para. 7.

[89] *Id.*

[90] *Id.*

[91] *Id.* at paras. 94–97, 103–105.

WHY DOES THE ICC HAVE JURISDICTION OVER CRIMES IN MALI?

The matter was referred to the ICC under Article 14 of the Rome Statute in 2012 by the government of Mali—a State Party to the Rome Statute since 2000—regarding acts committed during 2012.[92]

WHAT IS THE AL MAHDI CASE ABOUT?

In 2012, Mali was the site of noninternational conflict between governmental forces and Ansar Dine/Al Qaeda in the Islamic Maghreb in the northern portion of the country, including Timbuktu.[93] The Timbuktu region of Mali has historically been home to many important cultural and religious sites.[94] As part of its efforts to strengthen control in the area, Ansar Dine/Al Qaeda reached out to respected members of local communities, such as Al Mahdi. Members of these communities joined the newly formed "Hesbah" morality brigade and Al Mahdi became the leader of Hesbah under the authority of the governing Ansar Dine/Al Qaeda coalition.[95]

Once in this position, Al Mahdi was required to monitor the local population and the shrines and other holy sites in and around Timbuktu. In June 2012, Al Mahdi was ordered to oversee the destruction of these shrines and other holy sites because they were believed to be unholy in Ansar Dine/Al Qaeda's construction of Islam. The sites destroyed were "(i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the Sidi Yahia Mosque door and the two mausoleums adjoining the Djingareyber Mosque, namely (ix) the Ahmed Fulane Mausoleum and (x) the Bahaber Babadié Mausoleum."[96] The majority of these sites had previously been classified as UNESCO World Heritage sites and were also of cultural and religious significance to the nation of Mali as well as those in the area in and around Timbuktu.[97]

Al Mahdi was described as reluctant to carry out these orders; however, he ultimately complied and both facilitated and oversaw the destruction.[98] This included videotaping acts of bulldozing

[92] *Id.* at art. 13(a).
[93] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 1, at para. 31.
[94] *Id.* at para. 34. As the Trial Chamber noted, "the mausoleums of saints and mosques of Timbuktu are an integral part of the religious life of its inhabitants. Timbuktu's mausoleum and mosques constitute a common heritage for the community." *Id.*
[95] *Id.* at paras. 31, 33.
[96] *Id.* at para. 38.
[97] *Id.* at para. 10.
[98] *Id.* at para. 36–37.

and explanations on camera as to why the acts were being undertaken as well as procuring members of the Hesbah to commit the destruction.[99]
Once Ansar Dine/Al Qaeda was ousted from control of the Timbuktu region, the government of Mali referred Al Mahdi's the situation to the ICC for potential prosecution.

WHO IS AL MAHDI?

Ahmad Al Faqi Al Mahdi is a native of the Timbuktu region of Mali.[100] Although his exact age is not known, it is estimated that at the time of the trial he was between 30 and 40 years old.[101] Prior to the acts in question, Al Mahdi was regarded as an expert in Islam in the area.[102] In this capacity, he was viewed as an authoritative member of the Timbuktu Muslim community. According to the Trial Chamber, Al Mahdi became a member of Ansar Dine/Al Qaeda in the Islamic Maghreb in 2012.

HOW DOES THE ROME STATUTE ADDRESS CULTURAL HERITAGE CRIMES?

Cultural heritage crimes are found under several sections of the Rome Statute relating to war crimes.

For noninternational armed conflicts, war crimes under Article 8(2)(e)(iv) include "intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives."[103] Additionally, as the Trial Chamber pointed out in the Al Mahdi judgment, there could be a possibility of charging cultural heritage crimes under Article 8(2)(e)(xii), which classifies the following as war crimes "[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict."[104]

For international armed conflicts, war crimes under Article 8(2)(b)(ii) include "[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives,"[105] and, under Article 8(2)(b)(ix), "[i]ntentionally directing attacks against buildings dedicated to religion,

[99] *Id.* at paras. 38–41.
[100] *Id.* at para. 9.
[101] *Id.* at para. 9.
[102] *Id.* at para. 32.
[103] Rome Statute, *supra* note 6, at art. 8(2)(e)(iv).
[104] *Id.* at art. 8(2)(e)(xii).
[105] *Id.* at art. 8(2)(b)(ii).

education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives."[106]

The Al Mahdi case dealt exclusively with acts committed in noninternational armed conflict. To date, there has been no ICC jurisprudence on cultural heritage crimes committed in international armed conflict.

HOW DID THE ICC DEFINE CULTURAL HERITAGE?

Rather than providing an original definition of cultural heritage, the Trial Chamber used a combination of historical references to support the use of the definition of cultural heritage as used by the United Nations Educational, Scientific and Cultural Organization ("UNESCO")

The Trial Chamber noted that the concept of "special protection of cultural property in international law" stems from the 1907 Hague Conventions, followed by the 1919 Commission on Responsibility of the Authors of War, and the 1949 Geneva Conventions.[107] In this context, the Trial Chamber highlighted the importance of protecting cultural heritage as part of a larger protection of the interests of humanity as well as of the local population.[108] The Trial Chamber held that "UNESCO's designation of these buildings reflects their special importance to international cultural heritage, noting that 'the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all nations must fulfil in a spirit of mutual assistance and concern.'"[109] In this way, the Trial Chamber looked to UNESCO for the definition of cultural heritage, which is a general definition that can incorporate a number of different forms of heritage.

WHAT IS THE ICC'S PROCEDURE FOR ACCEPTING A GUILTY PLEA?

Al Mahdi is the first ICC defendant to enter a guilty plea.[110] Under Article 65 of the Rome Statute, a defendant has the ability to enter a plea of guilty; however, the Trial Chamber is still obligated to hear statements verifying that "(a) [t]he accused understands the nature and consequences of the

[106] *Id.* at art. 8(2)(b)(ix).
[107] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 1, at para. 14 (citing Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague (1907), arts. 27, 56; Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibility of the Authors of War and Enforcement of Penalties (1919); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (1977)).
[108] *Id.* at para. 15.
[109] *Id.* at para. 46.
[110] *Id.* at para. 21.

admission of guilt; (b) [t]he admission is voluntarily made by the accused after sufficient consultation with defence counsel; and (c) [t]he admission of guilt is supported by the facts of the case that are contained in: (i) [t]he charges brought by the Prosecutor and admitted by the accused; (ii) [a]ny materials presented by the Prosecutor which supplement the charges and which the accused accepts; and (iii) [a]ny other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused."[111] In addition, in the context of guilty pleas it is possible to examine other information presented by the parties or deemed to be of assistance in assessing guilt.[112]

The Trial Chamber highlighted that this series of requirements was an attempt at bridging the common law system's ability for the accused to plead guilty with the civil law system's requirement that the court review the surrounding facts around the case and the alleged act in order to make sure that there is support for the case regardless of whether the accused is willing to enter a guilty plea.[113] The Trial Chamber also noted that there is a balance of benefits offered through the accused having the opportunity to plead guilty, particularly to the victims of the crimes and the affected communities as well as to the defendant and the international community.[114]

In this case, the Trial Chamber was satisfied as to the credibility and reliability of Al Mahdi's plea and statements detailing his crimes. In particular, the Trial Chamber emphasized that witnesses and others were able to attest to the veracity of Al Mahdi's admissions and that Al Mahdi's confession was more extensive than necessary.[115]

HOW DID THE ICC ADDRESS THE ISSUE OF CO-PERPETRATION UNDER ARTICLE 25(3)(a)?

The issue of co-perpetration was raised before the ICC because Al Mahdi did not act alone in ordering or carrying out the destruction of the monuments although he was the only person to be charged and tried for them.[116] Based on his admissions and evidence from the Prosecution and witnesses, the Trial Chamber found that Al Mahdi acted as a co-perpetrator under the Rome Statute due to his direction of the demolitions, recruitment of those involved in the demolitions, purchase of the supplies needed to carry out the demolitions, active participation in several acts of destruction, and publicity of these activities.[117]

[111] Rome Statute, *supra* note 6, at art. 65(1).
[112] *Id.* at art. 65(2).
[113] *Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 1, at para. 27.
[114] *Id.* at para. 28.
[115] *Id.* at para. 44.
[116] *Id.* at para. 40.
[117] *Id.*

WHAT SENTENCE WAS IMPOSED BY THE ICC?

At the end of trial proceedings, the Prosecutor and defense presented the Trial Chamber with an agreed upon plea arrangement under which the Prosecutor recommended that Al Mahdi be sentenced from 9–11 years in prison.[118] The Trial Chamber was under no obligation to comply with the terms of this arrangement if it was deemed inappropriate. However, the Trial Chamber agreed with the essential terms of the plea arrangement and sentenced Al Mahdi to 9 years in prison for his crimes, including time already served prior to sentencing.[119]

WHAT WAS THE ICC'S RATIONALE FOR THE SENTENCE?

The Trial Chamber explained that there was no established punishment term for the crime but that, by using the terms of the preamble of the Rome Statute to provide additional background and guidance, the punishment was determined through considerations of retribution and deterrence.[120]

The Trial Chamber held that retribution in this context is "not to be understood as fulfilling a desire for revenge, but as an expression of the international community's condemnation of the crimes, which, by way of imposition of a proportionate sentence, also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation."[121] Part of these considerations involve balancing specific deterrence for the person involved in the crime and general deterrence to ensure that the international community be put on notice of the ramifications of pursuing similar crimes.[122]

Additionally, retribution in sentencing at the ICC "must be proportionate to the crime and the culpability of the convicted person."[123] The Trial Chamber held that gravity in this context is "to be assessed in concreto, in light of the particular circumstances of the case. The sentences to be imposed must, therefore, reflect the gravity of the crimes charged."[124]

[118] *Id.* at para. 106.
[119] *Id.* at paras. 106–111.
[120] *Id.* at para. 66.
[121] *Id.* at para. 67.
[122] *Id.*
[123] *Id.*
[124] *Id.* at para. 71.

WHAT WAS THE ICC'S JUDGMENT IN THE CASE? HOW DID IT BALANCE AGGRAVATING AND MITIGATION CIRCUMSTANCES?

The Trial Chamber found Al Mahdi guilty of war crimes under Article 8(2)(e)(iv) as a co-perpetrator.[125]

In evaluating aggravating and mitigating factors, the Trial Chamber stated that it cannot "'double count' any factors assessed in relation to the gravity of the crime as aggravating circumstances and vice versa."[126] The standard for finding aggravating circumstances at the ICC is beyond a reasonable doubt.[127] In the context of assessing aggravating circumstances, it is necessary that the determination "must relate to the crimes of which a person was convicted or to the convicted person himself."[128] Further, the Trial Chamber emphasized that "the absence of a mitigating circumstance does not serve as an aggravating circumstance." The standard for mitigating circumstances is the balance of probabilities.[129] In this context, "[m]itigating circumstances need not be directly related to the crimes and are not limited by the scope of the charges or the Judgment. They must, however, relate directly to the convicted person."[130]

In this instance, the Trial Chamber found that there were no aggravating circumstances;[131] however, it was willing to consider Al Mahdi's initial reluctance to order the destruction of the sites as a mitigating circumstance.[132] Similarly, the Trial Chamber found Al Mahdi's good behavior once in custody and his admission of guilt to be mitigating circumstances,[133] as were Al Mahdi's statements of remorse and acknowledgments of the wrongfulness of his conduct and pledging not to repeat it.[134]

IN EVALUATING GRAVITY, HOW DID THE ICC BALANCE THE IMPORTANCE OF THE DESTROYED SITES TO THE LOCAL POPULATION AND TO THE INTERNATIONAL COMMUNITY?

The Trial Chamber found that "Timbuktu is at the heart of Mali's cultural heritage, in particular thanks to its manuscripts and to the mausoleums of the saints. The mausoleums reflected part of Timbuktu's history and its role in the expansion of Islam. They were of great importance to the people of Timbuktu, who admired them and were attached to them. They reflected their

[125] *Id.* at para. 62–63.
[126] *Id.* at para. 70.
[127] *Id.* at para. 73.
[128] *Id.*
[129] *Id.* at para. 74.
[130] *Id.*
[131] *Id.* at para. 88.
[132] *Id.* at para. 93.
[133] *Id.* at para. 100.
[134] *Id.* at para. 105.

commitment to Islam and played a psychological role to the extent of being perceived as protecting the people of Timbuktu."[135]

In addition to the damage to the people of Timbuktu, the Trial Chamber found that since the majority of the sites destroyed were UNESCO World Heritage sites, the "attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful inhabitants of Timbuktu, but also people throughout Mali and the international community."[136] Further, the Trial Chamber found particular significance in the religious aspects of the case and the persecution of beliefs that was encompassed by the destruction of the sites, stating that it "considers that the discriminatory religious motive invoked for the destruction of the sites is undoubtedly relevant to its assessment of the gravity of the crime."[137]

The Trial Chamber acknowledged the significance of both local and international interests in and connections to the Timbuktu sites that were destroyed by Al Mahdi. However, it placed the greatest emphasis for the gravity of its ruling on the intimate intersection between the shrines and mausoleums as cultural heritage sites and as religious sites.[138] The ways in which the Trial Chamber valued the primacy of the sites as having religious importance suggests that the connection between cultural heritage and religion was of importance when determining the impact of cultural crimes under Article 8(2)(e)(iv).

However, the Trial Chamber nonetheless created a sentencing distinction between the gravity of crime and sentence appropriate for actions against persons and for actions against property.[139] Regardless, the Trial Chamber found that both forms of crime had sufficient gravity to merit punishment and a finding of guilt of war crimes at the international level.[140]

HOW DID THE ICC HANDLE THE DIFFERENCE BETWEEN DAMAGE TO CULTURAL PROPERTY COMMITTED DURING ACTIVE HOSTILITIES AND IN THE POST-HOSTILITIES SETTING?

The Trial Chamber asserted that there is no difference in the protections owed to cultural heritage property during active armed conflict compared to the post-hostilities setting.[141] This is particularly the case where the direct hostilities have ceased, but the area in question is under the control of occupying forces.[142] The Trial Chamber noted that "the element of 'direct[ing] an attack'

[135] *Id.* at para. 78.
[136] *Id.* at para 80.
[137] *Id.* at para. 81.
[138] *Id.* at para. 79–81.
[139] *Id.* at para. 72.
[140] *Id.* at para. 77.
[141] *Id.* at para. 15.
[142] *Id.*

encompasses any act of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group."[143] Further, Article 8(2)(e)(iv) was found not to require "a link to any particular hostilities but only an association with the non-international armed conflict more generally."[144]

IS THE ICC'S PROSECUTION OF CULTURAL HERITAGE SIGNIFICANT PRECEDENT GOING FORWARD?

Yes. Cultural heritage crimes have featured prominently in recent and ongoing armed conflicts, for example, in Afghanistan,[145] Iraq,[146] Libya,[147] and Syria.[148] With this in mind, the United Nations Security Council issued Resolution 2199 in 2015 in order to highlight the dangers of cultural heritage destruction, focusing on Syria and Iraq in particular. UNESCO and Interpol have also taken an interest in cultural heritage crimes, increasing awareness of them and evidence available to support their prosecution in the future.[149]

Further, international conflicts, such as those involving the so-called Islamic State of Iraq and Syria ("ISIS"),[150] have been identified by the United Nations as creating a threat to peace and security and a specific threat to cultural heritage sites.[151] Although the Al Mahdi decision dealt with cultural heritage crimes in noninternational armed conflict, it established the groundwork for a definition of cultural heritage and for the punishment of acts of destruction that take into account the impact

---

[143] *Id.*

[144] *Id.* at para. 18.

[145] Perhaps the most symbolic act of cultural heritage site destruction in Afghanistan came from the Taliban's demolition of the Buddhas of Bamiyan. *See* UNESCO, *Cultural Landscape and Archaeological Remains of the Bamiyan Valley*, *at* http://whc.unesco.org/en/list/208 (last visited Oct. 30, 2016).

[146] Key examples of cultural heritage sites being destroyed as part of concerted conflict planning in Iraq include the Nineveh site itself and the Mosul library. *See* Oriental Institute, *Oriental Institute Statement on Cultural Destruction in Iraq*, *at* https://oi.uchicago.edu/about/statement-cultural-destruction-iraq (last visited Oct. 30, 2016).

[147] In Libya, the culturally and religiously vital Sufi shrines located throughout the country have been destroyed as a part of recent conflicts. *See* UNESCO, *UNESCO Director-General Calls on All Parties to Protect Libya's Unique Cultural Heritage*, *available at* http://icorp.icomos.org/index.php/news/29-unesco-director-general-calls-for-an-immediate-halt-to-destruction-of-sufi-sites-in-libya (last visited Oct. 30, 2016).

[148] In Syria, there are numerous examples of intentional destruction and looting of cultural heritage sites as part of a coordinated plan of attack on the local population and to assert territorial control, such as the destruction of sites in Palmyra and Aleppo. *See* Syrian Cultural Heritage: APSA-report – April, May and June 2015, *available at* http://en.unesco.org/syrian-observatory/sites/syrian-observatory/files/Syrian_Cultural_Heritage_APSA-report-April-May-and-June-2015-.pdf (last visited Oct. 30, 2016).

[149] SC Res. 2199 (Feb. 12, 2015).

[150] ISIS is also varyingly known as the "Islamic State in Iraq and the Levant" ("ISIL") and *Da'esh*.

[151] *See* United Nations Security Council, Report of the Secretary-General on the Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat, S/2016/92 (Jan. 29, 2016), *at* http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/92 (last visited Oct. 30, 2016).

of the cultural heritage sites in question on the local and international populations. Given this, the Al Mahdi case will likely be an important guide for understanding the development of a core body of ICC law relating to cultural heritage crimes at the international level in the future.

To the extent that states either have the crime of destruction of cultural heritage already in their national laws, or have it by virtue of having incorporated Rome Statute crimes into their domestic legislation, there is also potential for prosecution of these crimes at the national level.

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

LETTER TO SECRETARY OF STATE REX W. TILLERSON AND ACTING LEGAL ADVISER RICHARD C. VISEK

AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION
INTERNATIONAL CRIMINAL COURT COMMITTEE

June 1, 2017

Secretary of State Rex W. Tillerson
Acting Legal Adviser Richard C. Visek
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

re: U.S. Policy toward the International Criminal Court and the importance of the Office of Global Criminal Justice

Dear Secretary of State Tillerson & Acting Legal Adviser Visek:

As chairperson of the Committee on the International Criminal Court of the American Branch of the International Law Association ("ABILA"),[1] I write to you regarding (1) the significant role of the United States in championing the prosecution of atrocity crimes; (2) the benefits of the United States continuing its engagement with the International Criminal Court ("ICC"); and (3) the importance of the Office of Global Criminal Justice and the continued need for that office. The committee would also like to express strong support for the recently articulated position of the U.S. Embassy in Khartoum, that the United States "oppose[s] invitations, facilitation, or support for travel by any person subject to outstanding International Criminal Court (ICC) arrest warrants, including President Bashir." [2]

This letter is primarily intended to assist you in developing U.S. policy vis-à-vis the ICC. It provides an overview of the role the United States has played in the development of international criminal justice and highlights some of the lessons that can be learned from the U.S.-ICC

[1] The ABILA ICC Committee consists of approximately 42 members. This letter does not represent the views of the American Branch of the International Law Association, which does not take positions on issues.
[2] U.S. Embassy in Khartoum, 17 May 2017.

relationship thus far. We encourage you to continue to foster a relationship between the United States and the ICC that advances the shared interests of both, insofar as these overlap. We also encourage you to appoint an Ambassador-at-Large for Global Criminal Justice to help navigate this ongoing and important relationship as well as continue other helpful work advancing the prosecution of atrocity crimes (for ICC purposes, genocide, war crimes and crimes against humanity).

We are encouraged by the position of principled engagement with the Court that the United States has employed over the course of the last dozen years, beginning in the second term of President George W. Bush, and including ongoing U.S. support for individual investigations and prosecutions on a case-by-case basis where consistent with U.S. national interests. We hope the United States will continue this policy of strategic engagement with the Court, when it is in the best interests of the United States. At the same time, we recognize that the U.S. has ongoing concerns regarding the ICC and no immediate plans for ratification.

(1) The Leading Role of the United States in International Criminal Justice

The United States has played a leading role in the development of international criminal justice since it first spearheaded efforts to ensure accountability for atrocities committed during World War II. At that time, then-Associate Supreme Court Justice Robert Jackson took a leave of absence from his duties at the Court to lead the prosecution of Nazi war criminals before the International Military Tribunal at Nuremberg, an institution that he helped create. Meanwhile, U.S. General Douglas MacArthur issued the special proclamation that established the International Military Tribunal for The Far East (Tokyo Tribunal), where the U.S. led the prosecution and was represented on the Tribunal's judicial panel.

The United States has similarly been at the forefront of the current resurgence of international criminal law, for example, leading the creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively), as well as the Special Court for Sierra Leone (SCSL). By playing key roles in the functioning of these institutions, the United States has strengthened their work and the development of international criminal law. At the ICTY, for instance, the United States has had a consistent judicial presence throughout the course of the Tribunal's run, with U.S. appointees serving as President of the Tribunal for much of the Tribunal's operations. U.S. presence at the SCSL has likewise been strong. Since its inception, three of the four SCSL Prosecutors hailed from the United States, and it is one of those American Prosecutors who is currently tasked with finishing the work of the court in its residual mechanism. Former U.S. Ambassador-at-Large for War Crimes David J. Scheffer is currently tasked with assisting the Extraordinary Chambers in the Courts of Cambodia, a tribunal prosecuting remaining high-level members of the Khmer Rouge; that tribunal is also currently led by a U.S. national as its international prosecutor.

Notably, this engagement has directly benefited U.S. policy-making and, in particular, has enhanced the leadership of the Office of Global Criminal Justice. For example, Pierre-Richard Prosper and Clint Williamson—the two Ambassadors-at-Large for War Crimes Issues appointed by former President Bush—brought to the position their experience as war crimes prosecutors at the ICTR and ICTY, respectively. Ambassador Stephen J. Rapp, who served both at the ICTR and as Prosecutor of the SCSL, also advanced such important work.

Consistent with this longstanding engagement, the United States was also at the forefront of the creation of the ICC. The United States played a prominent role in the drafting of the Statute for the ICC, with the bipartisan backing of Congress.[3] While the United States voted against the final draft of the Statute, it continued to hold a prominent position in the later work done to establish the ICC[4] by helping to develop key documents designed to direct the work of the Court.

(2) The Interests of the United States and the ICC are Often Aligned; thus, the U.S. Should Continue to Engage with the Court on a Case-by-Case Basis Where Consistent with U.S. National Interests

Both the United States and the ICC are committed to the broader notion that perpetrators of atrocity crimes ought to be held accountable, and their interest in ending impunity for specific crimes often overlaps:

- This includes, for example, a shared commitment to investigating and prosecuting the atrocities committed in Darfur, which former Secretary of State Colin Powell famously concluded amounted to genocide. Because Sudan is not a party to the ICC, the Court can only exercise jurisdiction over conduct committed on its territory if authorized by the United Nations Security Council (UNSC). A resolution to that effect was successfully passed during the second Bush Administration, a measure described by a Bush Administration official as having "an important sort of diplomatic dimension...sending a signal about accountability."[5]

- The ICC has also indicted key members of the Lord's Resistance Army, prosecutions that the United States also supports through the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009 ("LRA Act"), passed with unanimous consent in the Senate. Indeed, until recently the United States had Special Operations Forces working with members of the Ugandan military to track the head of the LRA, Joseph Kony, wanted by the ICC for mass atrocity crimes including the use of child soldiers and hacking off the limbs of victims.

[3] 103 H.R.J. Res. 89, 105th Cong. (1997).
[4] As a signatory to the Final Act in Rome, the U.S. earned the right to be a part of the Court's Preparatory Commission. Ellen Grigorian, *The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns*, Congressional Research Service Report, Report RL 30020, at 23 (updated Jan. 6, 1999).
[5] Press Briefing on Sudan, Robert Zoellick, Deputy Sec'y of State (May 27, 2005).

A shared priority of the United States and the ICC is for cases to be prosecuted domestically, unless nations lack the will or capacity for domestic prosecutions. The Court is designed to complement domestic proceedings, with any state able to block the ICC from exercising jurisdiction by addressing the crimes themselves through credible investigations and, if appropriate, prosecutions.[6] Thus, for example, the U.S. stands in a position to legally preempt the ICC's ability to investigate or prosecute any U.S. nationals for conduct in Afghanistan, by conducting such investigations or prosecutions itself. This would be equally true for crimes allegedly committed on the territory of, or by the nationals of, U.S. allies, or for any other country.

The ICC has also focused its targets on areas of critical concern to the United States, including the ICC's first prosecution of an Al Qaeda operative, Ahmad Al Faqi Al Mahdi, a member of Ansar Dine/Al Qaeda in the Islamic Maghreb. The ICC also has jurisdiction to prosecute ex-members of the Gadhafi regime, after a referral resolution by the U.N. Security Council that the United States supported. The ICC's Prosecutor also has the ability to prosecute ISIS members in Libya, as well as any ISIS members in Syria or Iraq who hail from an ICC State Party. The Prosecutor has already been exploring the feasibility of such prosecutions.

These efforts demonstrate that, on a case-by-case basis, it can benefit the United States to work with the Court. Indeed, this fact has been recognized by U.S. presidential administrations since 2005, and was affirmed in Congressional legislation from 2013 that, with bipartisan support and by unanimous vote in both Houses, expanded the U.S. Rewards for Justice Program to back the apprehension of individuals wanted by the ICC.[7]

This expansion of the Rewards Program has enabled the United States to incentivize arrests that advance U.S. interests, including ICC warrants for members of two different rebel factions that were designated by the United States as terrorist groups in the wake of 9/11.[8] In fact, one of the accused added to the U.S. wanted list was expressly targeted by Executive Order 13413 for crimes committed abroad that then-President George W. Bush deemed "an unusual and extraordinary threat to the foreign policy of the United States."[9] Significantly, two of the four ICC accused added to the U.S. Rewards Program are now in ICC custody and awaiting trial for war crimes and crimes against humanity.

Importantly, by continuing to assist the Court on cases and issues that are important to American national interests, the United States will draw additional benefits, including the enhanced goodwill of key allies, many of whom are ICC members. Moreover, because U.S. law limits support for the

[6] Article 17, Rome Statute.
[7] Department of State Rewards Program Update and Technical Corrections Act
[8] ICC accused Joseph Kony and Dominic Ongwen are both members of the Lord's Resistance Army (LRA), while Sylvestre Mudacumura, commands a rebel group that absorbed the Army for the Liberation of Rwanda (ALIR). Both the LRA and ALIR are U.S.-designated terrorist groups. Statement on the Designation of 39 Organizations on the USA PATRIOT Act's Terrorist Exclusion List (Dec. 6, 2001).
[9] Executive Order 13413 (Oct. 27, 2006).

Court to "in-kind" assistance, working with the ICC, as warranted, involves no direct costs to the United States.[10] The United States also has extensive power to shape the ICC's docket by the referral and deferral power of the U.N. Security Council; thus, the U.S. can vote for referrals (or block them via its veto power), as well as vote to defer ICC investigations and prosecutions.

In addition, continued engagement with the Court would align with domestic public opinion, which continues to support U.S. leadership in world affairs and the institutions that govern them.[11] In fact, U.S. engagement with the ICC has enjoyed majority support with the American public for years,[12] and that support has continued to grow over time.[13] This is consistent with widespread U.S. interest in combatting impunity and furthering international justice, non-partisan issues for which support extends across demographics, including political affiliation.[14]

Additionally, experience has shown that efforts to control the Court through bilateral relations are counterproductive. For example, the Bush Administration initially put pressure on countries to enter into bilateral immunity agreements a/k/a "article 98" agreements or lose U.S. funding assistance. The consequence was a continuing wave of strong criticism from countries that are close allies of the United States including almost all European countries—both individually and through resolutions and declarations by the EU—and by the great majority of Latin American countries. The reaction in many nations to military aid bans was so severe that American military relations with them were seriously damaged and the Defense Department asked Congress to lift the bans, which it did. Former Secretary of State Condoleezza Rice described the early Bush Administration policy, which pushed countries to obtaining foreign aid instead from China, as "shooting ourselves in the foot."[15] Such mistakes should not be repeated.

(3) Appointing an Ambassador-at-Large for Global Criminal Justice

Since 1997—just prior to the adoption of the ICC Statute—the United States has had an Ambassador-at-Large for Global Criminal Justice (formerly known as the Ambassador-at-Large for War Crimes Issues) who has led the Office of Global Criminal Justice at the State Department. As this brief overview suggests, previous Ambassadors have done invaluable work and this position ought to be promptly filled and meaningfully supported (and funding for the Office

[10] Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Foreign Relations Authorization Act (H.R. 3427), Public Law No. 106-113, §§ 705-706, November 29, 1999.

[11] DINA SMELTZ ET AL., CHI. COUNCIL ON GLOB. AFFAIRS, AMERICA IN THE AGE OF UNCERTAINTY 26-27 (2016).

[12] SMELTZ, CHI. COUNCIL ON GLOB. AFFAIRS, FOREIGN POLICY IN THE NEW MILLENNIUM 23 (2012) (70% support in 2012); CHI. COUNCIL ON GLOB. AFFAIRS, CONSTRAINED INTERNATIONALISM: ADAPTING TO NEW REALITIES 16 (2010) (70% support in 2010); CHI. COUNCIL ON GLOB. AFFAIRS, ANXIOUS AMERICANS SEEK A NEW DIRECTION IN UNITED STATES FOREIGN POLICY 13 (2008) (68% support in 2008).

[13] SMELTZ ET AL., at 31.

[14] *Id.* at 31-32 (72% support in 2016).

[15] Steven R. Weisman, U.S. Rethinks Its Cutoff of Military Aid to Latin American Nations, N.Y. Times, March 12, 2006, at *http://www.nytimes.com/2006/03/12/politics/us-rethinks-its-cutoff-of-military-aid-to-latin-american-nations.html.*

certainly should not be cut). A point person with the title of Ambassador and with established knowledge in the field of international criminal justice would provide an invaluable resource on the ICC and other international accountability efforts as this Administration moves forward. Such a figure could help to identify cases and situations of shared interest to the United States and the ICC, as well as work on other important initiatives to support the prosecution of atrocity crimes where consistent with U.S. national interests.

Moreover, history suggests that the experience gained in this role engenders additional benefits beyond an individual's designated term. Former Ambassadors-at-Large have gone on to play key roles outside of the United States, including serving as the UN Secretary-General's Special Expert on the Extraordinary Chambers of the Courts of Cambodia and as the European Union's Lead Prosecutor responsible for investigating war crimes in Kosovo. In other words, filling this position will not only directly assist the United States in the short term, but could contribute to future additional U.S. leadership roles in the field of international criminal justice.

* * *

For 70 years, the United States has been a global leader in the field of international criminal law, which it helped to create to ensure accountability infused with American values of fairness and the rule of law. The U.S. should not abdicate this leadership, and should instead continue to play a pivotal role in ending impunity, protecting the vulnerable, and creating a more just world. We hope that you will seriously consider the recommendations suggested in this letter as vital steps in this process.

I would be happy to meet with you or individuals within your offices regarding these issues.

Thank you for your consideration.

Sincerely,

Jennifer Trahan,
Chair, International Criminal Court Committee
American Branch of the International Law Association
jennifer.trahan@att.net

IV. CONSTITUTIONS AND BY-LAWS

INTERNATIONAL LAW ASSOCIATION

CONSTITUTION OF THE ASSOCIATION

(adopted at the 77th Conference, 2016)

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. Including through its website or otherwise online, gratuitously or otherwise, such papers, books, periodicals, pamphlets or other printed or electronic media 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 At least three of the Officers, designated by the Chair after consultation with all the Officers, shall constitute the Trustees of the Association for the purposes of the law regulating charities in the United Kingdom.

6 The Executive Council

6.1 The powers of the Association shall be vested in the Executive Council in the intervals between Conferences.

6.2 The members of the Executive Council shall be:-

6.2.1 the President, Vice-Presidents and Patrons;

6.2.2 the Officers;

6.2.3 the ex-Chairs and ex-Vice-Chairs of the Executive Council;

6.2.4 one to three Branch members elected by each Branch in accordance with the following formula: one member for a fully paid Branch membership of fewer than 100, two members for a fully paid Branch membership between 101 and 250, and three members for a fully paid Branch membership above 250; and

6.2.5 individuals co-opted by the Executive Council.

6.3 Members appointed in accordance with Articles 6.2.4 and 6.2.5 above shall be Members for a period not exceeding four years and shall be eligible for re-election or co-option again.

6.4 The Chair shall preside at any meeting of the Executive Council. In the absence of the Chair the Vice-Chair with the longest period in office shall preside.

6.5 If a Member appointed in accordance with Article 6.2.4 cannot attend a meeting of the Executive Council, then the president of the electing Branch may appoint a substitute to attend that meeting only.

6.6 A vacancy in the Executive Council may be filled by election by the electing Branch, if the former member was appointed in accordance with Article 6.2.4, or

by co-option, if the former member was appointed in accordance with Article 6.2.5. For the purposes of this Article 6.6 a vacancy shall occur by reason of resignation, death or election of that member as an Officer or President.

6.7 Eight members of the Executive Council shall constitute a quorum.

6.8 The Executive Council may appoint a Finance and Policy Committee and other special or standing committees, and it shall determine their terms of reference, powers, duration and composition.

6.9 The Executive Council shall have regard to any general direction of the Full Council.

6.10 The Executive Council shall, subject to the provisions of this Constitution, have power to settle, adopt and issue standing orders and/or rules for the Association, including standing orders or rules for the conduct of Conferences.

6.11 The Executive Council shall have power to delegate to such person or persons being members of the Association, such powers as it may resolve from time to time and for such period and on such conditions as it may resolve, in furtherance of the objectives of the Association and the conduct of its business.

6.12 The Executive Council shall have the power to consult and decide, in the interval between meetings, by electronic means, as follows:

6.12.1 Consultation: The Chair and the Secretary-General may, at the request of any Officer, propose a decision in draft form, including decisions for the approval of constitutions of new Branches in accordance with paragraph 8.5. The proposal shall include all relevant documents, request responses from members of the Executive Council, and set a reasonable deadline which shall not be less than one full week for such responses.

6.12.2 Decisions: After consultation in accordance with paragraph 6.12.1, the Chair and the Secretary-General may solicit a decision by consensus, setting a further deadline of no less than one full week for agreement on a decision in final form. If no objection is received by the deadline from any member of the Executive Council, that decision shall be taken as passed. If any objection is received by the deadline, the matter shall either be subject to further consultation, or shall be put before the Executive Council at a meeting.

6.12.3 Decisions reached by consensus shall be included in the Minutes of the next Executive Council Meeting.

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 and at such time 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.

CERTIFICATE OF INCORPORATION

OF

THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

A NONSTOCK CORPORATION ORGANIZED UNDER THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE

ARTICLE I

The name of the corporation is The American Branch of the International Law Association. Subject to the approval of the member or members of the corporation, the corporation shall become a branch of the International Law Association, an unincorporated association registered as a charity under the laws of England and Wales (the "ILA"), and the successor to the unincorporated association known as The American Branch of the International Law Association. This Certificate shall be deemed the constitution of the corporation under the constitution of the ILA.

ARTICLE II

The address of the corporation's registered office in the State of Delaware is c/o Registered Agent Solutions, Inc. 1679 S. Dupont Hwy., Suite 100, in the City of Dover, County of Kent, 19901. The registered agent of the corporation at such address is Registered Agent Solutions, Inc.

ARTICLE III

The corporation is a nonprofit corporation organized exclusively for charitable purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), or the corresponding provision of any subsequent federal tax law, including, but not limited to, the following:

(1) to further, in cooperation with the ILA, the education of academic scholars and practitioners in the field of international law, public and private;

(2) to promote, in cooperation with the ILA, the study, discussion, development and advancement of international law; and

(3) to engage, in furtherance of the foregoing, in any and all lawful activities for which a corporation may be organized under the General Corporation Law of the State of Delaware (the "DGCL"), except as restricted herein or in the bylaws of the corporation.

Notwithstanding any provision of this Certificate or any provisions of applicable state law to the contrary, the corporation is not authorized (a) to make any payments or distributions or otherwise carry on any activities, which would cause it to fail to qualify, or to continue to qualify, as (i) an organization exempt from federal income tax under section 501(c)(3) of the Code, or (ii) an organization contributions to which are deductible under sections 170, 2055 and 2522 of the Code, or (b) to accept gifts or contributions for other than the charitable purposes stated above.

ARTICLE IV

The corporation is not organized for pecuniary profit or financial gain, and no part of the earnings or assets of the corporation shall ever inure to the benefit of or be distributable to any individual having a personal or private interest in the activities of the corporation. No member, Director (as defined below), officer or employee of the corporation is entitled or permitted to receive any pecuniary profit from the operations and activities of the corporation, except reimbursement of out-of-pocket expenditures incurred in carrying out the exempt purposes of the corporation and reasonable compensation for services actually rendered to or on behalf of the corporation.

ARTICLE V

Under no circumstances may the corporation (a) carry on propaganda or otherwise attempt to influence legislation in a manner that would subject the corporation to any tax imposed by section 4911 of the Code, or (b) participate in, or intervene in (including by the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office or engage in any activities which would characterize it as an "action organization" as defined in Treasury Regulation section 1.501(c)(3)-1(c)(3). No substantial part of the activities of the Corporation shall be devoted to the carrying on of propaganda or otherwise attempting to influence legislation, except to the extent permitted by the Code, whether pursuant to an election under section 501(h) or otherwise.

ARTICLE VI

The corporation is a nonstock corporation and has no authority to issue capital stock.

ARTICLE VII

The member or members of the corporation shall be those persons, institutions, firms, associations or corporations meeting such conditions of membership as shall be set forth in the bylaws. Each member of the corporation, whether a natural person, an institution, a firm, an association or a corporation, shall be entitled to one vote on each matter submitted to a vote of members at any meeting of members of the corporation. Each member of the corporation entitled to vote at a meeting of members of the corporation may authorize another person or persons to act for such member by proxy. A member of the corporation may revoke any proxy that is not by law irrevocable by attending the meeting and voting in person or by filing with the Secretary either an instrument in writing revoking the proxy or another duly executed proxy bearing a later date. Each proxy shall be deemed to have expired, and no such proxy shall be voted, after six months from its date of execution unless such proxy provides on its face for a longer period.

ARTICLE VIII

The governing body of the corporation shall be known as the Board of Directors, and its members shall be known as Directors. Except as otherwise provided by the DGCL, the business and affairs of the corporation shall be managed by or under the direction of the Board of Directors.

The Board of Directors shall consist of the current Principal Officers of the corporation (as designated by or in the manner provided for in the bylaws; provided that the Principal Officers of the corporation shall include the president and the secretary of the corporation), the immediate past president of the corporation acting as the chairperson of the Board of Directors, and the honorary vice-presidents of the corporation, each *ex officio* (each of the foregoing, an "*Ex Officio* Director") and such number of Directors, not fewer than ten nor more than twenty, as may be fixed from time to time by the Board of Directors (the "At-Large Directors"). Election of Directors shall take place at each annual meeting of members of the corporation that takes place in an even-numbered year and shall be conducted in the manner provided for in the bylaws. Except as otherwise provided by this Certificate, any vacancies occurring in the Board of Directors may be filled as provided in the bylaws. Any At-Large Director may be removed at any time, and any *Ex Officio* Director may be removed at any time from the position or office giving rise to such *Ex Officio* Directorship, either for or without cause, upon the affirmative vote of not less than a majority of the members of the

corporation present in person or by proxy at a meeting of members of the corporation. Any vacant At-Large Directorship or position or office giving rise to an *Ex Officio* Directorship that is created by such removal may be filled by a vote of the members of the corporation present in person or by proxy at such meeting, or in lieu thereof as provided by the bylaws.

At all meetings of the Board of Directors, the presence of seven Directors shall constitute a quorum for the transaction of business. An absence of quorum that occurs after a meeting of the Board has begun shall not preclude the transaction of business, provided, that an act of the Board shall in all cases require an affirmative vote by the greater of (a) four Directors and (b) such vote as is otherwise required by law, this Certificate or the bylaws of the corporation.

Any action required or permitted to be taken at any meeting of the Board of Directors may be taken without a meeting if a majority of members of the Board of Directors consent thereto in writing or by electronic transmission and such writing or writings or electronic transmissions are filed with the minutes of proceedings of the Board of Directors; provided, that no such action without a meeting shall be effective if any member of the Board of Directors who has not consented to such action shall have transmitted to the president or secretary of the corporation his or her objection to such action, in writing or by electronic transmission, within ten days of his receipt of notice of such action.

The Board of Directors and the corporation shall have such sections and other committees, with such memberships and powers, as may be provided in the bylaws. The bylaws may delegate to the president of the corporation the power to establish and appoint or alter the membership of any committee of the Board of Directors or of the corporation.

The following persons shall serve as the initial Directors of the corporation, either *ex officio* or until their respective successors are duly elected and qualify, or until their earlier death, resignation or removal:

Name	*Ex Officio* Position or At-Large Status	Mailing Address
John E. Noyes	Chair	California Western School of Law 225 Cedar Street San Diego, CA 92101-3113
Ruth Wedgwood	President	11510 Lake Potomac Dr. Potomac, MD 20854

Valerie Epps	Vice-President	Suffolk University School of Law 120 Tremont Street Boston, MA 02114
Gary N. Horlick	Vice-President	1330 Connecticut Ave. NW Suite 219 Washington, DC 20008
Philip M. Moremen	Vice-President	Seton Hall University, Whitehead School 400 S. Orange Ave. South Orange, NJ 07079
Leila N. Sadat	Vice-President	Washington University School of Law Campus Box 1120 One Brookings Drive St. Louis, MO 63130-4899
David P. Stewart	Vice-President	Georgetown University Law Center 600 New Jersey Ave NW Washington, DC 20001
Houston Putnam Lowry	Secretary	Brown & Welsh, P.C. Meriden Executive Park 530 Preston Avenue Meriden, CT 06450-0183
Charles N. Brower	Honorary Vice-President	White & Case LLP 701 13 St NW Washington, DC 20005
Edward Gordon	Honorary Vice-President	325 Sharon Park Dr. #809 Menlo Park, CA 94025
P. Nicholas Kourides	Honorary Vice-President	27 Polly Park Road Rye, NY 10580

Luke T. Lee	Honorary Vice-President	6624 River Road Bethesda, MD 20817
Cynthia Lichtenstein	Honorary Vice-President	22 Water Street Stonington, CT 06378
John F. Murphy	Honorary Vice-President	Villanova University School of Law Villanova, PA 19085-1682
James A.R. Nafziger	Honorary Vice-President	Willamette University School of Law 245 Winter St. NE Salem, OR 97301
Ved Nanda	Honorary Vice-President	Director, Int'l Studies Program University of Denver College of Law 2255 East Evans Avenue Denver, CO 80208
Cecil J. Olmstead	Honorary Vice-President	4 Sprucewood Lane Westport, CT 06880-4021
Alfred P. Rubin	Honorary Vice-President	228 Slade St. Belmont MA 02478
Robert B. von Mehren	Honorary Vice-President	Debevoise & Plimpton LLP 919 Third Ave. New York, NY 10022
William Aceves	At-Large	California Western School of Law 225 Cedar Street San Diego, CA 92101-3046
Catherine Amirfar	At-Large	Debevoise & Plimpton LLP 919 Third Ave. New York, NY 10022

Dr. Kelly Askin	At-Large	Senior Legal Officer International Justice Open Society Justice Initiative 400 W. 59th St. New York, NY 10019
Andrea J. Bjorklund	At-Large	UC Davis School of Law 400 Mark Hall Drive Davis, CA 95616
Ronald A. Brand	At-Large	Director, Center for Int'l Legal Education; University of Pittsburgh School of Law 3900 Forbes Avenue Pittsburgh, PA 15260
John Carey	At-Large	86 Forest Avenue Rye, NY 10580
Christina M. Cerna	At-Large	550 N Street SW Apt #S-901 Washington, DC 20024
Paul R. Dubinsky	At-Large	Wayne State University Law School 471 West Palmer St. Detroit, MI 48202
Malvina Halberstam	At-Large	Benjamin N. Cardozo School of Law 55 Fifth Ave. at 12th Street New York, NY 10003
Scott Horton	At-Large	Human Rights First 333 Seventh Ave. 13 Fl. New York, NY 10001-5108
Karen A. Hudes	At-Large	5203 Falmouth Rd. Bethesda, MD 20816

Larry Johnson	At-Large	141 East 88th St., Apt. 3H New York, NY 10128
Anibal Sabater	At-Large	Fulbright Tower 1301 McKinney Suite 5100 Houston, TX 77010-3095
Michael P. Scharf	At-Large	13 Pepperwood Lane Pepper Pike, OH 44124
Louise Ellen Teitz	At-Large	Roger Williams University School of Law Ten Metacom Avenue Bristol, Rhode Island 02809
Nancy Thevenin	At-Large	Baker & McKenzie LLP 1114 Avenue of the Americas New York, NY 10036
Susan Tiefenbrun	At-Large	2683 Via de la Valle #G-514 Del Mar, CA 92014
Vince Vitkowsky	At-Large	Edwards Wildman Palmer LLP 750 Lexington Avenue New York, NY 10022
George Walker	At-Large	Wake Forest University School of Law PO Box 7206 Winston-Salem, NC 27109-7206
Peter K. Yu	At-Large	Drake University Law School 2507 University Avenue Des Moines, IA 50311

ARTICLE IX

No Director of the corporation has any liability to the corporation or its members for monetary damages for breach of such director's fiduciary duty as a Director. The preceding sentence does not eliminate or limit the liability of a Director (a) for any breach of the Director's duty of loyalty to the corporation or its members, (b) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law, (c) under Section 174 of the DGCL (imposing certain penalties in the case of willful or negligent violation of certain provisions of the DGCL with regard to payment of dividends to members, and in the case of stock corporations of certain other dispositions of corporate stock) or (d) for any transaction from which the Director derived an improper personal benefit.

ARTICLE X

Bylaws may be adopted, amended, altered or repealed by a majority vote of the members of the corporation present in person or by proxy at a meeting of members of the corporation or by resolution adopted by the Board of Directors.

ARTICLE XI

The corporation shall not, at any time, allow to remain outstanding total indebtedness in excess of the net worth of the corporation or incur any financial or other obligation that would cause the corporation to have a total outstanding indebtedness in excess of the corporation's net worth.

If there is a liquidation, dissolution or winding up of the affairs of the corporation, whether voluntary, involuntary or by operation of law, the Board of Directors shall, except as may be otherwise provided by applicable law, distribute all of the assets of the corporation in: such manner as the Board of Directors may determine so long as the distribution is (a) solely in furtherance of the objectives and purposes set forth in Article III of this Certificate and (b) is made to one or more organizations that are exempt from taxation as organizations described in section 501(c)(3) of the Code.

ARTICLE XII

This Certificate may be amended by a three-fourths affirmative vote of those members of the corporation who are present at a meeting of the members of the corporation (provided that a notice setting forth the proposed amendment or amendments shall have been sent to the members of the

corporation such member at least twenty days prior to such meeting) and the filing of a certificate of amendment in accordance with the requirements of the DGCL.

This Certificate may not be amended to authorize the Board of Directors to manage or conduct the operations or affairs of the corporation in any manner or for any purpose that would cause the corporation to fail to qualify or continue to qualify as an organization exempt from federal income tax under section 501(c)(3) of the Code or an organization contributions to which are deductible under sections 170, 2055 and 2522 of the Code.

ARTICLE XIII

This Certificate shall be effective on the date it is filed with the office of the Secretary of State of the State of Delaware.

ARTICLE XIV

The name and mailing address of the incorporator are as follows:

Sean P. Neenan
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022

The powers of the incorporator shall terminate upon the filing of this Certificate with the office of the Secretary of State of the State of Delaware.

[Filed on October 22nd, 2012 by Sean P. Neenan.]

BYLAWS OF

THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

(Adopted on October 9, 2018)

ARTICLE I

NAME

Section 1.01. Name. The name of this corporation is The American Branch of the International Law Association (the "Corporation"). The Corporation was incorporated under the General Corporation Law of the State of Delaware (the "DGCL") in 2012 to become, subject to the approval of the member or members of the Corporation (the "Members"), the successor to the unincorporated association The American Branch of the International Law Association (the "Association"), which was organized in 1922 as a branch of the International Law Association, an unincorporated association registered as a charity under the laws of England and Wales (the "ILA").

ARTICLE II

MEMBERS

Section 2.01 Members.

(a) The Members shall be those persons satisfying the conditions of Membership set forth herein. Each Member, whether a natural person, an institution, a firm, an association or a corporation, shall be entitled to one vote on each matter submitted to a vote of Members at any meeting of Members (such vote, in the case of a Member that is not a natural person, to be cast by such Member's designee). Except as otherwise provided in the certificate of incorporation, the initial Member shall be the Association. Upon the occurrence of both (i) conveyance by the Association to the Corporation, and assumption by the Corporation from the Association, of all the property, real, personal, and mixed, tangible and intangible; rights; credits; and choses in action then belonging to the Association and (ii) succession by the Corporation to the liability of the Association for any and all debts and obligations theretofore incurred by the Association then outstanding, including, without limitation, by the assignment and novation to the Corporation of

all contracts then in effect to which the Association is a party (both (i) and (ii) collectively, the "Reorganization"), the Association shall immediately cease to be a Member and the Members shall, as of the completion of the Reorganization, be those individuals, institutions, firms, associations and corporations who, immediately prior to the Reorganization, were members of the Association.

(b) Each Member, other than the Association as initial Member prior to the Reorganization, shall, by virtue of such Membership, also become a member of the ILA without further payment of dues and shall be entitled to receive all of the current publications and reports of the ILA.

Section 2.02 Applications for Membership.

(a) Any individual, institution, firm, association or corporation that is eligible for membership in the ILA may apply to become a Member by submitting a written application to the secretary of the Corporation (the "Secretary"). The Corporation's board of directors (the "Board" and each of its members, a "Director") may prescribe a form for such an application. Such individual, institution, firm, association or corporation shall become a Member upon the approval of such application by the Board and the payment of any applicable Membership dues.

(b) Any individual, institution, firm, association or corporation that is eligible for membership in the ILA may become a Member upon an affirmative vote of the Members and the payment of any applicable Membership dues.

(c) A member of the ILA who resides or has business within the United States may become a Member by submitting a request in writing to the Secretary to be enrolled as a Member and by payment of any applicable Membership dues. The Board may prescribe a form for such an enrollment request.

Section 2.03 Membership Dues. Membership dues may be established from time to time by the Board for Members.

Section 2.04 Termination.

(a) Members may terminate their status as such by written resignation at any time, but resignation shall not relieve such individuals of the obligation to pay any unpaid Membership dues.

(b) Failure to pay Membership dues shall result in termination of status as a Member.

Section 2.05 Meetings of Members.

(a) An annual meeting of Members (an "Annual Meeting") for the transaction of business shall be held each year either within or without the State of Delaware on such date and at such place and time, if any, as are designated by resolution of the Board. Election of Directors shall take place at each Annual Meeting that occurs in an even-numbered year (each, a "Biennial Meeting"). [DGCL §§ 215(a), 211(b)]1

(b) A special meeting of the Members (a "Special Meeting") for any purpose may be called at any time by the Board or by the president of the Corporation (the "President"), or upon the written request of not less than ten percent of Members, to be held either within or without the State of Delaware on such date and at such time and place as are designated by resolution of the Board or, if in lieu thereof, in the notice of such Special Meeting. [DGCL § 211]

(c) The Secretary shall cause notice of each meeting of Members including the Annual Meeting to be given to each Member entitled to vote at such meeting in writing (i) by electronic transmission or (ii) by first class mail postage prepaid to such Member's postal address as shown on the records of the Corporation, not less than twenty days nor more than fifty days prior to such meeting except where a different notice period is required by law. Such notice shall specify (i) the place, if any, date and time of such meeting, (ii) the means of remote communications, if any, by which Members and proxy holders may be deemed to be present in person and vote at such meeting, (iii) in the case of a Special Meeting, the purpose or purposes for which such meeting is called and (iv) such other information as may be required by law or as may be deemed appropriate by the Board. Except as otherwise provided by law, the quorum for a meeting of Members shall be that number of Members present either in person or by proxy at any meeting of Members. Unless otherwise required by law, the certificate of incorporation or these bylaws, the Members shall act by a vote of a majority of the Members present at any meeting at which a quorum is present and entitled to vote on the matter. The Board may establish additional rules for conducting or adjourning a meeting of Members to the extent consistent with the DGCL, the certificate of incorporation and these bylaws.

(d) The record date for determining Members eligible to vote for any meeting of Members shall be the close of business on the day prior to the sending of notice to Members or, if all

[1] [The citations at the end of sections, as well as this footnote, are inserted for reference and assistance in administration only, and do not constitute a part of the bylaws.]

Members waive notice, the date of such meeting. Each Member entitled to vote at a meeting of Members may authorize another person or persons to act for such Member by proxy. A Member may revoke any proxy that is not by law irrevocable by attending the meeting and voting in person or by filing with the Secretary either an instrument in writing revoking the proxy or another duly executed proxy bearing a later date. Each proxy shall be deemed to have expired, and no such proxy shall be voted, after six months from its date of execution unless such proxy provides on its face for a longer period.

(e) A waiver of notice of meeting by a Member provided to the Corporation in writing or by electronic transmission, whether given before or after the meeting time stated in such notice, is deemed equivalent to notice. Attendance of a Member at a meeting is a waiver of notice of such meeting, except when the Member attends a meeting for the express purpose of objecting at the beginning of the meeting to the transaction of any business at the meeting on the ground that the meeting is not lawfully called or convened. [DGCL § 229]

Section 2.06 Annual Reports. At each Annual Meeting, the Board shall present a report, verified by the President and the treasurer of the Corporation (the "Treasurer") or by a majority of the Board, or certified by a certified public accountant or by a firm of such accountants selected by the Board, showing in detail the following:

(a) the assets and liabilities, including the trust funds, of the Corporation as of the end of the last twelve month fiscal period terminating prior to such meeting;

(b) 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;

(c) the revenues or receipts of the Corporation, both unrestricted and restricted to particular purposes, and the expenses or disbursements of the Corporation, 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

(d) the number of Members 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 each Annual Meeting such reports of officers and committees as may be requested by the Board or as may be submitted at the meeting by such officers or by representatives of such committees.

ARTICLE III

BOARD OF DIRECTORS

Section 3.01 General Powers. Except as may otherwise be provided by law or by its certificate of incorporation, the business and affairs of the Corporation shall be managed by or under the direction of the Board, which shall be, and shall possess all the powers of, the "governing body" of the Corporation under the DGCL. The Directors shall act only as a Board, and the individual Directors shall have no power as such. [DGCL § 141(a)]

Section 3.02 Number of Directors. There shall initially be the number of Directors set forth in the certificate of incorporation. Except as otherwise provided in the certificate of incorporation, the Board may from time to time authorize, by resolution adopted by the affirmative vote of Directors constituting a majority of the total number of Directors at the time of such vote, a change in the number of At-Large Directors (as defined in the certificate of incorporation). Each of the Directors shall be a natural person. If the Board appoints any additional Principal Officers (as defined below), an honorary president or any additional honorary vice presidents under Section 4.01, such persons shall become Directors *ex officio* and the size of the Board shall increase accordingly. [DGCL § 141(b)]

Section 3.03 Election of Directors. The initial Directors shall be the persons named in the certificate of incorporation. Each initial Director who is also a Principal Officer shall serve until the conclusion of his or her term or terms of office as specified in these bylaws, or until his or her earlier death, resignation or removal. The initial Director who is also the Chair (as defined below) shall serve until the conclusion of the term of office of the then-current President, or until his or her earlier death, resignation or removal. Each initial At-Large Director shall serve until the Biennial Meeting held in the year 2014 (at which time such At-Large Director shall be eligible for re-election), or until his or her earlier death, resignation or removal. Except as otherwise provided in Section 3.12 and Section 3.14 of these bylaws, the At-Large Directors shall be elected at each Biennial Meeting, by a vote of a majority of the Members present at such meeting either in person or by proxy. Each At-Large Director shall hold office until his or her successor has been duly elected and qualified, or until his or her earlier death, resignation or removal. Each Principal Officer and the Chair (each of the foregoing, an "*Ex Officio* Director") shall cease to be an *Ex Officio* Director upon ceasing to be a Principal Officer or the Chair. Any Director who shall have failed to attend any meeting of the Board since the last Annual Meeting shall be ineligible for re-election (whether as an At-Large Director or to a position or office giving rise to an *Ex Officio*

Directorship) unless such Director shall have delivered to the President or the Secretary a written explanation for such nonattendance.

Section 3.04 Meetings of the Board. The annual meeting of the Board for the transaction of such business as may properly come before the meeting shall be held each year either within or without the State of Delaware on such date and at such time and place, if any, as are designated by resolution of the Board. The Board shall also meet whenever called by the President, the Chair, the president-elect of the Corporation (the "President-Elect") or any vice president of the Corporation (each, a "Vice President"), or upon written demand of not less than five Directors, at such place, date and time, if any, as may be specified in the respective notices of such meetings. Any business may be conducted at a meeting so called. [DGCL § 141(g)]

Section 3.05 Notice of Meetings; Waiver of Notice.

(a) Notice of each meeting of the Board shall be given to each Director, and notice of each resolution or other action affecting the date, time and place of one or more regular meetings shall be given to each Director not present at the meeting adopting such resolution or other action (subject to Section 3.08 of these bylaws). Such notices shall be given personally or by electronic transmission at least fifteen days prior to the meeting, or by a writing delivered by a recognized overnight courier service dispatched at least sixteen days prior to the meeting, or by regular mail (postage prepaid) dispatched at least twenty days prior to the meeting, directed to each Director by such means of electronic transmission, or at such address, as the case may be, from time to time designated by such Director to the Secretary. Notwithstanding the above, nothing in this 0 shall require advance notice to be given of any resolution or action not affecting the date, time and place of one or more regular meetings.

(b) A written waiver of notice of meeting signed by a Director or a waiver by electronic transmission by a Director, whether given before or after the meeting time stated in such notice, is deemed equivalent to notice. Attendance of a Director at a meeting is a waiver of notice of such meeting, except when the Director attends a meeting for the express purpose of objecting at the beginning of the meeting to the transaction of any business at the meeting on the ground that the meeting is not lawfully called or convened. [DGCL § 229]

Section 3.06 Quorum; Voting. At all meetings of the Board, the presence of seven Directors shall constitute a quorum for the transaction of business. Except as otherwise required by law, the certificate of incorporation or these bylaws, the vote of a majority of the Directors present at any

meeting at which a quorum (as defined in the certificate of incorporation) is present shall be the act of the Board. An interested Director may be counted in determining the presence of a quorum at a meeting of the Board that discusses, or authorizes as provided in 0 of these bylaws, a contract or transaction in which such Director is interested. An absence of quorum that occurs after a meeting of the Board has begun shall not preclude the transaction of business, provided, that an act of the Board shall in all cases require an affirmative vote by the greater of (a) four Directors and (b) such vote as is otherwise required by law, the certificate of incorporation or these bylaws. [DGCL §§ 141(b), 144(b)]

Section 3.07 Presence by Telephonic Communications. Members of the Board may participate in any meeting of the Board by means of a conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other at the same time, and participation in a meeting by such means shall constitute presence in person at such meeting, provided those members of the Board so participating shall have given the President not less than five days' advance notice of their desire to participate in such meeting remotely. Any expenses of remote participation in a meeting of the Board shall be borne equally by each of the members of the Board participating remotely, absent a determination by the Board that the Corporation shall cover such expenses. [DGCL § 141(i)]

Section 3.08 Adjournment. A majority of the Directors present may adjourn any meeting of the Board to another date, time or place, whether or not a quorum is present. No notice need be given of any adjourned meeting unless (a) the date, time and place of the adjourned meeting are not announced at the time of adjournment, in which case notice conforming to the requirements of Section 3.05 of these bylaws shall be given to each Director, or (b) the meeting is adjourned for more than 24 hours, in which case the notice referred to in clause (a) shall be given to those Directors not present at the announcement of the date, time and place of the adjourned meeting. At any adjourned meeting, the Directors may transact any business that might have been transacted at the original meeting.

Section 3.09 Action Without a Meeting. Any action required or permitted to be taken at any meeting of the Board may be taken without a meeting if a majority of members of the Board consent thereto in writing or by electronic transmission and such writing or writings or electronic transmissions are filed with the minutes of proceedings of the Board; provided, that no such action without a meeting shall be effective if any member of the Board who has not consented to such action shall have transmitted to the President or Secretary his or her objection to such action, in

writing or by electronic transmission, within ten days of his or her receipt of notice of such action. [DGCL §§ 141(f), 141(j)]

Section 3.10 Regulations. To the extent consistent with applicable law, the certificate of incorporation and these bylaws, the Board may adopt such rules and regulations for the conduct of meetings of the Board and for the management of the affairs and business of the Corporation as the Board may deem appropriate. The immediate past President shall serve as chairperson of the Board (the "Chair") during the term or terms of his or her successor as President, or until his or her earlier death, resignation or removal. In the absence or disability of the Chair, the President shall serve as chairperson of the Board. In the absence or disability of both the Chair and the President, the President-Elect shall serve as chairperson of the Board.

Section 3.11 Resignations of Directors. Any Director may resign at any time by delivering a written notice of resignation signed by such Director or by submitting an electronic transmission, to the Board, the President or the Secretary. Unless otherwise specified therein, such resignation shall take effect upon delivery. [DGCL § 141(b)]

Section 3.12 Removal of Directors. Any At-Large Director may be removed at any time, either for or without cause, upon the affirmative vote of not less than a majority of the Members present in person or by proxy at a meeting of Members, and such removal shall take effect immediately upon such vote. Any vacancy in the Board caused by any such removal may be filled at such meeting or in accordance with Section 3.14 of these bylaws. Any Ex Officio Director may be removed at any time in accordance with Section 4.03 of these bylaws. [DGCL §§ 141(j), 141(k), 223]

Section 3.13 Conflicts of Interest. Any contract or transaction in which a Director is interested must be approved by the Board acting in good faith through the affirmative vote of a majority of the disinterested Directors then members of the Board (being not less than two Directors) or by a committee made up of at least three disinterested Directors after disclosure to the Board or the committee of all material facts as to the Director's relationship to or interest in the contract or transaction and as to the nature of the contract or transaction, and the fact that an interested Director participated in meetings discussing or approving any such contract or transaction shall not make the approval void or voidable.

(a) No contract or transaction between the Corporation and one or more of its Directors or officers, or between the Corporation and any other corporation, partnership, association, or other organization in which one or more of its Directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the Director or officer is present at or participates in the meeting of the Board or committee that authorizes the contract or transaction, or solely because any such Director's or officer's votes are counted for such purpose, if:

(i) The material facts as to the Director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested Directors, even though the disinterested Directors be less than a quorum; or

(ii) The material facts as to the Director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the Members entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the Members; or

(iii) The contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified, by the Board, a committee or the Members.

(b) Common or interested Directors may be counted in determining the presence of a quorum at a meeting of the Board or of a committee which authorizes the contract or transaction.

Section 3.14 Vacancies and Newly Created Directorships. If any vacancies shall occur in the Board, by reason of death, resignation, removal or otherwise, or if the authorized number of Directors shall be increased, the Directors then in office shall continue to act. Any such vacancy (other than a vacancy of an *Ex Officio* Directorship, which shall be filled in accordance with Section 4.03 of these bylaws) or newly created Directorships may be filled either (a) by election at the next Annual Meeting or (b) by election by a majority of the Directors then in office, although less than a quorum, or by a sole remaining Director (the newly elected Director, in the case of either (a) or (b), a "Replacement Director"). Any Replacement Director shall hold office for the balance of the unexpired term of the replaced Director or the newly created Directorship and until his or her successor shall be elected and qualified (or until his or her earlier death, resignation or removal). [DGCL § 223]

Section 3.15 Compensation. The Directors shall not be compensated for their services as such but the Board may by resolution determine the expenses in the performance of such services for which a Director is entitled to reimbursement. [DGCL § 141(h)]

Section 3.16 Reliance on Accounts and Reports, etc. In the performance of his or her duties, a Director shall be fully protected in relying in good faith upon the records of the Corporation and upon information, opinions, reports or statements presented to the Corporation by any of its officers or employees or by any other person as to the matters the Director reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Corporation. [DGCL § 141(e)]

ARTICLE IV

OFFICERS

Section 4.01 Officers. The officers of the Corporation shall include a President, five Vice Presidents, a Secretary, a Treasurer and, from time to time, a President-Elect (each, a "Principal Officer"). The Board may also elect such other Principal Officers or other officers as the Board may determine. In addition, the Board from time to time may, by a vote of a majority of the total number of Directors, delegate to any Principal Officer the power to appoint subordinate officers or agents and to prescribe their respective rights, terms of office, authorities and duties. One person may hold any two Principal Offices, except that no individual holding the office of President, President-Elect or Secretary may at the same time hold another of such offices. The Board may also elect an honorary president and one or more honorary vice presidents to serve at the pleasure of the Board. None of the positions of Chair, honorary president or honorary vice president shall be deemed officers of the Corporation, notwithstanding any provision of these bylaws to the contrary. Each officer of the Corporation shall be a natural person. [DGCL § 142(a), (b)]

Section 4.02 Election of Officers.

(a) The Vice Presidents, the Secretary and the Treasurer shall be elected by and from among the Members at each Biennial Meeting, and shall hold office for a term expiring at the next succeeding Biennial Meeting or until their successors are elected or until their earlier death, resignation or removal. If such officers are not elected at such Biennial Meeting, such officers may be elected at any other meeting of the Members.

(b) At any Biennial Meeting, the then-serving President shall remain in office if (i) there is no President-Elect or (ii) he or she is re-elected by the Members; provided, however, that, as of such Biennial Meeting, a then-serving President who has held office since a date prior to the date of the Biennial Meeting next preceding shall not be eligible for re-election.

(c) At each Annual Meeting, if there is no President-Elect, a President-Elect may be elected from by and from among the Members, and shall hold office until he or she succeeds to the office of President or until his or her earlier death, resignation or removal. If there is no President-Elect and a President-Elect is not elected at an Annual Meeting, a President-Elect may be elected at any other meeting of the Members. If, at any time, there is no President-Elect and the then-serving President has held office since a date prior to the Biennial Meeting next preceding, a Special Meeting shall be called, to be held not less than four months prior to the Biennial Meeting next following, at which a President-Elect shall be elected from among and by the Members.

(d) The President-Elect shall succeed to the office of President at any Biennial Meeting at which the then-serving President is not re-elected or is not eligible for re-election, or upon the then-serving President's earlier death, resignation or removal. Except in cases of the then-serving President's death or removal, the then-serving President shall thereupon become the Chair, and shall serve in that capacity for the duration of his or her successor's Presidency, or until his or her earlier death, resignation or removal.

(e) The initial President, initial Vice Presidents, initial Secretary and initial Chair, and the initial President-Elect, if any, shall be those individuals named as such in the Certificate of Incorporation, each to serve for a term expiring at the Biennial Meeting held in 2014 or until such officer's earlier death, resignation or removal.

(f) Officers and agents appointed pursuant to delegated authority as provided in Section 4.01 (or, in the case of agents, as provided in Section 4.06) of these bylaws shall hold their offices for such terms and shall exercise such powers and perform such duties as may be determined from time to time by the appointing officer. Each officer shall hold office until his or her successor shall have been elected or appointed and qualified, or until such officer's earlier death, resignation or removal. [DGCL § 142(b)]

Section 4.03 Removal and Resignation of Officers; Vacancies.

(a) Any Principal Officer, honorary president, honorary vice president or Chair, however appointed or elected, may be removed at any time, either for or without cause, upon the affirmative vote of not less than a majority of the Members present in person or by proxy at a meeting of

Members, and such removal shall take effect immediately upon such vote. Except as otherwise provided by Section 4.02(d) of these bylaws, any vacancy occurring in any office of the Corporation by any such removal may be filled at such meeting or in accordance with Section 4.03(b) of these bylaws.

(b) Any officer of the Corporation other than a Principal Officer may be removed at any time for or without cause by the Board. Any officer granted the power to appoint subordinate officers and agents as provided in Section 4.01 of these bylaws may remove any subordinate officer or agent appointed by such officer, for or without cause, at any time. Any officer, honorary president, honorary vice president or chair may resign at any time by delivering notice of resignation, either in writing signed by such officer or by electronic transmission, to the Board, the President or the Secretary. Unless otherwise specified therein, such resignation shall take effect upon delivery. Except as otherwise provided by Section 4.02(d) or Section 4.03(a) of these bylaws, any vacancy occurring in any office of the Corporation by death, resignation, removal or otherwise, shall be filled by the Board, the President or the officer, if any, who appointed the person formerly holding such office. Any vacancy occurring in the position of Chair by death, resignation, removal or otherwise may be filled by the Board or the President. [DGCL § 142(b), (e)]

Section 4.04 Compensation of Officers. None of the officers of the Corporation shall be compensated for their services as such but the Board or a committee of the Board may determine the expenses in the performance of such services for which such an individual is entitled to reimbursement by the affirmative vote of a majority of the disinterested Directors then members of the Board or of such committee.

Section 4.05 Authority and Duties of Officers; Conflicts of Interest. The officers of the Corporation shall have such authority and shall exercise such powers and perform such duties as may be specified in these bylaws, and in any event each officer shall exercise such powers and perform such duties as may be required by law. Any contract or transaction in which an officer has an interest must be approved by a majority of disinterested Directors then members of the Board or by a committee made up of at least three disinterested Directors after disclosure to the Board of all material facts as to the officer's relationship to or interest in the contract or transaction and as to the nature of the contract or transaction. [DGCL § 142(a)]

Section 4.06 President. The President shall be the chief executive officer of the Corporation, have general control and supervision of the affairs and operations of the Corporation, keep the

Board fully informed about the activities of the Corporation and see that all orders and resolutions of the Board are carried into effect. He or she shall manage and administer the Corporation's business and affairs and shall also perform all duties and exercise all powers usually pertaining to the office of a chief executive officer of a corporation. Subject to Section 9.02 of these bylaws, he or she shall have the authority to sign, in the name and on behalf of the Corporation, checks, orders, contracts, leases, notes, drafts and all other documents and instruments in connection with the business of the Corporation, except in cases in which the signing and execution thereof shall be expressly delegated by the Board to some other officer or agent. If there is not a Chair, or in the Chair's absence or disability, the President shall preside at all meetings of the Members and of the Board. He or she shall appoint all members and chairs of sections of the Corporation, unless specifically provided otherwise by the certificate of incorporation, these bylaws or the Board. Except as otherwise provided in the certificate of incorporation or these bylaws, the President shall be an *ex officio* member of all appointed committees of the Board. The President shall have such other duties and powers as the Board may from time to time prescribe.

Section 4.07 President-Elect. The President-Elect shall perform such duties and exercise such powers as may be assigned to him or her from time to time by the Board or the President. In the absence of the President, the President-Elect shall perform the duties and exercise the powers of (and be subject to all the restrictions upon) the President. Except as otherwise provided in the certificate of incorporation or these bylaws, the President-Elect shall be an *ex officio* member of all appointed committees of the Board. If there is no President-Elect, the Vice President who has served as Vice President for the longest time continuously shall perform the duties and exercise the powers of the President-Elect, but shall not be considered the President-Elect for the purposes of Section 4.02 of these bylaws.

Section 4.08 Vice Presidents. Each Vice-President shall perform such duties and exercise such powers as may be assigned to him or her from time to time by the Board or the President.

Section 4.09 Secretary. The Secretary shall:

(a) act as secretary of all meetings of the Board and shall keep a record of all meetings of the Board in books provided for that purpose;

(b) cause all notices to be duly given in accordance with these bylaws and as required by law and prepare correspondence in relation to the business of the Corporation;

(c) subject to Section 9.02 of these bylaws, be the custodian of the records and of the seal of the Corporation and shall cause such seal (or a facsimile thereof) to be affixed to all documents and instruments that the Board or any officer of the Corporation has determined should be executed under its seal, may sign together with any other authorized officer of the Corporation any such document or instrument, and when the seal is so affixed may attest the same;

(d) subject to Section 9.02 of these bylaws, sign with the President, the President-Elect or any Vice President, all instruments requiring the signature or attestation of the Secretary;

(e) following the Reorganization, prepare for publication every two years the *Proceedings of the Corporation*, which shall include reports of the Working Committees (as defined below);

(f) properly maintain and file all books, reports, statements and other documents and records of the Corporation required by law, the certificate of incorporation or these bylaws; and have all powers and perform all duties otherwise customarily incident to the office of secretary, subject to the control of the Board and, in addition, shall have such other powers and perform such other duties as may be specified in these bylaws or as may be assigned to him or her from time to time by the Board or the President.

Section 4.10 Treasurer. The Treasurer shall be the chief financial officer of the Corporation and shall:

(a) have charge and supervision over and be responsible for the moneys, securities, receipts and disbursements of the Corporation, and keep or cause to be kept full and accurate records of all receipts of the Corporation;

(b) cause the moneys and other valuable effects of the Corporation to be deposited in the name and to the credit of the Corporation in such banks or trust companies or with such bankers or other depositaries as shall be determined by the Board or the President, and by such other officers of the Corporation as may be authorized by the Board or the President to make such determination;

(c) subject to Section 9.02 of these bylaws, cause the moneys of the Corporation to be disbursed by checks or drafts (signed by such officer or officers or such agent or agents of the Corporation, and in such manner, as the Board or the President may determine from time to time) upon the authorized depositaries of the Corporation and cause to be taken and preserved proper vouchers for all moneys disbursed, provided, that no disbursement, the amount of which exceeds one thousand dollars, may be made without being certified as correct and approved by the President;

(d) render to the Board or the President, whenever requested, a statement of the financial condition of the Corporation and of all his or her transactions as Treasurer, and render a full financial report at the annual meeting of the Board, if called upon to do so;

(e) be empowered from time to time to require from all officers or agents of the Corporation reports or statements giving such information as he or she may desire with respect to any and all financial transactions of the Corporation; and

(f) have all powers and perform all duties otherwise customarily incident to the office of treasurer, subject to the control of the Board, and, in addition, shall have such other powers and perform such other duties as may be specified in these bylaws or as may be assigned to him or her from time to time by the Board or the President.

ARTICLE V

COMMITTEES OF THE CORPORATION

Section 5.01 Working Committees. The work of the Corporation in studying International Law, Public and Private, shall be carried out by committees of the Corporation (each, a "Working Committee") from time to time established by the President or the Board. Such Working Committees are encouraged to coordinate their activities with those of corresponding committees of the ILA, where such corresponding committees exist. In the absence of a corresponding committee of the ILA, a Working Committee shall pursue such activities as may be suggested to it or approved from time to time by the President or the Board.

Section 5.02 Membership, Leadership and Duration. Each Working Committee shall consist of such Members as shall agree to serve on such Working Committee at the request of the President or the Board. In addition, each Working Committee shall have the discretion to add additional members as it sees fit. The Board may adopt other rules and regulations for the government of any Working Committee not inconsistent with the provisions of these bylaws, and each Working Committee may elect its own chairperson and adopt its own rules and regulations of government, to the extent not inconsistent with these bylaws or rules and regulations adopted by the Board. Each Working Committee shall continue for such period or periods as may be designated by the President or the Board.

ARTICLE VI

COMMITTEES OF THE BOARD OF DIRECTORS

Section 6.01 Designation of Committees. The Board shall have a Nominating Committee, and the Board may designate one or more other committees of the Board. Each committee shall consist of such number of Directors as from time to time may be fixed by the Board or, in the case of the Nominating Committee, by the President. Each committee shall have and may exercise all the powers and authority of the Board in the management of the business and affairs of the Corporation to the extent permitted by law and delegated to such committee by these bylaws or by resolution of the Board, provided that no committee shall have any power or authority in reference to the following matters:

(a) amendments to the certificate of incorporation or these bylaws;

(b) filling of vacancies in the Board or in any committee;

(c) amending or repealing any resolution of the Board that by its terms may not be so amended or repealed;

(d) delegating any of the power or authority of such committee to a subcommittee unless so authorized by the Board; and

(e) any other matter that pursuant to the DGCL is excluded from the authority of a committee of the Board.

Section 6.02 Committee Members. Except as otherwise provided in the certificate of incorporation or these bylaws, the members of each committee of the Board shall be appointed by the Board and shall serve at the pleasure of the Board; provided, that the members of the Nominating Committee may be appointed by the President if such members are not appointed by the Board and, if so appointed by the President, shall serve at the joint pleasure of the President and the Board. Each member of any committee of the Board (whether designated at an annual meeting of the Board to fill a vacancy or otherwise) shall serve for a term expiring at the next annual meeting of the Board. Each member of any such committee shall hold office until his or her successor is appointed or until his or her earlier death, resignation, removal or ceasing to be a Director.

Section 6.03 Nominating Committee. Except as otherwise provided in the certificate of incorporation or these bylaws, the Nominating Committee shall propose nominations for such Principal Officers and Directors as may be directed by the Board or the President or, in the absence of such direction, as the Nominating Committee sees fit. Except as otherwise provided in the certificate of incorporation or these bylaws, the Nominating Committee shall follow such rules and procedures as may be prescribed by resolution of the Board or, in the absence thereof, as the Nominating Committee may adopt.

Section 6.04 Committee Procedures. At any meeting of any committee of the Board, the presence of a majority of its members then in office shall constitute a quorum for the transaction of business, unless (a) such committee has only one or two members, in which case a quorum shall be one member, or (b) a greater quorum is established by the Board. The vote of a majority of the committee members present at a meeting at which a quorum is present shall be the act of the committee. Each committee of the Board shall keep regular minutes of its meetings and report to the Board when required. The Board may adopt other rules and regulations for the government of any committee of the Board not inconsistent with the provisions of these bylaws, and each committee of the Board may elect its own chairperson and may adopt its own rules and regulations of government, to the extent not inconsistent with these bylaws or rules and regulations adopted by the Board.

Section 6.05 Meetings and Actions of Committees. Meetings and actions of each committee of the Board shall be governed by, and held and taken in accordance with, the provisions of the following sections of these bylaws, with such bylaws being deemed to refer to the committee, its members and its chairperson (if any) in lieu of the Board, its members and the President or Secretary, respectively:

(a) Section 3.04 (to the extent relating to place and time of meetings);

(b) Section 3.05 (relating to notice and waiver of notice), except that a committee of the Board may, by resolution of a majority of the members of such committee, adopt lesser notice requirements than those specified in Section 3.05(a);

(c) the third sentence of Section 3.06 (relating to participation of interested Directors);

(d) Section 3.07 and Section 3.09 (relating to telephonic communication and action without a meeting), except that a committee of the Board may, by resolution of a majority of the members of such committee, adopt a lesser notice requirement than that specified in Section 3.07 for a

request by a member of such committee to participate remotely in a meeting of such committee; and

(e) Section 3.08 (relating to adjournment and notice of adjournment).

Special meetings of committees of the Board may also be called by resolution of the Board.

Section 6.06 Resignations and Removals of Committee Members. Any member of any committee of the Board may resign from such position at any time by delivering a written notice of resignation, either in writing signed by such member or by electronic transmission, to the Board or the President. Unless otherwise specified therein, such resignation shall take effect upon delivery. Any member of any committee of the Board may be removed from such position at any time, either for or without cause, by resolution adopted by a majority of the total authorized number of Directors acting at a meeting of the Board or by written consent in accordance with the DGCL and these bylaws.

Section 6.07 Vacancies on Committees. If a vacancy occurs in any committee of the Board for any reason the remaining members may continue to act if a quorum is present. A committee vacancy may only be filled by a majority of the total authorized number of Directors.

ARTICLE VII

INDEMNIFICATION

Section 7.01 Indemnification.

(a) Subject to Section 7.01(c) of these bylaws, the Corporation shall indemnify, to the fullest extent permitted by the DGCL or applicable law, any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (each, a "proceeding") by reason of the fact that such person is or was serving or has agreed to serve as a Director or officer of the Corporation, or is or was serving or has agreed to serve at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, or by reason of any action alleged to have been taken or omitted by such person in such capacity, and who satisfies the applicable standard of conduct set forth in section 145 of the DGCL and any other applicable law:

(i) in a proceeding other than a proceeding by or in the right of the Corporation to procure a judgment in its favor, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person or on such person's behalf in connection with such proceeding and any appeal therefrom, or

(ii) in a proceeding by or in the right of the Corporation to procure a judgment in its favor, against expenses (including attorneys' fees but excluding judgments, fines and amounts paid in settlement) actually and reasonably incurred by such person or on such person's behalf in connection with the defense or settlement of such proceeding and any appeal therefrom (but if such person shall have been adjudged to be liable to the Corporation indemnification of expenses is permitted under this clause (ii) only upon a judicial determination in accordance with the requirements of section 145(b) of the DGCL as to such person's entitlement to indemnification).

(b) To the extent that a present or former Director or officer of the Corporation has been successful on the merits or otherwise in defense of any proceeding referred to in Section 7.01(a) of these bylaws or in defense of any claim, issue or matter therein, such person shall be indemnified by the Corporation against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith. [DGCL § 145(c)]

(c) Notwithstanding anything to the contrary set forth in Section 7.01(a) of these bylaws, the Corporation shall not be required to indemnify a present or former Director or officer of the Corporation in respect of a proceeding (or part thereof) instituted by such person on his or her own behalf, unless such proceeding (or part thereof) has been authorized by the Board or the indemnification requested is pursuant to the last sentence of Section 7.03 of these bylaws.

(d) If the Corporation is a "private foundation" under the Internal Revenue Code of 1986 (as it may be amended, the "Code"), no indemnification shall be provided hereunder to the extent that such indemnification would result in a violation of section 4941 of the Code.

Section 7.02 Advance of Expenses. The Corporation shall advance all expenses (including reasonable attorneys' fees) incurred by a present or former Director or officer in defending any proceeding prior to the final disposition of such proceeding upon written request of such person and delivery of an undertaking by such person to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the Corporation under this Article or applicable law. The Corporation may authorize any counsel for the Corporation to represent (subject to applicable conflict of interest considerations) such present or former Director or officer in any proceeding, whether or not the Corporation is a party to such proceeding. [DGCL § 145(e)]

Section 7.03 Procedure for Indemnification. Any indemnification under Section 7.01 of these bylaws or any advance of expenses under Section 7.02 of these bylaws shall be made only against a written request therefor (together with supporting documentation) submitted by or on behalf of the person seeking indemnification or an advance of expenses. Indemnification may be sought by a person under Section 7.01 of these bylaws in respect of a proceeding only to the extent that both the liabilities for which indemnification is sought and all portions of the proceeding relevant to the determination of whether the person has satisfied any appropriate standard of conduct have become final. A person seeking indemnification may seek to enforce such person's rights to indemnification (as the case may be) in the Delaware Court of Chancery to the extent all or any portion of a requested indemnification has not been granted within 90 days of the submission of such request. All expenses (including reasonable attorneys' fees) incurred by such person in connection with successfully establishing such person's right to indemnification under this Article, in whole or in part, shall also be indemnified by the Corporation to the fullest extent permitted by law.

Section 7.04 Burden of Proof. In any proceeding brought to enforce the right of a person to receive indemnification to which such person is entitled under Section 7.01 of these bylaws, the Corporation has the burden of demonstrating that the standard of conduct applicable under the DGCL or other applicable law was not met. A prior determination by the Corporation (including its Board or any committee thereof, or its independent legal counsel) that the claimant has not met such applicable standard of conduct does not itself constitute evidence that the claimant has not met the applicable standard of conduct.

Section 7.05 Contract Right; Non-Exclusivity; Survival.

(a) The rights to indemnification provided by this Article VII shall be deemed to be separate contract rights between the Corporation and each Director and officer who serves in any such capacity at any time while these provisions as well as the relevant provisions of the DGCL are in effect, and no repeal or modification of any of these provisions or any relevant provisions of the DGCL shall adversely affect any right or obligation of such Director or officer existing at the time of such repeal or modification with respect to any state of facts then or previously existing or any proceeding previously or thereafter brought or threatened based in whole or in part upon any such state of facts. Such "contract rights" may not be modified retroactively as to any present or former Director or officer without the consent of such Director or officer.

(b) The rights to indemnification and advancement of expenses provided by this Article VII shall not be deemed exclusive of any other indemnification or advancement of expenses to which a present or former Director or officer of the Corporation may be entitled as to action in such person's official capacity or as to action in another capacity while holding such office. [DGCL § 145(f)]

(c) The rights to indemnification and advancement of expenses provided by this Article VII to any present or former Director or officer of the Corporation shall inure to the benefit of the heirs, executors and administrators of such person. [DGCL § 145(f), (j)]

Section 7.06 Insurance. The Corporation may purchase and maintain insurance on behalf of any person who is or was or has agreed to become a Director or officer of the Corporation, or is or was serving at the request of the Corporation as a Director or officer of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person or on such person's behalf in any such capacity, or arising out of such person's status as such, whether or not the Corporation would have the power to indemnify such person against such liability under the provisions of this Article VII. [DGCL § 145(g)]

Section 7.07 Employees and Agents. The Board may cause the Corporation to indemnify any present or former employee or agent of the Corporation in such manner and for such liabilities as the Board may determine, up to the fullest extent permitted by the DGCL and other applicable law.

Section 7.08 Interpretation; Severability. Terms defined in sections 145(h) or (i) of the DGCL have the meanings set forth in such sections when used in this Article VII. If this Article or any portion hereof shall be invalidated on any ground by any court of competent jurisdiction, then the Corporation shall nevertheless indemnify each Director or officer of the Corporation as to costs, charges and expenses (including attorneys' fees), judgments, fines and amounts paid in settlement with respect to any action, suit or proceeding, whether civil, criminal, administrative or investigative, including an action by or in the right of the Corporation, to the fullest extent permitted by any applicable portion of this Article that shall not have been invalidated and to the fullest extent permitted by applicable law.

ARTICLE VIII

OFFICES

Section 8.01 Registered Office. The registered office of the Corporation in the State of Delaware shall be located at the location provided in Article II of the certificate of incorporation. [DGCL § 131]

Section 8.02 Other Offices. The Corporation may maintain offices at such other locations within or without the State of Delaware as the Board may from time to time determine.

ARTICLE IX

GENERAL PROVISIONS

Section 9.01 Conduct of Business. The Corporation shall at all times conduct its business and affairs so as to qualify and remain qualified as exempt from federal income tax under section 501(c)(3) of the Code.

Section 9.02 Execution of Instruments; Contracts.

(a) Except as otherwise required by law or the certificate of incorporation, the Board or any officer of the Corporation authorized by the Board may authorize any other officer or agent of the Corporation to enter into any contract or to execute and deliver any instrument in the name and on behalf of the Corporation. Any such authorization must be in writing or by electronic transmission and may be general or limited to specific contracts or instruments. Contracts may not be entered into on behalf of the Corporation unless and except as authorized by the Board pursuant to this Section 9.02(a).

(b) Loans or advances shall not be contracted on behalf of the Corporation, and notes or other evidences of indebtedness shall not be issued in the name of the Corporation, unless and except as authorized by the Board pursuant to this Section 9.02(b). Any such authorization must be in writing or by electronic transmission, may be general or limited to specific instances and may include authorization to pledge, as security for the repayment of any and all loans or advances authorized, any and all securities and other personal property any time held by the Corporation.

Section 9.03 Surety Bonds. The Board may require a Director, officer, agent or employee of the Corporation who is authorized to sign checks, or to cash checks drawn to the order of the Corporation, or to handle or disburse funds of the Corporation, to give bond to the Corporation, with sufficient surety and in an amount satisfactory to the Board, 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 Corporation which may come into his or her hands.

Section 9.04 Voting as Stockholder. Unless otherwise determined by resolution of the Board, any officer of the Corporation shall have full power and authority on behalf of the Corporation to attend any meeting of stockholders of any corporation in which the Corporation may hold stock, and to act, vote (or execute proxies to vote) and exercise in person or by proxy all other rights, powers and privileges incident to the ownership of such stock at any such meeting, or through action without a meeting. The Board may by resolution from time to time confer such power and authority (in general or confined to specific instances) upon any other person or persons.

Section 9.05 Fiscal Year. The fiscal year of the Corporation shall commence on the first day of January of each year and shall terminate in each case on December 31.

Section 9.06 Seal. The seal of the Corporation shall be circular in form and shall contain the name of the Corporation, the phrase "organized 1922 incorporated 2012," and the words "Corporate Seal" and "Delaware". The form of such seal shall be subject to alteration by the Board. The seal may be used by causing it or a facsimile thereof to be impressed, affixed or reproduced, or may be used in any other lawful manner.

Section 9.07 Books and Records; Inspection. Except to the extent otherwise required by law, the books and records of the Corporation shall be kept at such place or places within or without the State of Delaware as may be determined from time to time by the Board.

Section 9.08 Electronic Transmission. "Electronic transmission", as used in these bylaws, means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process. [DGCL § 232(c)]

ARTICLE X

AMENDMENT OF CERTIFICATE OF INCORPORATION AND BYLAWS: CONSTRUCTION

Section 10.01 Amendments. These bylaws may be amended, altered or repealed by resolution adopted by the affirmative vote of the Board. Any such amendment by the Board shall be reported to the Members at the next following meeting of Members. No amendment, alteration, change or repeal of these bylaws shall be effected which will result in the denial of tax-exempt status to the Corporation under section 501(c)(3) of the Code. [DGCL 242(b)(3); 109(a)]

Section 10.02 Construction. In the event of any conflict between the provisions of these bylaws as in effect from time to time and the provisions of the certificate of incorporation as in effect from time to time, the provisions of the certificate of incorporation shall be controlling.

V. IN MEMORIAM

LUKE T. LEE

Dr. Luke T. Lee, an Honorary Vice President of ABILA and one of the most productive leaders in the ILA's projects on international human rights and humanitarian law, died in Bethesda, Maryland on January 7, 2015, at the age of 91.

A former Director of Planning and Programs of the Coordinator for Refugee Affairs in the U.S. Department of State, where he served for 20 years, Luke was at the time the highest ranking Asian-American in the Senior Executive Service. Earlier, he had been Professor of International Law in the Fletcher School of Law and Diplomacy at Tufts University.

He initiated and chaired new fewer than four successful ILA projects: (1) The Declaration of Principles of International Law on Mass Expulsion (1986); (2) The Declaration of Principles of International Law on Compensation to Refugees and Countries of Asylum (1990); (3) The Declaration of International Law Principles on Internally Displaced Persons (2000); and (4) Compensation for Victims of War.

After Luke's retirement as Chair in 2009, the project was retitled Reparations for Victims of Armed Conflict, which produced two sets of principles: a substantive Declaration (2010) and Procedural Principles (2014).

Luke was born in Fuzhou, China. He earned an A.B. from St. John's University in Shanghai, followed by an M.A. from Columbia University, a Ph.D. from Fletcher, and a J.D. from the University of Michigan. His seminal book, Consular Law and Practice, first published in 1961 (now in a third edition co-authored by John Quigley) directly inspired the Vienna Convention on Consular Relations two years later. His scholarship also included books on law and the status of women, population and law, the Vienna Convention on Consular Relations, China and international agreements, and other topics of public international law, and over 100 scholarly articles.

In his own words, Luke envisioned "a world without refugees." His historical perspective and passionate commitment to the progressive development of international human rights are reflected in his observation that "refugees have existed since time immemorial. Indeed we are all descendants of refugees, from the time Adam and Eve were expelled from the Garden of Eden...[T]here are approximately 10 million refugees today, not counting Palestinian refugees. While estimates vary, it is certain that no continent has been spared the human suffering that is the hallmark of the refugee."

Colleagues and other friends of Luke will fondly recall his wife, Denise—particularly at biennial conferences. We in ABILA express our deep appreciation for Luke's important scholarly contributions on behalf of underserved populations. He was a truly humane expert. Our warm personal memories of him will also endure.

- By James A.R. Nafziger

ROBERT B. VON MEHREN

Robert B. von Mehren, a leader in the International Law Association and the American Branch, died on May 5, 2016, at age 93. He had a distinguished career as a partner at Debevoise & Plimpton in New York and as an international arbitrator, a field in which he was a pioneer and a distinguished practitioner.

Bob graduated summa cum laude from Yale and magna cum laude from Harvard Law School, where he served as president of the Harvard Law Review. He clerked for Judge Learned Hand on the Second Circuit and Justice Stanley Reed on the U.S. Supreme Court before joining Debevoise. Early in his career, Bob served on the legal team defending Alger Hissbagainst charges of perjury; Hiss had been accused of being a Soviet spy in testimony before the Committee for the Investigation of Un-American Activities of the House of Representatives.

Bob held a variety of leadership roles in the American Branch. He was member of our Executive Committee from 1971-1992; President of the Branch from 1979-1986; Chair of the Executive Committee from 1986-1992; and Honorary Vice President from 1992 until his death.

In the International Law Association, Bob was Vice Chair of the Executive Council from 1989-2008, one of very few Americans to have held that position. He also chaired the ILA Committee on Transnational Recognition and Enforcement of Foreign Public Laws (1984-1988) and provided valuable service as a member of the Steering Committees of ILA biennial conferences. These Steering Committees vet every ILA resolution produced by ILA committee sessions before the resolution is sent to the ILA plenary for approval or rejection. Although other organizations – including the American Arbitration Association, the Practicing Law Institute, committees of the New York City Bar Association, and the Harvard Law School Association of New York – also benefited from Bob's leadership skills, Bob once told his colleagues that of all the organizations he served, the ILA was his very favorite.

M. CHERIF BASSIOUNI

Prof. Bassiouni (affectionally "Cherif" to all who knew him) was a wonderful ABILA member and supporter, and a truly global citizen. Brilliant, creative, hardworking and skilled in international diplomacy and foreign languages (he was fluent in at least six), he was known as the "father" of international criminal law.

From the Torture Convention to the Statute of the International Criminal Court, his fingerprints are on every major international criminal law instrument of the past fifty years, including the emerging new convention on crimes against humanity. As a scholar, Cherif wrote and edited seventy-five books and several hundred law review articles in Arabic, English, French, Italian and Spanish. His publications were repeatedly cited as authority by the Yugoslavia Tribunal, the Rwanda Tribunal, and the United States Supreme Court, and were always thoroughly researched, beautifully written and copiously footnoted.

A passionate and devoted educator, he taught at DePaul Law School for nearly fifty years and started the International Human Rights Law Institute (IHRLI) there, as well as the International Institute of Higher Studies in Criminal Science in Siracusa, Italy, which he headed until 2015. Cherif co-chaired a Committee of Experts tasked with drafting an anti-torture treaty. Much of this draft found its way into the 1984 UN International Convention Against Torture, Cruel, Inhuman and Degrading Treatment.

Cherif subsequently chaired the Commission of Experts which the Security Council established in 1992 to investigate atrocities in the former Yugoslavia. Under his leadership, the Commission issued a 3,500-page report detailing the ethnic cleansing, genocide and crimes against humanity committed during the war, which led to the establishment of the ICTY.

Cherif subsequently served as Vice-Chair of the UN General Assembly Ad Hoc Committee to Establish an International Criminal Court in the mid-1990s and participated in the Preparatory Committee that prepared a draft Statute for the Court. It was then that ABILA President Al Rubin decided that ABILA should create an ICC Committee, and asked me to chair it. Cherif participated actively as a member of that Committee, as did many other ABILA members including the late Edward Wise, Chris Joyner, Kelly Askin, Michael Scharf, Roger Clark, Chris Blakesley, Dan Derby, Malvina Halberstam, and Dorean Koenig.

When the Diplomatic Conference opened in Rome, Cherif was chosen as the Chair of the Drafting Committee and set about the challenge of developing a widely acceptable text for the treaty. I travelled to Rome in 1998 at Cherif's urging, and had the opportunity not only to observe the negotiations firsthand, but to speak with him often as they were ongoing. He regularly took time out of his busy schedule to dine with me and a small group of ABILA members, enjoying camaraderie and fellowship even as the grueling weeks of diplomatic wrangling wore on. On July 17, 1998, the treaty establishing the Court was adopted. Although the establishment of the Court was the result of thousands of individuals working to that end all over the world, I believe that without Cherif's contribution and leadership the Court would not now exist.

In 1999, Cherif was nominated for the Nobel Peace Prize for his work on global justice. In recognition of his extraordinary contributions, not only to the world, but to his adopted City of Chicago, a street there is now named in his honor. He will be greatly missed.

- By Leila Nadya Sadat

JOHN CAREY

John Carey, who had a long and distinguished career as a public servant as an attorney, legal scholar, and judge, passed away the morning of October 7, 2019. He was 95. John Carey was also a widely respected scholar of international human rights law. He authored dozens of academic articles and two books, including "UN Protection of Civil and Political Rights." He also founded United Nations Law Reports and served as editor for half a century. John Carey was a member of the International Law Association's Human Rights Committee, was the first Chair of the American Branch's Human Rights Committee (formed in 1966) and served on the Branch's Executive Committee. He was for many years an Honorary Vice President.

After a career as an international lawyer, primarily at Coudert Brothers, then only one of two private international law firms in the country, Mr. Carey served as civil and criminal law judge of the State of New York. After reaching the mandatory retirement age of 70, he continued as a judicial hearing officer for another two decades.

John Carey was appointed to the UN Subcommission on the Prevention of Discrimination and the Protection of Minorities and served for nearly 25 years, from 1964 to 1988. The Subcommission was created to provide advice to the Human Rights Commission, and initiated the development of human rights treaties, the appointment of working groups and special rapporteurs, and procedures which have fostered the development of objective fact-finding, as well as new legal concepts and norms and principles fostered promotion and protection of human rights. During his tenure, Carey often advocated on behalf of victims of human rights violations.

During his judicial career, John Carey was known for his carefully written judgments, including on the issue of the extent to which lawyers could consider the race of potential jurors *in voire dire* in order to prevent juries composed of only members of one race. He was most well known for presiding over both murder trails of Carolyn Warmus, in White Plains, the first ending in mistrial and the second in her conviction. The trial became famous after the release of the film "Fatal Attraction," whose plot is loosely based on the case.

He graduated from Milton Academy in 1942, Yale College in 1945, Harvard Law School in 1949, and, in 1965, earned a Master of Law from NYU, where he wrote his thesis under the late Professor Thomas Franck. He served as an Ensign and then was promoted to a Lieutenant Junior Grade in World War II in both the Atlantic and Pacific theaters from August 1943 to January 1946 on anti-Submarine ships, the USS DE-160 and the USS PC-1245.