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## 21st Annual Fulbright Symposium - Harmony and Dissonance in International Law

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**GOLDEN GATE UNIVERSITY**

**School of Law**

The Sompong Sucharitkul Center for Advanced International Legal Studies  
Proudly Presents

# **HARMONY AND DISSONANCE IN INTERNATIONAL LAW**

The 21<sup>st</sup> Annual Fulbright Symposium on  
International Legal Problems

**Friday, April 1, 2011**

**9:00 a.m. to 5:00 p.m.**



**Room 2201  
536 Mission Street  
San Francisco, CA 94105**

**Keynote Speaker:**

***Sir Arnold K. Amet***

Current Minister for Justice and Attorney General of Papua New Guinea. Previously served in Papua New Guinea as Chief Justice, Governor of Madang Province and Judge of the National and Supreme Courts. Also held positions as a State Attorney and Public Solicitor of Papua New Guinea, as well as Legal Officer and Secretary of Air Niugini and the National Airline Commission

**In Cooperation with:**



**REGISTRATION**

8:30 a.m. – 9:00 a.m.

Continental Breakfast: Room 2313

**MORNING SESSION**

9:00 a.m. – 10:00 a.m.

*Master of Ceremonies***Professor Dr. Remigius Chibueze**, Attorney at Law; Adjunct Professor of Law, Golden Gate University School of Law**Welcome:** **Dr. Dan Angel**, President of Golden Gate University**Introduction:** **Professor Dr. Christian N. Okeke**, Professor of Law, Director of LLM & SJD International Legal Studies Programs, Director of the Sompong Sucharitkul Center for Advanced International Legal Studies, Golden Gate University School of LawKEYNOTE SPEAKER: *Terrorism and International Law: Cure the Underlying Problem, Not Just the Symptom***The Honorable Chief Sir Arnold K. Amet**, Minister for Justice and Attorney General of Papua New Guinea. Previously served in Papua New Guinea as Chief Justice, Governor of Madang Province and Judge of the National and Supreme Courts. Also held positions as a State Attorney and Public Solicitor of Papua New Guinea, as well as Legal Officer and Secretary of Air Niugini and the National Airline Commission**BREAK**

10:00 a.m. – 10:15 a.m.

**Conference Report:**

Harmony and Dissonance in International Law

**Professor Dr. Christian N. Okeke**

10:15 a.m. – 10:45 p.m.

**MORNING PANEL**

10:45 a.m. – 1:00 p.m.

*Moderator***Professor Peter Keane**, Dean Emeritus and Professor of Law, Golden Gate University School of Law*Making Peace with the Past: Federal Republic of Germany's Accountability for WWII Massacres before the Italian Supreme Court***Professor Dr. Benedetta Faedi Duramy**, Associate Professor of Law, Golden Gate University School of Law

***Harmony and Dissonance among International Tax Regimes***

**Professor Dr. Nancy Yonge**, Adjunct Professor of Law, Golden Gate University School of Law

***Research Freedom to University Scholars***

**Associate Dean Mark Perry**, Research, Graduate Program and Operations; Faculty of Law; Associate Professor of Computer Science, The University of Western Ontario, London, Ontario, Canada

***Dissonance in International Law: The Increasing Tension Between International Humanitarian Law and State Sovereignty***

**Professor Warren Small**, Attorney at Law; Adjunct Professor of Law, Golden Gate University School of Law and Monterey College of Law

***Non-Majoritarian Difficulty Squared***

**Professor Dr. Hubert Smekal**, Assistant Professor, Department of International Relations and European Studies, Faculty of Social Studies, Masaryk University, Brno, Czech Republic; Assistant of the E.MA Director for the Czech Republic; Visiting Fulbright-Masaryk Post-Doc Researcher, Centre for the Study of Law and Society, UC Berkeley School of Law

*Rapporteur*      **Professor Barton S. Selden**, Adjunct Professor of Law, Golden Gate University School of Law; Partner, Gartenberg Gelfand Wasson & Selden, LLP; Advisor, International and Domestic Sale of Goods, Licensing and Trademarks; Fulbright Grantee, Vysoká Škola Ekonomická v Praze (Spring, 2008, Czech Republic).

**LUNCH BREAK****1:00 p.m. – 2:00 p.m.****AFTERNOON SESSION****2:00 p.m. – 5:00 p.m.**

*Moderator*      **Professor Dr. Arthur Gemmell**, Adjunct Professor of Law & Senior Fellow, Sompong Sucharitkul Center for Advanced International Legal Studies, Golden Gate University School of Law.

***ADR as a Catalyst for the Promotion of Harmony in International Law: Myth or Reality?***

**Professor Dr. Rabiatu I. Danpullo Hamisu**, Associate Professor of Law, Department of Common Law, University of Yaoundé II, Soa – Cameroon; Visiting Fulbright Scholar, George Washington University School of Law

*Fitting Square Pegs Into Round Holes – The Vexed Question of Harmonizing International Legal Regulation of Traditional Cultural Expressions Under Intellectual Property Law*

**The Honorable Justice Gertrude Araba Esaaba Torkornoo**, Judge of Commercial Division of High Court, Ghana; Fellow, Golden Gate University School of Law/International Women Judges Graduate Fellowship Program (LLM in Intellectual Property Law), 2010 – 2011

*“International (In)Justice: Six Decades After, Have We Progressed Significantly Since Nuremberg?”*

**Professor Dr. John G. Rodden**, University of Texas at Austin and University of Pecs (Hungary)

*An Issue of Invocability of Provisions of the WTO Covered Agreements Before Domestic Courts*

**Dr. Ramesh Karky**, Post-Doctoral Associate, The University of Western Ontario Faculty of Law; Visiting Scholar, York University Osgoode Hall Law School

*Do We Need a European Civil Code?*

**Mr. David Schmid**, LLM in United States Legal Studies Candidate, Golden Gate University School of Law; PhD Candidate, University of Heidelberg, Germany

*Coal-fired China: Rethink the Precautionary Principle*

**Ms. Shufan Sung**, S.J.D. in International Legal Studies Candidate, Golden Gate University School of Law; Attorney of Law in Taiwan, Republic of China

*Rapporteur*      **Professor Dr. Sophie Clavier**, Adjunct Professor of Law, Golden Gate University School of Law; Associate Professor of International Relations, San Francisco State University

*Closing Remarks*      **Professor Dr. Christian N. Okeke**      **5:00p.m. – 5:05 p.m.**

Please enjoy some wine and cheese outside the Lecture Hall at the end of the symposium.

**No financial support has been provided by Fulbright Program for this event**

**HARMONY AND DISSONANCE  
IN INTERNATIONAL LAW****The 21<sup>st</sup> Annual Fulbright Symposium on  
International Legal Problems***(Welcome)***Dr. Dan Angel**

President of Golden Gate University

PhD, Communications, Purdue University  
MA, BS, Education, Wayne State University**Areas of Expertise**

Higher Education, Development, Strategic Planning, Communications, and Forensics

Dr. Dan Angel was appointed President of Golden Gate University in January of 2007 and has steadily moved the university forward. Late in 2010 he was awarded a most admired CEO award by the Bay Area's Business Times. His career includes five other Presidencies: Marshall University (WV), Stephen F. Austin University (TX), Austin Community College (TX), Citrus College (CA) and Imperial Valley College (CA). He was elected to the State Legislature in Michigan and served as a Special Assistant to a U.S. Senator in Washington D.C. His university teaching experience includes Purdue University, Wayne State University, the University of Delaware, Albion College and Queens College in NYC. A prolific writer, he has published 12 books including a political biography of former Michigan Governor George Romney, a primer on long range planning, and a book on management. He and the Dean of the Ageno School of Business, Terry Connelly, have just finished a book – RIPTIDE: The New Normal for Higher Education, to be published later this spring. His educational credentials include a BS and MA (Education) from Wayne State University and a PhD earned at Purdue (Communications). Major public service assignments have included membership on the Federal Reserve Board (Dallas). Career honors include: Distinguished Alumnus at Wayne State University (Michigan), Public Administrator of the Year (Austin, TX) and an invitation to the Oxford Roundtable (England).

**Education Honors**

- Outstanding College President Award, All American Football Foundation (2004)
- Distinguished Alumnus, Wayne State University (2003)
- Distinguished Alumnus, Purdue University School Of Liberal Arts (2003)
- Honorary Life Member, Texas Ranger Hall Of Fame (1999)
- Honorary Fellowship, Rose Bruford College, London, England (1997)
- Exemplary Leadership Award, American Council On Education (1995)
- Honorary Associate of Arts Degree, Austin Community College (1992)
- Transformational Leadership Medal (1989)
- Selected "Pacesetter of the Year," National Council For Community Relations (1989)

- Designated as “Public Administrator of the Year,” Austin Society For Public Administrators (1986)
- Named among “75 Outstanding Young Educators in the United States,” Phi Delta Kappa (1981)

**Educational Leadership**

## Michigan

- State Representative (1973-1978)
- Higher Education Assistance Authority (1970-1972)

## California

- Southern California Chief Executive Officers  
Vice President (1982-83)  
President (1983-84)
- California Association of Community Colleges  
Board of Directors (1979-82)  
Legislative Committee (1978-82)  
Chair, State Convention (1980)
- San Diego Association of Chief Executive Officers  
Vice President (1979-80)  
President (1980-81)

## Texas

- Southland Athletic Conference  
Chair, President’s Council (1996-98)
- Texas Council of Public University Presidents and Chancellors  
Board of Directors (1995-98)
- Texas International Education Consortium  
Executive Committee (1996-98)
- Association of Texas Colleges And Universities  
Board of Directors (1994-98)
- Northeast Texas Consortium  
Chairman (1995-97)
- Region 4 Higher Education Council  
Chairman (1995-96)
- Texas Higher Education Coordinating Board  
Chairman, Advisory Committee on Annexation (1988-89)  
Chairman, Faculty Professional Development Advisory Committee (1989-90)  
Member, SPRE Advisory Committee (1994-95)  
Member, HEAF Advisory Committee (1997-98)
- Texas Public Community And Junior College Association  
Board of Directors (1986-89)  
Chairman, Texas Academic Skills Program Committee (1988)  
Legislative Committee (1990-92)  
Governor’s Task Force on Strategic for Public Community Colleges (1991-1992)

**West Virginia**

- Fifth Third Bank  
Board of Directors (2002-2004)
- Saint Mary's Hospital Board of Directors (2001-2003)
- Governor's Energy Task Force (2001-2002)
- Chemical Alliance Zone  
Board of Directors (2000-2004)
- West Virginia Roundtable  
Board of Directors (2000-2004)

**National and International**

- San Francisco Chamber of Commerce  
Board of Directors (2007- 2009)
- Oxford Roundtable  
Summer (2004)
- American Council on Education  
The Futures Project (2004)
- Federal Reserve Bank of Dallas  
Director (1997-99)
- American Council On Education  
Chairman, Commission on Minorities in Higher Education (1993-1995)
- Combase  
Executive Committee (1990-93)
- College Board  
National Forum Planning Committee (1990)

**Publications (Articles)**

- Community, Technical, and Junior College Journal, "Managing McLean," August/September 1991, pp. 26-29
- Update, "Dealing with Reality," Texas Association for Continuing Adult Education, June 1990, p. 5
- Texas Community College Communicator, "TASP Adds Value," January 1990, p. 7
- Capsule, "Texas Academic Skills Program," Winter 1990, pp. 10-15
- Leadership Abstracts, "Americana Higher Education on the Grill," October, 1990, pp.1-2
- Community College Week, "Only in the Magic Kingdom," October 2, 1989, pp. 13-14
- Community College Week, "VAT is Taxing for Higher Education," September 4, 1989, p. 5
- Capitalines, "The Dropout Challenge," March/April 1989, pp. 4-5
- Community College Week, "No More Dead Cow," December 1988, p. 6
- Austin Lawyer's Journal, "A Taxing Issue," February 1986, p. 2
- Vital Speeches, "The Rainbow Connection," Austin, 1985, pp. 262-263
- Austin Business Executive, "128,000 People Can't be Wrong," June 1985, pp. 15-16
- Community College Journal, "Survey Reveals Dramatic Growth in Computer Use," May 1983, pp. 23-25

- Community College Journal, “Save the Colleges,” March 1983, pp. 36-38
- Community College Journal, “A Bull Market for Foundations,” November 1981, pp. 5-8
- Community College Journal, “Legislative Lobbying—It’s 3 Dimensional,” November 1980, pp. 34-37
- AGB Reports, “How to Play the State Capitol Game,” National Association of Governing Boards of Universities and Colleges, September 1980, pp. 41-44
- Vital Speeches, “California’s Tax Revolt-Some Alarming Side Effect,” June 1, 1980, pp. 482-484
- Resources In Education Abstract, “Commission on the Future,” ERIC, Education Resources Information Center, January 1980
- Community College Frontiers, “Propositions 13-First Year Impact,” Spring 1979, pp. 50-52
- American School and University, “Proposition 13 Pinches,” February 1979, p. 189
- Advisor, “Impact of Proposition 13 on California Community Colleges,” American Association of Community College Trustees, January 1979, p. 1
- Compact, “Proposition 13 – Taking Stock in California,” Education Commission of the States, Summer/Fall 1978, pp. 20-21
- The Spotlighter, “Amending the Standard Valuation and Non forfeiture Laws,” Michigan State Association of Life Underwriters, January 1979, p. 17
- Argus, “No Fault Auto Insurance?,” December 28, 1977, p. 81
- Vital Speeches, “Product Liability—A Call to Action,” November 1, 1977, pp. 40-52
- Recommendations of The Governor’s Advisory Commission on Electric Power Alternatives, “Commentary,” August 1976, pp. 80-82
- Michigan Association of School Boards Journal, “The Noncontributory Retirement System,” April 1974, pp. 17-18
- Michigan Speech Association Journal, “A Symposium on Campaign Oratory,” Spring 1969, pp. 23-29
- Detroit Daily Press, “How Romney Came to be a Possibility for President,” January 14, 1968, pp. 7-9
- Vital Speeches, “Gaposis—The New Social Disease,” August 15, 1968, pp. 671-672
- Michigan Quarterly, “The Guaranteed Income,” July 1968, pp. 5-8

#### Publications (Booklets)

- *The Experiments In Relevance Experiment At Albion College*, 1973, 62 pages
- *Energy and the Michigan Economy*, Michigan House of Representatives Printing Office, 1975, 128 pages
- *Critical Issues Facing Michigan Higher Education*, State of Michigan, 1978, 50 pages
- *The Commission on the Future*, Imperial Valley College, January 1979, 20 pages
- *“Access, Quality, Equity: Annexation Is the Answer,”* A Report to the Texas Higher Education Coordinating Board, 1988, 26 pages
- *Texas Tomorrow*, Editor, Austin Community College, 1992
- *Nine Action Themes for The 90’S*, Editor, Austin Community College, 1992

**Publications (Books)**

- ***George Romney – A Political Biography***, Exposition Press, New York City, 1967
- ***William G. Milliken – A Touch of Steel***, Public Affairs Press, Detroit, Michigan, 1970
- ***When Colleges Lobby States***, Chapter Nine, American Association of State Colleges and Universities, 1987
- ***Alternative Funding Sources***, Chapter Ten, (with Dale Gares), Praeger Publishers, 1991
- ***Rekindling Minority Participation***, Editor and contributor (with Adriana Barrera), Jossey-Bass Inc., 1991
- ***Conceptualizing 2,000: Proactive Planing***, Editor and contributor (with Mike DeVault) C C Press, Washington, D.C., 1991
- ***Managing Back: Mugged By Reality***, Author (with Mike DeVault), Foreword by Lee Iacocca, Tassle Top Publishing, 1995
- ***Polonius Contemporaries***, Editor (with Janelle Ashley), Stephen F. Austin State University, University Press, 1998
- ***21<sup>st</sup> Century Direction For Higher Education***, Editor (with Sarah Denman) Marshall University Press, Fall 2001
- ***Profiles In Prominence***, Chapter Five, Marshall University Press, Fall 2002
- ***Profiles In Prominence***, Editor (with Patricia Angel), Marshall University Press, Fall 2002
- ***Profiles In Prominence***, Vol. II, Editor (with Patricia Angel), Marshall University Press, Fall 2003
- ***Profiles In Prominence***, Vol. III, Editor (with Patricia Angel), Marshall University Press, Fall 2004
- ***Candy Bar Surprise***, (Children's Book) Avant Garde Publishing, 2005
- ***Greased Watermelon***, (Children's Book) Tassletop Press, 2006
- ***Will I Ever Get A Big League Baseball?***, (Children's Book), Tassletop Press, 2007
- ***The International Scooter***, (Children's Book) Tassletop Press, 2008
- ***\$50 Candy***, (Children's Book) Tassletop Press. 2010
- ***Profiles In Prominence***, 2008, 2009, 2010, Editor (with Patricia Angel), Golden Gate University, 2008, 2009, 2010
- ***Riptide – The New Normal in Higher Education***, 2011, co-authored with Terry Connelly, Golden Gate University (to be released late Spring 2011)

***(Keynote Speaker)*****The Honorable Chief Sir Arnold K. Amet, GCL., Kt. CBE, OStJ, LL.D**

Minister for Justice and Attorney General of Papua New Guinea

Legal Training Institute, Papua New Guinea (1976)

University of Papua New Guinea, Faculty of Law, (1972-1975)

**Topic: Terrorism and International Law: Cure the Underlying Problem, Not Just the Symptom****Special Interest**

Judicial Education and Training, Leadership Coaching

**Professional Experience (National)**

- Minister for Justice and Attorney General, Papua New Guinea (2010 – Current)
- Governor, Madang Province, Papua New Guinea (2003-2006)
- Chief Justice, Papua New Guinea (1993 -2003)
- Judge, National and Supreme Courts of Papua New Guinea (1983)
- Public Solicitor of Papua New Guinea (1981-1983)
- Associate Public Solicitor of Papua New Guinea, (1980-1981)
- Legal Officer/Secretary, Air Niugini and the National Airline Commission (1979 -1980)
- State Attorney, Public Solicitor's Office (1976 - 1979)

**Professional Experience (International)**

- Legal Consultant, Leadership Coach in Law and Justice and Executive Leadership Capacity Development Program (2006)
- Legal Consultant to the Pacific Island Forum to conduct Governance and Leadership Code Program in Tuvalu, Kiribati, Marshall Islands and Fiji (2006)
- Member, Eminent Persons Group appointed by the Pacific Islands Forum to enquire into and report on the military take-over of government in Fiji (2006)
- Member, Commonwealth Secretariat Arbitral Tribunal (2005-2009)
- Chairman, Commonwealth Observer Group on the Solomon Islands National Elections (2005)
- Chairman, Steering Committee, South Pacific Judicial Conference (2000-2003)
- Co-Chairman, External Advisory Board, UNDP Regional Rights Resources Team (2000-2002)
- Member, Australian Institute of Judicial Administration Council, (1993-2003)
- Visiting Judge, Supreme Court, Fiji (1992)
- Visiting Judge, Court of Appeal, Fiji (1990-1993)
- Visiting Judge, High Court, The Solomon Islands (1989)
- Visiting Judge, Supreme Court, Republic of Vanuatu (1986)

**Awards and Honors**

- Grand Companion of Logohu (GCL) by the state of Papua New Guinea (2006)
- Order of St. Johns (O. St. J.) by St. John's Ambulance (2004)
- Honorary Doctor of Laws (LL.D.) by the University of Papua New Guinea for contribution to legal development (1993)
- Knight Bachelor (Kt.) for service to the Judiciary, Law and Justice (1993)
- Commander of the British Empire, (CBE), for service to the Judiciary, Law and Justice (1986)

**His Excellency, Ambassador Robert Guba Aisi**

Permanent Representative of Papua New Guinea to the United Nations

Diplome, L'Institute International d'Administration Publique, Paris, France (1989-1990)

Intern, Office of the Mayor of Bordeaux, at the Communaute de Bordeaux and at the Executive and Legal Branch of UNESCO, Paris, France (1989-1990)

Legal Training, Victorian Legal Bar, Melbourne Australia (1986)

Member , National Courts of Papua New Guinea, Port Moresby, Papua New Guinea (1981 – present)

Bachelors of Law, University of Papua New Guinea, Port Moresby, Papua New Guinea (1980)

High School, The Armidale School, New South Wales, Australia (1970 -1975)

**Professional Experience**

- Vice Chair - on behalf of Papua New Guinea for the Review Conference of the Parties to the Non-Proliferation of Nuclear Weapons (NPT) (2010)
- Chairman – Pacific Islands Ambassadors' Group at the UN (2006)
- Chairman – Special Committee on Decolonization (C24). C-24 UN Mission to Tokelau to attend a constitutional workshop prior to the two political referendums conducted in that territory (2004)
- Permanent Representative of Papua New Guinea to the U.N. – Permanent Mission of Papua New Guinea to the United Nations (June 25, 2002 – present)
- Founder & Principala Partner – Thirlwall, Alsi and Koiri Law Firm (1992)  
Posman, Kua, and Aisi Law Firm (2000)
- Legal Counsel – Papua New Guinea Electricity Commission (1991-1992)
- Legal Counsel – Municipal Authority of the Capital City of Papua New Guinea, Port Moresby (1986-1991)
- Lawyer – Gadens and Blakes Law Firm, Papua New Guinea (1981-1986)

**Awards**

- Chevalier de la Legion d'Honneur, National Order of the Legion of Honours of France (February 2011)

**Professional Affiliations**

- Member (Current) Papua New Guinea Law Society (Current)
- Member (2002 – present) Intl. Assoc. Of Permanent Representatives (2002 – present)
- President (1990-2000) Papua New Guinea Lawn Tennis Association (1990-2000)
- Member and President 1995-1999 Papua New Guinea Business Council (1995-1999)
- Lecturer (1982-1985) Post Graduate Legal Training Institute of Papua New Guinea (1982-1985)

***(Introduction & Conference Report)*****Professor Dr. Christian Nwachukwu Okeke**

Professor of Law, Director of LLM & SJD International Legal Studies Programs, Director of the Sompong Sucharitkul Center for Advanced International Legal Studies, Golden Gate University School of Law

Doctor in de Rechtsgeleerdheid, Free University of Amsterdam

LLM, (magna cum laude) Kiev State University, Ukraine

- A book of essays in honor of Professor Okeke has been published by Vandepas Publishing: ***Contemporary Issues on International and Comparative Law: Essays in Honor of Professor Chris Okeke*** (2009). The book has 27 chapters and explores the broad range of legal, personal, social, political and historical foundations of international law and covers many important subjects in comparative law. The authors are drawn from varying cultures across the oceans of the world, representing diverse legal philosophies and corresponding practices. The noted editor of the book is Justice Centus Nweze, an erudite judge and international law scholar of the Nigeria Court of Appeal. The writer of the foreword is His Excellency Judge Abdul G. Koroma - a two-term erudite judge of the International Court of Justice at The Hague.
- Solicitor and Advocate of the Supreme Court of Nigeria
- Practiced with Ilegbune, Okeke & Co. (Nigeria)
- Consulted for The Law Offices of Dr. Jude A. Akubuilu (Los Angeles)
- Former Deputy Vice-Chancellor of Enugu State University of Science and Technology (Nigeria)
- Pioneer Dean of two Schools of Law, namely: Nnamdi Azikiwe University, Awka (formerly Anambra State University of Technology) and Enugu State University of Science and Technology, Enugu, Nigeria
- Author of Controversial Subjects of Contemporary International Law and Theory and Practice of International Law in Nigeria and numerous book chapters and review articles in the field of international law
- Currently Pro-Chancellor and Chairman of the Governing Council, Godfrey Okoye University, Enugu, Nigeria
- Taught courses in international legal studies at various universities in Africa, Europe and North America for 25 years

**Publications (Books)**

- *Science, Technology and the Law: The Impact of Science and Technology on Law*, Enugu: Gresham Publishers (1992)
- *Nigerian-Soviet Economic and Industrial Relations*, Enugu: Chuka Press (1983)
- *Settlement of Disputes between International Organizations and Their Employees*, The Hague Academy (1976)
- *The Theory and Practice of International Law in Nigeria*, Enugu: Fourth Dimension Press (1986)
- *Controversial Subjects of International Law*, Rotterdam: Rotterdam University Press (1974)
- *The Expansion of New Subjects of Contemporary International Law through their Treaty-Making Capacity*, Rotterdam: Rotterdam University Press (1973)
- *International Treaty as the Main Source of Contemporary International Law*, Kiev State University (1969) (written and published in Russian)

**Publications (Book Chapters/Chapters in Conference Proceedings)**

- *Conference Proceedings on Using International Norms in Interpreting Local Actions* ch. *Human Rights in Africa*, Indiana University (1995)
- *Current Status of Refugee Law in Africa*, California State University, Long Beach, Conference Proceedings on Refugee Problems in Africa (1995)
- *The Ghana Conference Proceedings* ch. *A Critique of the Nigerian response to Violations of Human Rights*, van Nieuwaal and Ray, eds. (1993)
- *Human Rights, Democracy and the Rule of Law: A Review of Twenty-Three Years of Military Dictatorship in Nigeria*, Seminar Papers of the Africa Study Center, University of Leiden, Holland (1993)
- *Catholic Social Teachings Enroute in Africa* ch. *Bankruptcy of Justice under Nigerian Law*, Ike ed. (1991)
- *Management in Nigeria* ch. *Nigerian Law of Contract*, Ejiofor ed.
- *African Network for Protection and Prevention of Child Abuse and Neglect Conference Proceedings* ch. *A Critical View of the Historical Development of the United Nations Convention on the Rights of the Child*, Peter Ebigbo ed. (1990)
- *The Soviet Union in World Politics* ch. *Nigeria's Relations with Eastern Europe*, Victor Kalu ed. (1988)
- *The Rights of the Child, UNICEF Conference Proceedings* ch. *Laws Affecting the Rights of the African Child in West Africa with Particular Reference to Ghana and Nigeria* (1988)
- *Proceedings of the 16th Annual Conference of the Nigerian Society of International Law* ch. *Extradition in International Law with Particular Reference to Recent Events in Nigeria* (1985)
- *National Seminar on the Apartheid Regime in South Africa: Conference Proceedings* ch. *The Legal Status of National Liberation Movements*, Lagos, Nigeria (1984)
- *New Directions in International Law* ch. *Treaty-Making and Treaty Implementation by a Federal State under International Law with Particular Reference to the Relevant Provisions of the 1979 Nigerian Constitution* (1982)
- *Introduction to Nigerian Law* ch. *International Law*, C.O. Okonkwo ed. (1980)
- *Marketing in Nigeria* ch. *The Impact of Law on Marketing*, J. O. Onah ed. (1979)

- *Proceedings of a Workshop on the Nigerian Draft Constitution* ch. *The Fundamental Objectives and Directive Principles of State Policy* (1977)
- *Proceedings of the African Studies Association* ch. *The Organization of African Unity and Other Regional Organizations: A Comparative Study* (1975)
- *Proceedings of the Annual Scientific Conference of the Nigerian Society of International Law* ch. *The Legal Status of Unrecognized States and Governments in International Law* 45 (1975)

#### Articles

- *The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?* 42 *The International Lawyer* 193 (2008)
- *The Exeat of a Remarkable Man from the Academia: Distinguished Professor Dr. Sompong Sucharitkul: Statesman, Diplomat and Notable Scholar*, 13 *Annual Survey of Intl. and Comp. Law* 1 (2007)
- *The Debt Burden: An African Perspective*, 35 *The International Lawyer* 1489 (2001)
- *International Law in the Nigerian Legal System*, 27 *California Western International Law Journal* 311 (1997)
- *A Note on the Right of Secession as Human Right*, 3 *Annual Survey of International and Comparative Law* 27 (1996)
- *Africa and the Environment*, 3 *Annual Survey of International and Comparative Law* 37 (1996)
- *Africa and the Environment*, 11:3 *Foreign Relations Journal* (Publication of Philippine Council for Foreign Relations) (1996)
- *Law - A Mordant to Science and Technology*, 1 *ESUT Journal of Science and Technology* 31 (1993)
- *Nigerian Foreign Policy under the Constitution of the Federal Republic of Nigeria 1979*, 55 *Suffolk Transnational Law Journal* 201 (1981)
- *Recent Developments in the Law Relating to Aliens in Nigeria*, 1 *University of Jos Law Journal* 35 (1980)
- *The Legal Framework of the Provision of Open Spaces in Anambra State of Nigeria*, *University of Nigeria Journal of Tropical Environment* (1976)
- *The United Nations International Law Seminar: A Critique*, *Journal of International Affairs* (1975)
- *The Military and Africa*, 514 *Review of International Affairs* 8 (1971)

#### Book Reviews

- Ndiva Kofele-Kale, *International Law of Responsibility for Crimes Committed by Heads of States and High Ranking Officials* (August 1997)
- Oli Igbo, *TIENA* (1992)
- Martin C. Okany, *Nigerian Commercial Law* (1987)
- Justice John G.O. Aneke Rtd., *Law for Everyman* (1987)

**Courses:** Air, Space and Telecommunications Law, Comparative Legal Systems, International Investment Law, International Organizations, LLM & SJD Programs

*(Master of Ceremonies for the Morning Session)*

**Professor Dr. Remigius Chibueze**

Attorney at Law; Adjunct Professor of Law, Golden Gate University of Law

SJD, Golden Gate University (2006)

LLM, Golden Gate University (2003)

LLM, University of Alberta, Canada (2000)

BL, Nigerian Law School, Lagos (1993)

LLB, University of Benin, Nigeria (1992)

Dr. Chibueze is in private practice in Oakland and serves as a consultant to some Nigerian companies with business interests in the United States. Dr. Chibueze teaches Jessup International Law Moot Court Competition, SJD Dissertation Seminar, and International Investment Law at Golden Gate University School of Law. Dr. Chibueze also taught Intellectual Property Seminar at John F. Kennedy University School of Law. He is a member of the California State Bar and Solicitor and Advocate of the Supreme Court of Nigeria. He has published academic works in International Law, International Commercial Arbitration and International Criminal Law. His research areas include International Law, International Criminal Law, International Human Rights Law, International Commercial Arbitration, and International Intellectual Property Law.

**Publications:**

- *The Legal Personality of Non-State Entities in International Law: A Settled Issue?* In Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Dr. Christian Nwachukwu Okeke, 171 Vandepul Publishing (2009)
- *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*, 12 Annual Survey of International and Comparative Law 185 (2006)
- *United States Objection to the International Criminal Court: A Paradox of Operation Enduring Freedom*, 9 Annual Survey of International and Comparative Law 19 (2003)
- *The 1998 Rome Statute of the International Criminal Court: Scope of the Subject Matter and Personal Jurisdiction—Towards Individual Criminal Accountability*, Golden Gate University School of Law (2003)
- *The Adoption and Application of the Model Law in Canada: Post-Arbitration Challenge*, 18 Journal of International Arbitration 191 (2001)
- *The Bamako Convention on Movement of Hazardous Wastes: Africa Rejects Foreign Impurities*, *Journal of Pet. & Env't. L* (2001)
- *Appraisal of the Grounds for Challenging Arbitral Awards, the Practice in U.S. and Canadian Courts*, University of Alberta (2000)

**Courses:** International Investment Law, Jessup Moot Court, SJD Dissertation Seminar

*(Moderator for the Morning Session)*

**Professor Peter Keane**

Dean Emeritus and Professor of Law, Golden Gate University School of Law.

JD, Southern Methodist University

BA, City College of New York

- Served as Dean, Golden Gate University School of Law (1998-2003)
- An audio essay about being a criminal defense attorney was broadcast on National Public Radio. It aired on the program "All Things Considered" as part of their continuing series called "This I Believe"
- Author of "San Francisco's Handgun Control Ordinance and of California's Proposition 190" amending the California Constitution and reforming the State Commission on Judicial Performance
- Former Vice-President of the State Bar of California
- Former President of the Bar Association of San Francisco
- Former Chief Assistant Public Defender in the San Francisco Public Defender's office (1979-1998)
- Former assistant professor at Hastings College of the Law
- Internationally known legal analyst for broadcast media: has appeared on CBS Evening News, CNN, BBC, ABC World News, Larry King Live, Nightline, Burden of Proof, MSNBC InterNight, and other news programs throughout the world
- Provides regular legal analysis on CBS television and radio in San Francisco
- Hosted "Keane on the Law," a weekly program on KPIX radio in San Francisco. (1994 to 1997)
- Member of California and Texas State Bars

#### **Publications**

- *Interloper in the Fields of Academe (First-time Experiences of A Non-traditional Dean) (Leadership in Legal Education Symposium IV)*, 35 University of Toledo Law Review 119 (2003)
- *The Jury - Some Thoughts, Historical and Personal*, 47 Hastings Law Journal 1249 (1996)

**Courses:** Constitutional Law, Criminal Procedure, Evidence, Professional Responsibility, Trial Advocacy

**Professor Dr. Benedetta Faedi Duramy**

Associate Professor of Law, Golden Gate University School of Law

JSD (PhD equivalent), Stanford Law School

Certificate in International Human Rights Law and Practice, London School of Economics and Political Sciences, London, UK

LLM, London School of Economics and Political Sciences, London, UK

M.A., Political Science, University of Florence, Florence, Italy

LL.B (summa cum laude) (first class honors), University of Rome *La Sapienza*, Rome, Italy

**Topic: Making Peace with the Past: Federal Republic of Germany's Accountability for WWII Massacres before the Italian Supreme Court**

Professor Dr. Benedetta Faedi Duramy is an Associate Professor of Law at Golden Gate University School of Law in San Francisco where she teaches International Human Rights, Gender and Children's issues in International Law, and Property. The author of several book chapters and articles, Professor Faedi Duramy completed her JSD (PhD equivalent) at Stanford Law School where she has been the recipient of numerous awards for her extensive research and scholarship on gender-based violence, with a special focus on Haiti. Previously she received an LLM from the London School of Economics and Political Sciences, an MA in Political Science from the University of Florence, and an LLB from the University of Rome "*La Sapienza*" (*summa cum laude*). She formerly was a researcher for the Child Protection Unit of the United Nations Stabilization Mission in Haiti and worked in private practice in London.

**Presentations**

- ***From Gender-Based Violence to Women's Violence in Haiti***, selected by the AALS International Human Rights Section Executive Committee to be presented in New Voices in Human Rights Panel at the AALS Annual Meeting (January 7, 2011)
- ***Making Peace with the Past: Federal Republic of Germany's Accountability for World War II Massacres before the Italian Supreme Court***. Symposium "Untold Stories: Hidden Histories of War Crimes Trials," Melbourne Law School (October 14-16, 2010)
- ***From Violence Against Women to Women's Violence in Haiti***: The Annual Meeting of Law and Society Association (May 28-31, 2009); Women on Margins, Columbia Journal of Gender and Law Symposium, Columbia Law School (April 10, 2009); International Studies Association Annual Convention, New York (February 15-18, 2009), Ethnography Workshop, Stanford University (April 28, 2008); Stanford Center on International Conflict and Negotiation Workshop, Center for Democracy, Development and the Rule of Law, Stanford University (April 10, 2008)
- ***Explaining Sexual Violence During Civil War***. Center for International Security and Cooperation, Freeman Spogli Institute for International Studies, Stanford University (October 16, 2008)

- ***What Have Women Got to do with Peace? A Gender Analysis of the Laws of War and Peacemaking.*** International Graduate Legal Research Conference, King's College London School of Law (June 9-10, 2008)
- ***Women & the Law: Gender, the Justice System, & Human Rights.*** Stanford University (March 5, 2008)
- ***The Double Weakness of Girls: Discrimination and Sexual Violence in Haiti.*** Stanford Symposium on Law, Colonialism and Domestic Violence in Africa, Stanford University (April 13-14, 2007)

### Fellowships and Grants

- O'Bie Shultz Completion Dissertation Fellowship, Freeman Spogli Institute for International Studies, Stanford University (2009 – 2010)
- VPGD Diversity Dissertation Research grant (2009 – 2010)
- Gerald J. Lieberman Fellowship, Stanford University (2007 – 2008) and (2009 – 2010)
- Stanford Law School Summer Public Interest Funding Program (Summer 2007, 2008 and 2009)
- Graduate Dissertation Fellowship, Michelle Clayman Institute for Gender Research, Stanford University (2008 – 2009)
- O'Bie Shultz Dissertation Research Travel Grant, Freeman Spogli Institute for International Studies, Stanford University (2008 – 2009)
- Richard Goldsmith Research Fellowship, Stanford Center on International Conflict and Negotiation, Stanford University (2008 – 2009)
- JSD Dissertation Research Grant, Stanford Law School (2008 – 2009)
- International Studies Association Travel Grant (2008)
- Arthur C. Helton Fellowship, American Society of International Law (2008)
- Stanford Center on International Conflict and Negotiation Fellowship (2007 – 2008)
- Stanford Law School Scholarship (2007 – 2008)
- The Class of 2002 Fellowship in Conflict Resolution, Stanford University (Summer 2007)
- European Commission Scholarship to finance the LLM at the London School of Economics and Political Sciences (2000 – 2001)
- Scholarship to finance the entire LL.B. at the University of Rome *La Sapienza* (1994 – 1999)
- Grant to attend the Summer School program at *Scuola Normale Superiore di Pisa* – awarded to the 100 best students in Italy (Summer 1993)

### Publications

- ***From Gender-Based Violence to Women's Violence in Haiti***, (Work in Progress)
- ***Making Peace with the Past: Federal Republic of Germany's Accountability for World War II Massacres before the Italian Supreme Court***, (Work in Progress)
- ***Gender-based Violence, Help Seeking and Criminal Justice Recourse in Haiti***, in *The Body Of The Nation: International Efforts To Address Sexual Violence In Conflict And Post-Conflict Zones* (Tonia St. Germain & Susan Dewey eds.), (forthcoming 2011)

- ***From Violence Against Women to Women's Violence in Haiti***, in *Columbia Journal Of Gender And Law* (2010), (forthcoming). This paper was awarded the 2009 Stanford Richard S. Goldsmith Writing Award In Dispute Resolution, and 2008 Marjorie Lozoff Graduate Essay Prize at the Michelle R. Clayman Institute for Gender Research, Stanford University
- ***What Have Women Got to do with Peace? A Gender Analysis of the Laws of War and Peacemaking***, in *10 Georgetown Journal Of Gender And The Law*, (2009)
- ***What Have Women Got to do with Peace? A Gender Analysis of the Laws of War and Peacemaking***, reprinted in *Law And Outsiders: Norms, Processes And 'Othering' In The 21st Century*, (Cian C. Murphy & Penny Green eds), (Oxford: Hart Publishing) (forthcoming 2010)
- ***The Double Weakness of Girls: Discrimination and Sexual Violence in Haiti***, in *44 Stanford Journal Of International Law*, 147, (2008). This paper was awarded the 2007 Carl Mason Franklin Prize In International Law at Stanford Law School for the most outstanding paper in International Law
- ***Domestic Violence as Human Rights Violation: The Challenges of a Regional Human Rights Approach in Africa***, in *Domestic Violence and the Law in Colonial and Postcolonial Africa*, (Richard Roberts eds.) (Ohio University Press: 2010)
- ***Rape, Blue Jeans and Judicial Developments in Italy***, *16 Columbia Journal of European Law* 13 (2009)
- ***Marie Vieux Chauvet***, in *Women and Crime: An Encyclopedia of Issues and Cases*, (Greenwood Publishing Group: 2010), (forthcoming)
- ***Lucrezia Borgia***, in *Women and Crime: An Encyclopedia of Issues and Cases*, (Greenwood Publishing Group: 2010), (forthcoming)
- ***Marie de Brinvilliers***, in *Women and Crime: An Encyclopedia of Issues and Cases*, (Greenwood Publishing Group: 2010), (forthcoming)
- ***Françoise Athénaïs de Montespan***, in *Women and Crime: An Encyclopedia of Issues and Cases*, (Greenwood Publishing Group: 2010), (forthcoming)
- ***Catherine Deshayes La Voisin***, in *Women and Crime: An Encyclopedia of Issues and Cases*, (Greenwood Publishing Group: 2010), (forthcoming)
- 16 scripts for television programs in the field of education for young people commissioned by RAI- Radio Televisione Italiana and broadcasted on the first channel of the Italian television in prime time (1999)

**Courses:** Gender, Children & International Law, International Human Rights, Property

**Professor Dr. Nancy A. Yonge**

Adjunct Professor of Law, Golden Gate University

Ph.D., Economics, Massachusetts Institute of Technology

LLM, International Tax, Regent University School of Law

JD, University of Connecticut School of Law

A.B., (cum laude) Smith College

**Topic : Harmony and Dissonance Among International Tax Regimes****Professional Experience**

Professor Dr. Nancy Yonge has been a teacher, scholar and policy adviser throughout the US and abroad. Her areas of expertise include comparative tax and regulatory regimes, economic development, international trade, and legal aspects of the policy process. She began her full time teaching career on the East Coast of the US at Long Island University, State University of New York at Albany, and the University of Hartford. Following policy research appointments in Washington, D.C. during the administrations of Ronald Reagan and George H.W. Bush, Dr. Yonge served as a Visiting Professor at universities in the UK, France, Hungary, and Poland. During her career she has received three Fulbright awards for teaching and research on faculties of law and economics in the former Yugoslavia, Romania, and Portugal. In 2005-2006, she was a consultant on tax administration and compliance for the President's Commission on Tax Reform. She joined the adjunct faculty of Golden Gate University School of Law in 2008.

**Publications**

Dr. Yonge is author /editor of four books and more than 50 articles. Among her most significant works are:

- *Using Tax Incentives as Tools in Economic Development* (2003)
- *Regulatory Regimes for Emerging Market Economies* (1998)
- *Regulatory Climate and Investment Patterns in the 50 States* (1995)
- *Securities Regulation on Three Continents* (1989)
- *Assessing the North American Free Trade Agreement* (1988)

**Associate Dean Mark Perry**

Research, Graduate Program and Operations; Faculty of Law; Associate Professor of Computer Science, The University of Western Ontario, London, Ontario, Canada

Barrister-at-Law, Law Society of Upper Canada (Ontario)

MJur (First Class Honours), The University of Auckland

Dip. CSc, The University of Auckland

Basic Certificate (Dip.) SA, The National Computer Centre, London, UK

LLB (Honours), Manchester University, United Kingdom

**Topic: Research Freedom for University Scholars****Areas of Specialization**

Biotechnology Law, Software Licensing, Open Innovation, Intellectual Property Rights

Professor Mark Perry is jointly appointed to the Faculty of Science, Computer Science, and the Faculty of Law at the University of Western Ontario, London, Canada where he is Associate Dean of Research, Graduate Programs and Operations. He is a Faculty Fellow at IBM's Center for Advanced Studies, a Barrister and Solicitor of the Law Society of Upper Canada, a member of the

International Association for the Advancement of Teaching and Research in Intellectual Property, the IEEE, the Intellectual Property Institute of Canada, and the ACM. He is a member of the College of Reviewers of the Canada Research Chairs, a reviewer for Canadian Foundation for Innovation, a member in the Selden Society and the Computer Research Association, on the executive committee for the ACM Special Interest Group on Computers and Society, in the Rotman Institute of Science and Values, a reviewer for Natural Science and Engineering Research Council (NSERC) and the Social Science and Humanities Research Council (SSHRC). Professor Perry's research is focused on the nexus of science and law, and in the area of autonomic computing system development. He holds grants to pursue his research in both law and science, including Genome Canada, and has supervised numerous graduate and undergraduate theses. He has been invited by universities in Australia, India, New Zealand, United Kingdom, United States, and Canada to speak at research-intensive colloquia and classes. He regularly contributes to the media on technology and law issues. A selection of papers can be found at <http://ssrn.com/author=10510>. Professor Perry is an expert on the nexus of legal issues and leading technologies. His science and legal backgrounds have led him to a unique approach to both disciplines that brings together the scientific approach and legal analysis. This has been expressed through modeling the legal relationships in computer and biological systems. His current focus has been on copyright, patent and trademark (as well as other intellectual property rights) in technology systems, and also the regulation of cutting edge technologies.

#### Professional Experience/Teaching

- **Associate Dean**, Faculty of Law, The University of Western, Ontario, London, Canada (2008 - Present)
- **Visiting Fellow & Adjunct Professor**, Faculty of Law, Queensland University of Technology, Brisbane, Australia (2005-2006)
- **Associate Professor**, Faculty of Law, The University of Western Ontario, London, Canada (2005–2008)
- **Associate Professor**, Faculty of Science/ Computer Science, The University of Western Ontario, London, Canada (2005 – Present)
- **Associate Professor**, Faculty of Graduate Studies, The University of Western Ontario, London, Canada (2005)
- **Assistant Professor**, Faculty of Law, The University of Western Ontario, London, Canada (1999–2005)
- **Assistant Professor**, Faculty of Science/ Computer Science, The University of Western Ontario, London, Canada (1999–2005)
- **Assistant Professor**, Faculty of Graduate Studies, The University of Western Ontario, London, Canada (1999–2005)
- **Senior Lecturer in Commercial Law** (PT), Faculty of Commerce, The University of Auckland, Auckland, New Zealand (1997)
- **Senior Lecturer in Law** (PT), Faculty of Law, The University of Auckland, Auckland, New Zealand (1994–1999)
- **Tutor** (Part Time), Education, IBM (Japan) and Matsushita Denki (National Panasonic), Kyoto and Fukuoka, Japan (1985–1990)

**Administrative/Managerial Experience**

- **Information Technology Manager**, Faculty of Law, The University of Auckland, Auckland, New Zealand (1992–1999)
- **Consultant**, Government of NZ, Rotorua, New Zealand (1991)
- **Shepherd**, Agriculture, Raukawa Station, Hawkes Bay, New Zealand (1990-1991)
- **Data Processing Manager**, Data Processing, Kyushu High Technology Center, Fukuoka, Japan (1987–1990)
- **Systems Analyst-Programmer**, Department of Mathematics and Statistics, University of North London, London, UK (1984–1985)

**Publications and Research (Scholarly Books)**

- ***Knowledge Policy for the 21st Century: Legal Perspectives***, (forthcoming) Irwin Law, Toronto, Canada (with B. Fitzgerald) (March 2011)
- ***Creating a Legal Framework for Copyright Management of Open Access Within the Australian Academic and Research Sector***, Sydney University Press, Sydney, Australia, 249 pp (with B. Fitzgerald et al) (2006)

**Publications and Research (Book Chapters)**

- ***The Protection of Rights Management Information: Modernization or Cup Half Full?***, Geist, M. (ed.), From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda, Irwin Law, Toronto, Canada, pp. 304-326 (2010)
- ***From Pasteur to Monsanto: Approaches to Patenting Life in Canada***, Gendreau, Y. (ed.), An Emerging Intellectual Property Paradigm, Edward Elgar, United Kingdom, pp. 67-80 (2008)
- ***Employing Intelligent Agents to Automate SLA Creations***, Pautasso, C. & Bussler, C. (ed.), Emerging Web Services Technology, Birkhäuser, Basel, Switzerland, pp. 33-46 (with H. Kaminiski) (2007)
- ***Rights Management Information***, Geist, M. (ed.), In the Public Interest: The Future of Canadian Copyright Law, Irwin Law, Toronto, Canada, pp. 251-266 (2005)
- ***Information Technology***, Electronic Business and Technology Law, Butterworths Lexis, New Zealand (2004)
- ***Business Case: Napster, MP3 and the Music Industry***, Crossan, M.M., Fry, J.N., Killing, J.P., & White, R.E., (ed.), Strategic Management: A Casebook, Prentice Hall, Toronto, Canada, pp. 129-145 (with M. Crossan & M.A. Wilkinson) (2002)
- ***SITA: Protecting Internet Trade Agents from Malicious Hosts***, Pierre, S. & Glitho, R. (ed.), Mobile Agents for Telecommunication Applications, Springer, New York, pp. 173-184 (with Q. Zhang) (2001)
- ***Information Technology***, Electronic Business and Technology Law, Butterworths Lexis, New Zealand, pp. 23001-23023 (2001)
- ***Domain Names***, Ibusuki (ed.), Transnational Cyberspace Law, Nippon Hyoron Sha, Tokyo, pp. 79-87 (in Japanese) (2000)

**Publications and Research (Peer Reviewed Journal Articles)**

- ***Ownership in Complex Authorship: Joint Works in Italy and the United States of America*** (under journal review) (with T. Margoni)
- ***Decentralized Approach to Resource Availability Prediction using Group Availability in a Desktop Grid***, *Future Generation Computer Systems* (forthcoming) (with H. Lutfiyya & K. Ramachandran)
- ***From Music Tracks to Google Maps: Who Owns Computer-Generated Works?***, *Computer Law and Security Review*, Vol.26 No.6, pp. 22-49 (with T. Margoni) (2010)
- ***University Research and Protection of Confidential Information***, *Canadian Intellectual Property Review*, Vol.26, pp. 92-122 (with M.A. Wilkinson) (2010)
- ***Free Libre Open Source Software as a Public Policy Choice: An Inquiry into the Canadian Situation***, *International Journal on Advances in Internet Technology*, Vol. 3 (with T. Margoni) (2010)
- ***FLOSS as Democratic Principle***, *International Journal of Technology, Knowledge and Society*, Vol.2, No.3, pp. 155-164 (with B. Fitzgerald) (2006)
- ***Leveraging Knowledge Assets: Can Law Reform Help?***, *Canadian Journal of Law and Technology*, Vol.4 No.1, pp. 1-20 (with M.A. Wilkinson) (2005)
- ***Lifeform Patents: the High and the Low***, *Journal of International Biotechnology Law*, Vol.1, No.1, pp. 20–27 (2004)
- ***Introducing Carnivore: Going for the Throat with Precision Surveillance***, *TLF*, Vol.2, No. 41 (A version of paper was first published in the *Computer Law and Security Report*, 20.2, below) (with T. Nabbali) (2004)
- ***Going for the Throat: Carnivore in an Echelon World Part II***, *Computer Law and Security Report*, Vol.20, No.2, pp. 84–97 (with T. Nabbali) (2004)
- ***Introducing Carnivore: Going for the Throat with Precision Surveillance***, *TLF*, Vol. 2, No. 31, pp. 31-40 (A version of this paper was first published in the *Computer Law and Security Report*, 19.6, below) (with T. Nabbali) (2003)
- ***Going for the Throat: Carnivore in an Echelon World***, *Computer Law and Security Report*, Vol.19, No.6, pp. 456-467 (with T. Nabbali) (2003)
- ***Making Sense of Mouse Tales: Canadian Lifeform Patents Topsy-Turvy***, *European Intellectual Property Review*, Vol.23, No.4, pp. 196-204 (with P. Krishna) (2001)
- ***Audio-files on Trial***, *Butterworths Technology Law Forum*, 2000, Vol.1, No.1, pp. 2-5.
- ***Copyright and Anti-circumvention: Growing Pains in a Digital Millennium***, *New Zealand Intellectual Property Journal*, pp. 261–275 (with C. Chisick) (2000)
- ***Copyright Undecided, but Headnotes Lack Originality***, *European Intellectual Property Review*, Vol.22, No.5, pp. 237-241 (2000)
- ***Another Look at Appropriation of Digital Persona: Domain Names at the Costs Hearing***, *New Zealand Business Law Quarterly*, pp. 7–12 (1999)
- ***Judges Reasons for Judgment - Intellectual Property Rights***, *New Zealand Universities Law Review*, Vol.18, pp. 257–293 (1999)
- ***Cybersquatters or Entrepreneurs – When is Legal Intervention Appropriate?***, *New Zealand Business Law Quarterly*, pp. 111-117 (1998)

- ***Acts of Parliament: Privatisation, Promulgation, Crown Copyright — is there a Need for a Royal Royalty?***, New Zealand Law Review, pp. 493–529 (1998)
- ***Roadblocks to LIINZ - Problems Facing Public Access to New Zealand Laws***, Law Via the Internet, pp. 128–136 (1997)

#### Publications and Research (Peer Reviewed Conference Papers)

- ***Towards a Unified Trust Framework for Trust Establishment and Trust Based Service Selection***, 24<sup>th</sup> Annual IEEE Canadian Conference on Electrical and Computer Engineering (with Z. Al-Jazaff & M. Capretz) (2011 forthcoming)
- ***Trust Metrics for Services and Service Providers***, 6<sup>th</sup> International Conference on Internet Web Applications and Services (with Z. Al-Jazaff & M. Capretz) (2011 forthcoming)
- ***Clarifying Privacy in the Cloud***, Cyberlaws: The Second International Conference on Technical and Legal Aspects of the e-Society, St. Maarten, Netherlands Antilles, pp. 12-17 (with T. Margoni & K. Ramachandran) (Feb. 2011)
- ***Online Trust: Definition and Principles***, 5th International Multi-conference on Computing in the Global Information Technology, Valencia, Spain, pp. 163-168 (with Z. Al-Jazaff & M. Capretz) (Sept. 2010)
- ***Decentralized Resource Availability Prediction for a Desktop Grid***, Cluster, Cloud and Grid Computing (CCGrid): 10th IEEE/ACM International Conference, Melbourne, Australia, pp. 643-648 (with H. Lutfiyya & K. Ramachandran) (May 2010)
- ***FLOSS for the Canadian Public Sector: Open Democracy***, ICDS' 4th International Conference on Digital Society, St. Maarten, Netherlands Antilles, pp. 294-300 (with T. Margoni) (Feb. 2010)
- ***Interpreting Network Discrimination in the CRTC and FCC***, ICDS' 4th International Conference on Digital Society, St. Maarten, Netherlands Antilles, pp. 301-306 (with T. Margoni) (Feb. 2010)
- ***The Proxy-based Mobile Grid***, Mobileware, Chicago, United States, pp. 59-69 (with A. Khalaj & H. Lutfiyya) (June-July 2010)
- ***An Autonomic Software License Management System: an Implementation of Licensing Patterns***, The 5th International Conference on Autonomic and Autonomous Systems, Valencia, Spain, Apr. 2009, pp. 257-263 (with L. Noorian).
- ***An Ontology for Autonomic License Management***, 5th IEEE International Conference on Autonomic Computing, Chicago, United States, pp. 204-211 (with Q. Zhao) (June 2008)
- ***Autonomic Creation of Service Level Agreements***, IADIS e-Society, Algarve, Portugal, pp. 379-386 (with H. Kaminski) (April 2008)
- ***Another Pattern Language for Open Source Software Licensing***, OOPSLA PLoP Workshop, Montreal, Canada (with H. Kaminski) (Oct. 2007)
- ***A Pattern Language for Open Source***, SugarLoafPLoP, Porto de Galinhas, Brasil (with H. Kaminski) (May 2007)
- ***Agent Design of SmArt License Management System Using Gaia***, Third International Conference on Autonomic and Autonomous Systems (ICAS'07), Athens, Greece (with Q. Zhao & Y. Zhou) (June 2007)

- ***Using Intelligent Agents in SLA Negotiations***, 4th IEEE European Conference on Web Services: Emerging Technologies Workshop, Zürich, Switzerland (with H. Kaminski) (Dec. 2006)
- ***Verifiable Electronic Voting System: An Open Source Solution***, IASTED Law and Technology Conference, Cambridge, United States (with H. Kaminski) (Oct. 2006)
- ***Software as Performance***, IASTED Law and Technology Conference, Cambridge, United States (with S. Watt) (Oct. 2006)
- ***Differentiating Web Service Offerings***, International Conference on Information Society (i-Society), Miami, United States, pp. 80-88 (with H. Kaminski, H. Lutfiyya, N. Madhavji, & K. Sherdil) (Aug. 2006)
- ***SLA Automated Negotiation Manager for Computing Services***, CEC-EEE '06 Proceedings of the The 8th IEEE International Conference on E-Commerce Technology and The 3rd IEEE International Conference on Enterprise Computing, E-Commerce, and E-Services, San Francisco, United States, pp. 347-350 (with H. Kaminski) (June 2006)
- ***Developing Legal Protocols and Practices for Managing Copyright in Electronic Theses***, Electronic Theses and Dissertation Conference, Quebec City, Canada (with P. Callan) (June 2006)
- ***Agreement-aware Semantic Management of Services***, International Conference on Autonomic and Autonomous Systems (ICAS'06), Silicon Valley, United States (Best Paper Award) (with Q. Zhao & Y. Zhou) (July 2006)
- ***Service Level Agreements Negotiation Manager (Short Presentation)***, OOPSLA '05, San Diego, United States (with H. Kaminski) (2005)
- ***Pattern Language for Software Licensing***, Tenth European Conference on Pattern Languages of Programs (EUROPLoP Conference), Irsee, Germany, pp. 177 – 219 (with H. Kaminski) (July 2005)
- ***A Token-Based Software License Protection Framework Using One-Way Hash Functions***, World Congress in Applied Computing: EEE05 (with M. Bauer & L. Wang) (2005)
- ***Towards an Accessible Web through Semantic Web Standards***, International Conference on Computers for People with Special Needs (CSPN '05), Las Vegas, United States, pp. 10-16 (with C. So & S. Watt) (June 2005)
- ***Who Counts Your Votes?*** IEEE International Conference on e-Technology, e-Commerce and e-Service (EEE05), Hong Kong, pp. 598-603 (with H. Kaminski & L. Kari) (Mar.-Apr. 2005)
- ***Reasoning Over Ontologies for SLAs***, IEEE International Conference on e-Technology, e-Commerce and e-Service (EEE'05), Hong Kong, pp. 381-384 (with Q. Zhao & Y. Zhou) (Mar.-Apr. 2005)
- ***Policies, Rules and their Engines: What Do They Mean for SLAs?***, Knowledge-Based Intelligent Information and Engineering Systems Conference KES, Wellington, New Zealand, pp. 1164-1170 (with M. Bauer) (Sept. 2004)
- ***Delegation Model for Enforcement of On-demand Service Level Agreement***, 8th World Multi-Conference On Systemics, Cybernetics and Informatics, (SCI2004), Orlando, United States (with Q. Zhao & Y. Zhou) (July 2004)

- *Policy Driven Licensing Model for Computer Software*, 4th IEEE International Workshop on Policies for Distributed Systems and Networks POLICY, Washington, United States, pp. 219-228 (with Q. Zhao & Y. Zhou) (June 2003)
- *Policy Enforcement Pattern*, 9th Conference of the Pattern Language of Programs, Monticello, United States, pp. 1-14 (with Q. Zhao & Y. Zhou) (Sept. 2002)

**Publications and Research (Technical Reports)**

- *RFC-3 Interim Report of the WIPO Internet Domain Name Process — The Management of Internet Names and Addresses: Intellectual Property Issues*, Submission to World Intellectual Property Organisation (March 1999)
- *Report 50: Electronic Commerce I – A Guide for the Legal and Business Community*, Submission to the New Zealand Law Commission, pp. 1-204 (with L. Barnard) (1999)
- *Access to Acts of Parliament*, Submission to Parliamentary Council (1998)
- *Technology Crimes Reform Bill*, Submission to Commerce Commission (with G. Huscroft) (1997)

**Publications and Research (Fellowships, Awards and Recognition)**

- Fellow of International Academy, Research, and Industry Association, (2009–)
- Law Commission of Ontario Research Advisory Board, (2007-2008)
- Tremayne-Lloyd Faculty Fellow, (2006-2008)
- Visiting Fellow, Queensland University of Technology, Brisbane, (2005-2006)
- Faculty Fellow, IBM Centre for Advanced Studies, (2003–)
- Member of the Canada Research Chairs College of Reviewers, (2001–)

**Professor Warren Small**

Attorney at Law; Adjunct Professor of Law, Golden Gate University School of Law and Monterey College of Law

JD, Golden Gate University School of Law

MA, Political Science (International Relations), Stanford University

MA, Political Science (American Government), Auburn University

Air War College, Air University

MS, Oceanography, U.S. Naval Postgraduate School

BS, Building Science, Rensselaer Polytechnic Institute

**Topic: Dissonance in International Law: The Increasing Tension between International Humanitarian Law and State Sovereignty**

After spending twenty-five years in the U.S. Navy as a commissioned officer, Professor Small earned his J.D. from Golden Gate, where he specialized in international law. He joined the adjunct faculty in 1996 to complement his private practice which specializes in all aspects of domestic and international intellectual property matters as well as domestic and international business formation. Professor Small is also a member of the adjunct faculty of the Monterey Institute of International Studies and the Monterey College of Law where he teaches several courses in international law. Professor Small frequently delivers guest lectures on international legal issues arising from operations sponsored by the Department of Defense and has been a regular presenter at the ASIL Regional Meetings on the topic of the laws of armed conflict. Professor Small teaches International Patent Law, Copyright Law of the U.S., The Law of International Armed Conflict, Contemporary Issues in International Law, and Pacific Rim Trade Seminar.

### Publications

- ***Stalwart or Stagnant in Defense of Protected Persons: International Humanitarian Law in a Time of Change*** - paper presented to the 20<sup>th</sup> Annual Fulbright Symposium on International Legal Problems at the Sompong Sucharitkul Center for Advanced International Legal Studies, San Francisco, CA (April 9, 2010)
- ***International Humanitarian Law as Law in View of the Changing Nature of Armed Conflict*** – paper presented to the 19<sup>th</sup> Annual Fulbright Symposium on International Legal Problems at the Sompong Sucharitkul Center for International Legal Studies, San Francisco, CA (April 3, 2009)
- ***Obstacles to the Adjudication of War Crimes: The Impact of National Objectives on International Tribunals, the International Criminal Court, and Domestic Courts*** - paper presented to the 18<sup>th</sup> Annual Fulbright Symposium on International Legal Problems at the Sompong Sucharitkul Center for International Legal Studies, San Francisco, CA (April 18, 2008)
- ***Consistency of U.S. Practice as Evidence of Conformity with International Law*** - paper presented to the 17<sup>th</sup> Annual Fulbright Symposium on International Legal Problems and the 16<sup>th</sup> Regional Meeting of the American Society of International Law at the Golden Gate University School of Law, San Francisco, CA (April 6, 2007)
- ***Humanization of Humanitarian Law*** - paper presented to the Centennial Conference of the American Society of International Law (16<sup>th</sup> Annual Fulbright Symposium on International Legal Problems and the 15<sup>th</sup> Regional Meeting of the American Society of International Law) at the Golden Gate University School of Law, San Francisco, CA (April 7, 2006)
- ***The Occupation of Iraq: The Need for New Rules in the Changing Nature of Armed Conflict*** - paper presented to the 15<sup>th</sup> Annual Fulbright Symposium on International Legal Problems and the 17<sup>th</sup> Regional Meeting of the American Society of International Law at the Golden Gate University School of Law, San Francisco, CA (April 8, 2005)
- ***The Increasing Importance of Protocol II Additional to the 1949 Geneva Conventions*** - paper presented to the 12<sup>th</sup> Annual Fulbright Symposium on International Legal Problems and the 11<sup>th</sup> Regional Meeting of the American Society of International Law at the Golden Gate University School of Law, San Francisco, CA (March 28, 2002)

**Courses:** The Law of International Armed Conflict, Contemporary Issues in International Law, Pacific Rim Trade Seminar, International Patent Law, and Copyright Law of the United States.

**Professor Dr. Hubert Smekal**

Assistant Professor, Department of International Relations and European Studies, Faculty of Social Studies, Masaryk University, Brno, Czech Republic; Assistant of the E.MA Director for the Czech Republic; Visiting Fulbright-Masaryk Post-Doc Researcher, Centre for the Study of Law and Society, UC Berkeley School of Law

Summer School EU Advanced Legal Practice, Total Law Team (Weiler, Maduro, Bradley, Areilza, Strehö) – Budapest, CEU (evaluation: magna cum laude)

IBEI Summer School, Barcelona, Spain

Ph.D., European Studies, Faculty of Social Studies, Masaryk University, Brno, the Czech Republic

M.A., Governance and Politics of European Integration, Università di Bologna, Italy

Mgr., Law Faculty, Masaryk University, Brno, the Czech Republic.

**Topic: Non-Majoritarian Difficulty Squared**

**Fields of Academic Interests**

The European Court of Justice; Integration theories; Human Rights Regimes, especially European

- Member of the Academic Senate of the Faculty of Social Studies, Masaryk University (Fall 2009 -)
- Co-founder of the Czech Centre for Human Rights and Democratization (January 2009)
- Regular participant in debates of the human rights movie festival Jeden svět (*One World*)
- Founder of the blog on international politics “Politica Mundi”
- Lecturer in Summer School **University of Toronto** in Brno - module on the European Integration (2004–2009)
- One week lectures program for **Bilgi University**, Istanbul, on the EU Enlargement and EU Czech Presidency (April 2009)
- Representative of the Masaryk University on EIUC diplomatic conferences and EIUC Council meetings
- Evaluator of research grants for Slovak Academy for Sciences (2009)
- Series of lectures on the EU for teachers and public servants, lecturer on number of summer schools in the Czech Republic for Czech students
- Co-author of the revision of the Faculty’s Rules Against Plagiarism (2008)
- Expert cooperation on reconstruction of the Czech official governmental info-portal on the EU – Euroskop (2007)
- Expert opponency to the proposal of the Union of European Federalists for the reform of the European Union judicial system, Prague, Senate of the Czech Republic (2006)
- Member of the Czech Society for European and Comparative Law

**Publications**

- Topics covered: human rights in the EU, the European Constitution, the ECJ, human rights
- **Bončková, Helena – Smekal, Hubert.** Fragmentace společných hodnot? Výjimky z Listiny základních práv Evropské unie. *Současná Evropa*. VŠE Praha, roč. 2, č. 2, s. 61-81 (2010)
- **Kaniok, Petr - Smekal, Hubert.** České předsednictví v Radě EU: politický standard, mediální katastrofa. *Politologický časopis*, Brno : Masarykova univerzita, Mezinárodní politologický ústav, roč. 17, č. 1, s. 39-59
- **Smekal, Hubert.** Lidská práva v Evropské unii. Brno: IIPS, ISBN 978-80-210-5045-7 (2009)
- **Holzer, Jan – Smekal, Hubert.** The Czech Republic: From Lip Service to Concrete Application. In: Jaichand, Vinodh– Suksi, Markku (eds., 2009). *60 Years of the Universal Declaration of Human Rights in Europe*, Mortsel: Intersentia, p. 305–323 (2009)
- **Kaniok, Petr – Smekal, Hubert.** The Czech Presidency of the EU Council: No Triumph, No Tragedy. *Romanian Journal of European Affairs*, Vol. 9, No. 4, ISSN 1582-8271, p. 59–78 (December 2009)
- **Müller, David – Smekal, Hubert.** Droga Republiki Czeskiej do członkostwa w Unii Europejskiej. In: Szymczyński, Tomasz R. (ed.). *Negocjowanie Granic: od “UE-15” do “UE-27” Rozszerzenie wschodnie Unii Europejskiej część pierwsza – ‘Grupa luksemburska’ (2004). Estonia. Polska, Republika Czeska, Slovenia, Węgry, Cypr w UE*. Poznan: Wydawnictwo Naukowe WNPiD UAM, p. 57–92 (2009)
- **Hrabálek, Martin – Majerčík, Lubomír – Smekal, Hubert.** Česká republika a lidská práva ve vnějších vztazích Evropské unie. In Kořan, Michal. *Česká zahraniční politika v zrcadle sociálně-vědního výzkumu*. Praha: Ústav mezinárodních vztahů, s. 149–163 (2009)
- **Smekal, Hubert.** Daniel C. Thomas: Helsinský efekt. Mezinárodní zásady, lidská práva a zánik komunismu. *Mezinárodní vztahy*, roč. 44, č.1, p. 107–112 (2009)
- **Smekal, Hubert.** Evropský soudní dvůr. *Když se řekne Brusel*. E-publikace Institutu státní správy Ministerstva vnitra ČR, s. 53–64
- **Smekal, Hubert.** In Lacina, L. a kol. *Měnová integrace: náklady a přínosy členství v měnové unii*. Praha: C.H. Beck, 2007. s. 573. ISBN: 80-7179-313-2, p. 393-416
- **Pitrová, Markéta – Smekal, Hubert – Suchý, Petr.** Principy organizace zájmových skupin v ČR: právní předpisy a jejich změna v důsledku procesu evropeizace. *Politologický časopis* 14, č. 4, p. 376-388 (2007)
- **Pospíšil, Ivo – Smekal, Hubert.** Vztah národní a nadnárodní úrovně práva: pohled Ústavního soudu ČR a vybraných ústavních soudů zemí EU. In Dančák, Břetislav - Hloušek, Vít (eds.). *Víceúrovňové vládnutí v Evropě: zkušenosti, problémy a výzvy*. Brno: Masarykova univerzita, p. 201- 239, ISBN 978-80-210-4458-6 (2007)
- **Smekal, Hubert.** Jak si ODS poradí s “evropskou ústavou”?, *Revne Politika*, č. 3, roč. V., s. 34–36 (2007)
- **Smekal, Hubert.** Evropská unie a Rada Evropy - možnosti soužití v oblasti lidských práv. In Srb, Vladimír - Hirtlová, Petra. *Lidská práva a svobody v demokratické společnosti*. 1. vyd. Kolín : Nezávislé centrum pro studium politiky, od s. 197-214, 18 s. ISBN 80-86879-06-2 (2007)

- **Majerčík, Lubomír – Smekal, Hubert.** „Lidská práva v boji proti terorismu. Srovnání evropského a amerického přístupu.“ In: Dančák, Břetislav (ed.): Perspektivy západní civilizace a pět let globálního terorismu. Brno: MPÚ, s. 89-118 (2006)
- **Smekal, Hubert.** *Pozice ČR ve Smlouvě o Ústavě pro Evropu: rizika a výhody plynoucí pro ČR.* In: Dočkal, Vít – Fiala, Petr – Kaniok, Petr – Pitrová, Markéta (eds.): Česká politika v Evropské unii. Evropský integrační proces a zájmy České republiky. Brno: MPÚ, s. 151-170 (2006)
- **Smekal, Hubert.** *Evropský zatykač rozkaz.* In: Závěšický, Jan – Rojčík, Ondřej: Nebojte se (v) EU. Hrozby, reakce a budoucnost evropské bezpečnosti. Brno: MPÚ, s. 50-60 (2006)
- **Smekal, Hubert.** The Impact of the "European Constitution" on the National Political and Legal Systems. *Politologický časopis* 12, č. 2, 224-235 (2005)
- **Smekal, Hubert.** *Výzkum evropské integrace a „evropská ústava“ jako impuls pro jeho další vývoj.* Fiala, P. – Strmiska, M. (eds.) Víceúrovňové vládnutí: teorie, přístupy, metody. Brno: Centrum pro studium demokracie a kultury. Edice Srovnávací politologie, sv. č. 2., s. 187-200. ISBN 80-7325-074-8 (2005)
- **Smekal, Hubert.** *Europeanizace práva.* In Dančák, Břetislav – Fiala, Petr, - Hloušek, Vít. Evropeizace. Nové téma politologického výzkumu. Brno: Mezinárodní politologický ústav a Masarykova univerzita, s. 344-364. ISBN 80-210-3865-9 (2005)
- **Smekal, Hubert.** *Aktuální problémy Evropské unie – malá schopnost rozhodovat.* In: Sborník ze závěrečné konference projektu Evropská budoucnost je i budoucnost česká. Praha, s. 80–84 (2005)
- **Stýskalíková, Věra – Smekal, Hubert** (eds.). *Zabranění a bezpečnostní politika Slovinska, Chorvatska, Rumunska a vývoj bezpečnostní situace v Bosně a Hercegovině.* Brno: MPU (2005)
- **Smekal, Hubert.** „Fajmon, Hynek (ed.): *Cesta České republiky do Evropské unie.* Brno: CDK, 2004,“ *CEVRO Revue*, 2005, č. 1
- **Stýskalíková, Věra – Smekal, Hubert** (eds.). *Zabranění a bezpečnostní politika vybraných zemí Balkánu.* Brno: MPU, 220 s. ISBN 80-210-3572-2 (2004)
- **Plaga, R. – Smekal, H.** Pakt stability a růstu – kritická analýza a perspektivy jeho další existence.“ *ACTA*, LII, 3, MZLU Brno, s. 97-106, ISSN 1211 – 8516 (2004)
- **Smekal, Hubert.** Mezinárodní středisko pro řešení sporů z investic. *Evropské a mezinárodní právo* (2002)
- **Smekal, Hubert – Vráblíková, Kateřina.** CEDAW in the Czech Republic (book on CEDAW application to be published with Intersentia in 2011)
- **Smekal, Hubert – Kornel, Martin.** CRC in the Czech Republic (book on CRC application to be published with Intersentia in 2011)

#### Conferences Abroad

- “Přistoupení EU k Evropské úmluvě o lidských právech” (*EU Accession to the European Convention of Human Rights*). **Košice**, Human Rights Forum (May 2010)
- “Human Rights Violations vis-a-vis European Union Staff”. **Brussels**, international conference: Accountability for Human Rights Violations by International Organizations (March 2007)

- The Impact of the "European Constitution" on the National Political and Legal Systems, ISE, **Berlin**. Paper: "Debate on the "European Constitution" in the Czech Republic" (January 2005)

**Conferences in the Czech Republic**

- "Česká republika a výjimka z Listiny základních práv EU". Praha, Symposium Česká zahraniční politika (May 2010)
- "Lisabonská smlouva po irském referendu". Přerov, ČR v EU (June 2008)
- "Vztah národní a nadnárodní úrovně práva: pohled Ústavního soudu ČR a vybraných ústavních soudů zemí EU" (spolu s I. Pospíšilem). Brno, Vládnutí v 21. století (April 2007)
- EU Fundamental Rights Agency – Needed or not? Mezinárodní konference, Brno. Příspěvek: "EU Fundamental Rights Agency – Needed or not?" (November 2006)
- Lidská práva a svobody v demokratické společnosti, Kolín. Příspěvek: "Evropská unie a Rada Evropy – možnosti soužití v oblasti lidských práv." (May 2006)
- Evropské hodnoty a identita pro 21. století, Brno. Příspěvek: "Evropský přístup k lidským právům?" (May 2006)
- Evropská budoucnost je i budoucnost česká, Koncepce informování o evropských záležitostech v ČR, Praha. Příspěvek: "Aktuální problémy Evropské unie – malá schopnost rozhodovat." (December 2005)
- Česká republika a evropská ústava: dopady ústavního textu na vnitřní a vnější fungování EU, Brno. Příspěvek: "Charta základních práv EU" (June 2005)
- Víceúrovňová vláda. Metodologická konference ISPO, Brno. Příspěvek: "Teorie evropské integrace a "evropská ústava" jako impuls pro politologický výzkum" (May 2005)
- Evropeizace - nové téma politologického výzkumu, Brno. Příspěvek: "Evropeizace práva" (April 2005)

***(Rapporteur for the Morning Session)*****Professor Barton S. Selden**

Adjunct Professor at Golden Gate University School of Law

Partner at Gartenberg Gelfand Wasson & Selden, LLP

Advisor, International and Domestic Sale of Goods, Licensing and Trademarks

Fulbright Grantee, Vysoká škola Ekonomická v Praze (Czech Republic, Spring 2008)

LLM, International and Comparative Law (magna cum laude), Vrije Universiteit Brussel, Belgium

JD, Boalt Hall, University of California Berkeley

BA, Political Science (cum laude), University of California Irvine

Professor Barton S. Selden is a partner at Gartenberg Gelfand Wasson & Selden, LLP, where he advises clients on international trade and business transactions. He provides guidance for European and Asian companies on their activities in the United States, and for U.S. entities in their foreign activities. His clients include producers of industrial, construction and consumer products, and suppliers of services including transportation, food, television broadcasting, and computer software. Mr. Selden provides direct legal services in the formation of U.S. subsidiaries and related companies, registration and enforcement of trademarks, intellectual property licensing, distribution and agency agreements, employment matters, and civil litigation. For companies that cannot dedicate a member of the legal department to oversee matters in the United States, Mr. Selden functions as an outside General Counsel, providing a single point of contact for the overseas client in working with the various attorneys needed to follow matters in particular states or in specialized fields of law. He spent the Spring 2008 semester teaching classes on International Business Transactions and Intellectual Property Law at the Prague University of Economics, as the recipient of a Fulbright award. He is an Adjunct Professor of International Business Transactions and European Law at Golden Gate University School of Law in San Francisco. Professor Selden lectures frequently at Italian universities, including Ca' Foscari in Venice, the University of Bologna, and the University of Pavia, on subjects of international trade, commercial law and intellectual property. He also teaches an annual intensive course on U.S. Trademark Law at the Johannes Gutenberg University in Mainz, Germany. Mr. Selden is fluent in Italian. For 2011 and 2012, Mr. Selden is a Vice Chair of the International Bar Association's International Sales Committee.

#### Publications and Talks

- *Assessing the Convention on Contracts for International Sale of Goods*, International Bar Association, Buenos Aires (2008).
- *Going Global: Essential International Law for Business Transactions*, National Business Institute, San Francisco (2008).
- *Responding to Deception in International Sales of Goods*, International Bar Association, Singapore (2007).
- *Profili processuali del commercio elettronico*, Rivista Trimestrale Di Diritto E Procedura Civile, p. 73 (Giuffrè, 2002).
- *Le fonti del diritto statunitense dei contratti commerciali*, Università di Torino (2005), Università Ca' Foscari di Venezia (2003).
- *I rapporti bilaterali tra l'Unione europea e gli Stati Uniti davanti al WTO*, Università Ca' Foscari di Venezia (2005), Università di Bologna (2004).
- *Open Source ed istituti di ricerca: verso un modello F/LOSS per la commercializzazione di software sviluppato con il supporto pubblico*, Centro di Documentazione Europea, Venezia (2004).
- *Il «discovery» nel sistema processuale civile statunitense: la funzione e lo scopo*, Consiglio dell'ordine degli avvocati di Venezia (2004), Università di Pavia (2004).
- *Resolving Disputes Between Trademark Owners and Domain Name Registrants: Comparing the U.S. and Italian Systems*, American Society of International Law Regional Meeting, San Francisco (2002).
- *La risoluzione delle dispute tra i titolari di marchi ed i registranti di nomi a dominio*, Università di Bologna, Università di Modena, Università di Pavia (2002).

- *An Introduction to the Regulation of Electronic Commerce in the United States and the European Union*, Golden Gate University (2001).

**Courses:** European Union law, International Business Transactions, International Litigation in U.S. Courts, U.S. Distribution and Sales Agreements, *Commercio elettronico: la disciplina comunitaria e la regolamentazione statunitense*, Trademark Law and e-commerce for Providers of Electronic Content

**(Moderator for the Afternoon Session)**

**Professor Dr. Arthur Gemmell**

Adjunct Professor of Law & Senior Fellow, Sompong Sucharitkul Center for Advanced International Legal Studies, Golden Gate University School of Law

SJD, International Legal Studies, Golden Gate University School of Law

LLM, Comparative and International Law, Santa Clara University School of Law

JD, Lincoln Law School

BA, Hunter College

After completing extensive arbitral research in China, Professor Art Gemmell received an SJD in International Legal Studies from Golden Gate University School of Law. Dr. Gemmell has studied International Law at Oxford University, Aberdeen University (Scotland), and at *L' Institut International des Droits de L'Homme* in Strasbourg, France. He is the recipient of a Practice Diploma in International Arbitration from the College of England and Wales and is a member of the Chartered Institute of Arbitrators. Dr. Gemmell also teaches at Santa Clara University School of Law. The J. William Fulbright Foreign Scholarship Board (FSB), Bureau of Education and Cultural Affairs of the Department of State (ECA), and the Council for International Exchange of Scholars (CIES) has approved Dr. Gemmell for candidacy on the Fulbright Senior Specialists Roster.

**Publications**

- **The Lex Mercatoria-Redux, forthcoming**, Transnational Dispute Management Journal.
- Book Review, **Contemporary Issues on Public International and Comparative Law: Essays in Honor of Christian Nwachukwu Okeke**, 15 Ann. Sur. of Comp. and Int'l Law 153, (Spring 2009)
- **The Foundations of Western and Chinese Arbitration: A Comparative Analysis**, University Press of America, (2008)
- **International Rules of Arbitration**, European American Trade Association.
- **Commercial Arbitration in the Islamic Middle East**, 5 Santa Clara Journal of Int'l Law 169 (2006)
- **A French Pre-Nup in a California Court**, 33 Lincoln Law School Law Review 1 (2005-6)
- **How Foreign Firms Should Invest in the US**, Economic World
- **America's Most Wanted: Manufacturing Managers**, Dallas Business Journal
- **Cross Culturalism, Silicon Valley Style**, Santa Clara County Business
- **The Right Mindset**, EMA Journal
- **Planning the Japanese Way in the United States**, Journal of Business Strategy

- **Beyond Global HR**, The Personnel Journal

**Courses:** International Law, International Commercial Arbitration, International Commercial Dispute Resolution, and International Business Transactions

**Professor Dr. Rabiatu I. Danpullo-Hamisu**

Associate Professor of Law, Department of Common Law, University of Yaoundé II, Soa – Cameroon; Visiting Fulbright Scholar, George Washington University

Doctorat d'Etat en Droit Privé, mention Très Honorable (2005)

Doctorat de Troisième Cycle en Droit Privé, mention Très Bien (1997)

DEA en Droit Privé (1991)

Maitrise en Droit Privé (1990)

Licence en Droit Privé (LLB), University of Yaounde (1989)

**Topic: Alternative Dispute Resolution as a Catalyst for the Promotion of Harmony in International Law: Myth or Reality?**

**Area of specialization**

Family law, Women and the Law, Child Law, Law of Contract, Securities and Alternative Dispute Resolution

- Founding President: Association of University Law Women - Cameroon
- Director of Department of Child Protection, Ministry of Social Affairs, Cameroon (2005-2007)
- Head of Project for the Protection of Vulnerable Children, Cameroon- UNICEF Co-operation Program (2005-2007)
- Head of Committee that drafted the law against child trafficking and slavery in Cameroon (2005)
- Head of Steering Committee for the elaboration of the Child Protection Code (2005-2007)

**Member**

- National Steering Committee for support to orphans and other children made vulnerable by the HIV/AIDS
- Faculty Post-Graduate Program Committee

**Selected Publications (Books)**

- *The Socio-Legal Perspective of Child Protection in Cameroon* (2008)
- *A Practical Guide on the OHADA Uniform Act on Securities in BI-JURAL Cameroon* (2010)

**Selected Publications (Articles)**

- *Alternative Dispute Resolution as a Means of Settling International Commercial Disputes: Strengths and Weaknesses*, Law Review, Faculty of Law and Political Sciences, University of Yaounde II, Soa (February 2011)
- *Human Rights, Women and the Islamic Veil (Hijab): The Case of Cameroon*, Law Review, Faculty of Law and Political Sciences, University of Yaounde II, Soa (2009)
- *Women and the HIV/AIDS Pandemic in Cameroon: The Way Forward*, Annales de la Faculté des Sciences Juridiques et Politiques Université de Dschang, Tome 10 (2006)
- *The Role of the Family in the Promotion of Peace and Security*, JURIDIS- Review de Droit et de Science Politique (2006)
- *Women, Property and Inheritance: The Case of Cameroon*, Rechts in Afrika , Germany (2005).
- *The Education of the Muslim Girl-child in Cameroon: Bringing the Right to Life*, Annales de la Faculté des Sciences Juridiques et Politiques, edition special droits de l'homme, Université de Dschang, Tome 4 (2000)
- *Marriage in Cameroon: The Gap Between Law on the Books and Social Reality*, Butterworth's Family law Journal, Volume 3, Part 12 of 12 (2001)
- *Customary Bride-Price in Cameroon: Do Women Have A Say?* Butterworth's Family Law Journal, Volume 3, Part 8 of 12 (2000)
- *Interaction, Conflict and Concord Between Islamic Dower and Customary Bride-Price: The Case of Cameroon*, JURIDIS- Review de Droit et de Science Politique (2000)

**The Honorable Justice Gertrude Araba Esaaba Torkornoo**

Judge of Commercial Division of High Court, Ghana; Fellow, Golden Gate University School of Law/International Women Judges Graduate Fellowship Program (LLM in Intellectual Property Law), 2010 – 2011

LLM in Intellectual Property Law Candidate, Golden Gate University School of Law  
Post-Graduate Diploma in International Law, Institute of Social Studies, The Hague Netherlands  
Barrister-At-Law , Ghana School of Law  
BA, University of Ghana

**Topic: Fitting Square Pegs Into Round Holes – The Vexed Question of Harmonizing International Legal Regulation of Traditional Cultural Expressions Under Intellectual Property Law**

**Specializations**

Business Law, Construction Law, Local Government and Administrative Law, International Law and Organizations for Development, Private Customary Law

**Professional Experience**

- Editorial Chair, Judicial Journal, Ghana
- Faculty Member, Judicial Training Institute, Ghana
- Justice of the High Court, Commercial Division, Ghana (2004 –)
- Chief Executive, SLC Law Forum, Accra (a publishing, training and research firm in business law (2002 – 2004)
- External Counsel, City of Tema , Ghana (1997 – 2004)
- Managing Partner, Sozo Law Consult, Accra (1997 – 2004)
- Consultant in Construction Contracts Law to Ghana Institute of Construction, Ghana Institution of Engineers, Ghana Institute of Architects, Ministry of Roads and Highways, Ghana (1990 – 2004)
- Solicitor & Advocate/Director, Fugar & Company, Accra (1987 – 1996)
- Visiting Scholar, Nabarro Nathanson, London (as part of 1989 Study Scholarship in Construction Contracts Law awarded by International Bar Association to an eminent young lawyer)

**Professional Development & Projects**

- Editor, Judicial Ethics Training Manual for the Ghanaian Judiciary
- Delivering Judicial Education: Commonwealth Judicial Educators Institute, Canada; National Judicial Institute, Canada; Judicial Training Institute, Ghana
- Legal Audit/Due Diligence on Access to Justice in the Commercial Court , Malawi
- Representative of the Commercial Division of High Court on Public Service Institutions Implementing Intellectual Property Rights and Regulations – Participated in meetings in Accra, South Africa, Virginia (USPTO)
- Representative of Ghana Judicial Service in the Harmonization of Business Laws in Africa (OHADA Agreement). Participated in meetings in Accra, Senegal, Benin
- Development and Administration of Commercial Courts – Participated in study tours of Commercial Courts in Tanzania, Uganda, Denmark, UK
- Training as Arbitrator and Mediator – Delivered by University of Ghana Legon Center for International Affairs, International Law Institute, Washington
- Legal Issues in Structuring Public Private Partnerships – Institute of Public Private Partnerships, Washington (2000)
- Securities Law – Ghana Stock Exchange (1993, 1994)
- Post Graduate Diploma, International Law & Organizations for Development, Institute of Social Studies, The Hague, Netherlands
- Qualifying Certificate for the Legal Profession, Ghana School of Law
- BA Law & Sociology, University of Ghana

**Books, Papers & Publications**

- *Judicial Ethics Training Manual* for the Ghanaian Judiciary (2009)
- *Articles on Judicial Ethics, Case Management, Access to Justice*, Judicial Journals (2009, 2010)
- *The Case for Prioritization of Commercial Justice Reforms in Africa: Lessons from Ghana*, Conference on Administration of Commercial Justice in Africa - Arusha , Tanzania (September 2007)

- ***Reviewing Remedies in Intellectual Property Cases under Civil Procedure Rules 2004 CI47***, WIPO/Judicial Service of Ghana Conference (2008)
- Several papers on ***Project Management, Contract and Construction Law*** delivered at meetings of Ghana Institute of Construction, Ghana Institution of Engineers, Ministry of Roads and Highways Capacity Building for Contractors Seminars
- ***Business in Ghana – A Handbook on Laws and Regulations***, 1<sup>st</sup> Edition, 2000; 2<sup>nd</sup> Edition (SLC Law Forum) (2003)
- ***Legislative Watch, A Research Tool on Legislation in Ghana***, Annual Publication (SLC Law Forum) (1997-2004)
- ***Doing Business in Ghana***, Chapter in ‘Doing Business in Africa’ – (Annual Publication of Center for International Legal Studies, Austria; now published by Kluwer Law) (2002 – 2009)
- ***The Role of International Economic Organizations in Development of African Countries, with Focus on IFC***, ISS, The Hague (2001)
- ***The Doctrine of Sovereignty in International Relations v. The Doctrine of Sanctity of Contracts – The Case of Renegotiating the Ghana Valco Agreement***, International Business Lawyer (Dec. 1989)

#### Non Legal Publications & Articles

- ***Goal Setting as a Leadership Skill***, Haggai Institute (2005 – updated annually)
- ***The Child and the Rainbow***, Collection of Poetry – Combert Impressions (2010)
- ***The Wise Still Hear the Birds***, Collection of Poetry on Africa, Combert Impressions (2010)

#### Professor Dr. John G. Rodden

University of Texas at Austin and University of Pecs (Hungary)

Ph.D., English, UVA, 1987

M.A., English, UVA, 1982

B.A., English (summa cum laude), La Salle University, 1978

**Topic: “International (In)Justice: Six Decades After, Have We Progressed Significantly since Nuremberg ?”**

Professor Dr. John Rodden has taught rhetoric and communication studies at the University of Virginia and the University of Texas at Austin. He has published twenty books, including “Dialectics, Dogmas, And Dissent: Stories of Human Rights Abuse in Eastern Germany” (2010) and “The Walls That Remain: Eastern and Western Germans Since Reunification” (2007). He is on the editorial board of The Journal of Human Rights and The Human Rights Review, among other publications.

**Academic Curricular/Distinctions**

## National/International

- National Communication Association (NCA) Book Award (for The Politics of Literary Reputation) (1990)
- Fulbright Scholar Award to University of Frankfurt, Germany (1988)
- Advisory Editorial Board Member: Modern Age (1994-), Society (1998-), Human Rights Review (1999-), Journal of Human Rights (2001-)
- U.K. Debating tours (sponsored by the English Speaking Union) (1978 and 1981)
- First Place, National Forensics Association Championships (1978)

## Regional/Local

- Western Communication Association, “Best Article” Award (for “Field of Dreams”)(1994)
- University of Texas, College of Communication, Book Award 1987-89(April 1990)

## Invited Lectures

- National University of Singapore, College of Liberal Arts (June 2011)
- Tunghai University (Taichung, Taiwan ), Keynote Speaker, George Orwell In Asia Symposium (May 2011)
- National Taiwan University, College of Humanities (May 2011)
- Hong Kong University, English Department (May 2011)
- Stanford University, Fulbright Scholars of California Lecture Series (December 2010)
- University of Michigan at Ann Arbor, American Studies Program (September 2009)
- Loyola Marymount University, Presidential Speakers Program (September 2009)
- University of Toronto, Sociology Department (September 2009)
- McMaster University (Canada), Sociology Department (September 2009)
- Concordia University (Montreal), Institute for Genocide Studies and Human Rights (September 2009)
- University of California at Berkeley, Fulbright Scholars of California Lecture Series (October 2009)
- Northwestern University, Institute for the Humanities (November 2006)

**Professional Services**

- Editorial/Scholarly Advisor, “Marxism Today,” Film Documentary on East Germany, Phil Collins Productions (2011)
- Editorial/Scholarly Advisor, “Doublethinking Troubles,” Film Documentary, Canadian Film Board (2006 to Present)
- Co-chair, University of Louisiana at Lafayette, “Lionel Trilling Centennial Conference,” (November 2005)
- Co-Producer, “Orwell’s Relevance Today,” Film Documentary, Baranowski Productions, (2003)
- Co-Chair, Wellesley College, “George Orwell Centenary Conference,” (May 2003)

## Publications (Books)

- *Dialectics, Dogmas, and Dissent: Stories of East German Victims of Human Rights Abuse*, Penn State University Press (2010)
- *The Walls That Remain: Western and Eastern Germans Since Reunification*, Paradigm Publishers (2008)
- *Textbook Reds: Schoolbooks, Ideology, and Eastern German Identity*, Penn State University Press (2006)
- *Repainting the Little Red Schoolhouse: A History of Eastern German Education, 1945-1995*, Oxford University Press (German edition under consideration at Shaker Verlag) (2001)

## Publications (Articles, Book, and Reviews Chapters) (Peer-Reviewed=PR; Not Peer-Reviewed=NPR)

- *The Berlin Wall at 20: Lessons from German History*, Journal of Human Rights (Fall 2009) (PR)
- *Heuristics, Hypocrisy, and History without Lessons: Nuremberg, War Crimes, and Shock and Awe*, Journal of Human Rights (Spring 2008) (PR)
- *Innocents Abroad, or What I Didn't Do on My Summer Vacation*, Human Rights Review (July 2008) (PR)
- *November 9, Germany's Friday the 13<sup>th</sup>: What Should We Remember?*, Together: The American Gathering of Jewish Holocaust Survivors and Their Descendants, online (November 27, 2008) (NPR)
- *Postcommunism Meets McUniversity: An East German's Ideologiekritik of U.S. Higher Education*, Society, (Nov.-Dec. 2008) (NPR)
- *Iraq's Executions and the Delicate Path to Justice*, The Bulletin, Philadelphia (with Michael D. Kerlin) (January 15, 2007) (NPR)
- *Dictatorship of the Professoriat? Academic Unfreedom in East Germany*, Human Rights Review (Fall 2007) (PR)
- *Of Pigs and Poison Shelves: How An East German Student Was Persecuted by the Stasi*, Human Rights Review (Winter 2006) (PR)
- *Ideology As Core Curriculum: DDR Textbooks and German Re-education*, Fachverband Moderne Fremdsprachen (March 2006) (NPR)
- *Of War Crimes and Contrition: The Son of Hitler's Bodyguard Confronts His Father's Legacy*, Journal of Human Rights (Fall 2006) (PR)
- *Human Rights: Progress, Problems*, Baltimore Sun, December 27, 2006 (with Michael D. Kerlin). Syndicated throughout the U.S. and in the Tribune (Chandigarh, India), Kathmandu Post (Nepal), and the Peninsula (Qatar). (NPR)
- *Buchenwald at Sixty: A Somber Anniversary*, Journal of Human Rights (Summer 2005) (PR)
- *The Uses and Abuses of History: Lessons of Progressivist Pedagogy and Analysis of East German History Textbooks*, Midwest Quarterly (Winter 2002) (PR)
- *It Should Have Been Written Here: Germany and The Black Book of Communism*, Human Rights Review (Jan.-March 2001) (PR)

**Dr. Ramesh Karky**

Post-Doctoral Associate, The University of Western Ontario Faculty of Law; Visiting Scholar, York University Osgoode Hall Law School

SJD, Golden Gate University School of Law, San Francisco, USA (2005)

LLM, Vrije Universiteit Brussel, Brussels, Belgium (1991)

Diploma of Law, Tribhuvan University, Kathmandu, Nepal (1982)

Certificate of Law, Tribhuvan University, Nepal (1978)

**Topic: An Issue of Invocability of Provisions of the WTO Covered Agreements before Domestic Courts**

Dr. Ramesh Karky, SJD graduate from Golden Gate University School of Law, is currently a Post-Doctoral Associate at the University Of Western Ontario Faculty Of Law in London, Canada. Prior to joining the University of Western Ontario, Dr. Karky was working as a WTO/IP Consultant on USAID projects in Iraq. Dr. Karky has also worked as an expert to the UNCTAD technical assistance project: “Nepal's Accession to the WTO.” He also served as a National Program Manager on two UNDP projects: Rule of Law and Strengthening Judiciary Programmes. In addition, Dr. Karky practiced law as an Advocate for several years and taught Public International Law and Administrative Law in Nepal.

**Honors**

- **Bidhya Bhusan Medal:** received nationally acclaimed “Bidhya Bhusan” medal for educational and professional achievements by the President of Nepal (2008)
- A **Certificate of Appreciation** was awarded for the excellent program Intellectual Property Rights for SMEs by the USAID Iraq Izdihar Project in Baghdad, Iraq (August 2006)
- **S. J. D. International Legal Studies Merit Tuition Scholarship**, Golden Gate University School of Law, San Francisco, USA (2001-2005)
- **Senior Student Editor: Annual Survey of International & Comparative Law**, Golden Gate University School of Law (2001-2002)
- **Vrije Universiteit Brussel Scholarship** Vrije Universiteit Brussel, Brussels, Belgium (1990-1991)
- **Secretary- Elect: Supreme Court Bar Association of Nepal** (1987 to 1988)
- **Co-editor: Naya Pratik, Periodical Law Journal** (Nepal) (1982 to 1983)

**Publications (Book Chapters)**

- Book chapter on *Globalization and Least-Developed Countries* in a book, Contemporary Issues On Public International And Comparative Law: Essays In Honor Of Professor Christian Nwachukwu Okeke, Editor Chima Centus Nweze, published by Vandepas publishing, USA (February 2009)
- Book chapter on *Review of Status of the Nepalese Membership Procedure to the WTO* in a book, Wto, Globalisation And Nepal, published by Nepal Foundation for Advanced Studies and the United States Embassy, Kathmandu, Nepal (2001)
- Book chapter on *Human Rights in China?* in a book, Justice, Nepal (1992).

**Publications (Articles Published in Refereed Journals)**

- *Issue of Invocability of Provisions of the WTO Covered Agreements Before Domestic Courts*, The Annual Survey of International & Comparative Law, USA (forthcoming)
- *A Comprehensive Survey of Nepalese Legislation Affecting Foreign Trade in Goods*, Journal of World Trade 39 (6): 1119- 1134, Geneva, Switzerland (2005)
- *Nepal's Accession to the WTO: Legislative Enactments in Compliance with the TRIPS Agreement*, The Journal of World Intellectual Property, Vol. 7, No. 6, 891-918 Geneva, Switzerland (2004)
- *Note on Cambodia's and Nepal's Accession: A Landmark Decision in the History of the World Trade Organization*, The Annual Survey of International & Comparative Law, Vol. X, 207- 213, USA (2004)
- *Trademark under the Nepalese Legal System: A Comparative Study with the TRIPS Agreement*, The Annual Survey of International & Comparative Law, Vol. IX, 111- 134 (2003), USA. (2003)
- *Present Chief Justice and Human Rights Commission*, Nepal Times, Nepal (1994)
- *Democracy and Democratic Forces*, Nepal Times, Nepal (1994)
- *Constitutional Limitation and Democracy*, Naya-Doot, Nepal Bar Association Law Journal, Nepal (1993)
- *Individual Liberty and Present Nepal*, Nepal Times, Nepal (1993)
- *Present Situation of Human Rights in Nepal*, Naya-Doot, Nepal Bar Association Law Journal, Nepal (Co-Author) (1989)
- *Legal Aid in Nepal*, 'Raj Dhani,' Nepal (Co-Author) (1984)

**Publications (Books)**

- *The Law Of Intellectual Property And Trips Accord: A Nepalese Perspective*, Nepal (2001)

**Publications (Major Contributions and/or Technical Reports)**

- Formal report on *International Trade (WTO) Rule and Intellectual Property Rights Implication on Genetically Modified Seeds: A Brief Analytical Survey on Iraqi Prospective* submitted to the USAID Izdihar Project in Baghdad, Iraq (August 6, 2009)
- Formal report on *Intellectual Property Rights as one of the Essential Determinants of Foreign Direct Investment* submitted to the USAID Iraq Izdihar Project in Baghdad, Iraq (September 2007)
- Formal report on *Iraq's Accession to the WTO: Conformity of Iraqi Draft Law on Intellectual Property Rights to the WTO/TRIPS Agreement* submitted to the Government of Iraq in Baghdad, Iraq (August 2006)
- Brochure on *A Brief Survey of Trade Related Aspects of Intellectual Property Rights*, prepared for the Council of Representatives (Parliament) in Baghdad, Iraq (September 2008)
- Booklet on *The Promotion Of Intellectual Property Rights: Necessity Of The Modern Age*, submitted to the Government of Iraq (December 2007)

- Booklet on *Trade is an Engine of Economic Development- The World Trade Organization (Wto): Accession And Benefits*, submitted to the USAID Iraq Izdihar Project (December 2007)
- Formal report on *Conformity of Nepal's Legislation to the WTO Agreement* submitted to the UNCTAD (Co-Author) (2000)
- Drafted *Sound Pollution Control Rules, 2057* for the Ministry of Environment, His Majesty's Government of Nepal (2000)
- Formal report on *Management of Vegetation in Road Reserves: the Legal Position of Trees and Forest Products in Road Reserves*, published by His Majesty's Government of Nepal (prepared as a Consultant to Roughton International (England) and Overseas Development Administration, London (England) and this report was used for a governmental training program (1996)
- Involved in the preparation of *Nepal's Country Report on Environment* for the Ministry of Environment, His Majesty's Government of Nepal (1996)
- Research work on '*The Watershed Laws in Nepal*' was undertaken under the Bagmati Watershed Project, Nepal funded by the European Economic Commission (1994)
- Drafted a proposed *Legal Aid Act* along with other Committee Members constituted by the Nepal Bar Association (1985)
- LLM Thesis on *The Protection of Untried Prisoners Under International Human Rights Law*, the University of Brussels in Belgium (1990-1991)

#### Trainings/Seminars/Workshops/Others

Teaching as an Expert at USAID Technical Assistance Programs

- Delivered a lecture on *Intellectual Property Rights/Human Rights and WTO Accession* for the Council of Representatives Human Rights Committee in Baghdad, Iraq (May 3, 2009)
- Delivered a one day lecture on *WTO Accession* for the Ministry of Planning, Government of Iraq in Baghdad (April 13, 2009)
- Conducted a workshop on *Intellectual Property Rights Legislative Drafting* for the officials of the Department of Intellectual Property Rights in Erbil, Iraq (March 10-15, 2009)
- Delivered a one day specialized training course on *Compliance of Domestic Law and WTO Accession* for lawyers in Baghdad, Iraq (March 28, 2009)
- Delivered a one day specialized training course on *Protecting Copyrights in Iraq: Challenges & Opportunities* for the Ministry of Culture, Government of Iraq in Baghdad (January 12, 2009)
- Delivered a two day specialized training course on *WTO Accession and Jurisprudential Aspects of WTO Agreements* for Iraqi Judges in Erbil, Iraq (November 15 and 16, 2008)
- Delivered a one day training course on *Accession to the Madrid System for the International Registration of Marks: Opportunities and Challenges* at a Technical Workshop for the Officials of the Ministry of Industry and Minerals in Baghdad, Iraq (October 20, 2008)

- Delivered a training course on *The Promotion of Copyright and Deterrent Effect to Copyright Piracy* to the Officials of the Ministry of Culture in Baghdad, Iraq (August 20, 2008)
- Delivered a training course on *The Effective Protection of Trademarks and the WTO/TRIPS Agreement* to the Officials of the National Investment Commission, and the Ministry of Industry and Minerals in Baghdad, Iraq (July 30, 2008)
- Delivered a specialized training course on *The Challenges on Giving Effect to the Provisions of the WTO/TRIPS Agreement by Iraqi Judicial System* to the Judges of Iraq in Baghdad, Iraq (June 2, 2008)
- Delivered a training course on *The Issue of TRIPS Compliance and WTO Accession* to private sector from all over the country in Erbil, Iraq (February 11 and 13, 2008)
- Delivered a copyright awareness training program on *The Deterrent Effect to Copyright Piracy and Infringement* to the participants from the Ministry of Culture and private sector in Baghdad, Iraq (January 28, 2008)
- Delivered a technical training workshop on *Overview of Intellectual Property Rights for Business* to the participants from private sector in Baghdad, Iraq (October 10, 2007)
- Delivered a technical training workshop on *The Main Challenges of the Copyright Related Intellectual Property Rights in Iraq and the Copyright Draft Law* to the participants from the Copyright Committee of the Ministry of Culture of the Government of Iraq in Erbil, Iraq (July 14- 17, 2007)
- Delivered a specialized training course on *Issues and Challenges of Intellectual Property Rights in Iraq and Its Impact on SMEs, Foreign Investment and Transfer of Technology* to the participants from private sector (Kurdistan Economic Development Center, Iraqi Business Center) in Erbil, Kurdistan region of Iraq (May 16, 2007)
- Delivered a specialized training seminar on *WTO Accession: Challenges and Opportunities* to the participants from private sector in Erbil, Kurdistan region of Iraq (May 15, 2007)
- Provided a specialized training course on *The Effective Protection of New Plant Variety under the TRIPS Agreement* to the high level officials of the Ministry of Planning and the Ministry of Agriculture of the Government of Iraq in Baghdad, Iraq (December 28, 2006)
- Provided a specialized training course on *WTO Accession: Issues of Copyright and Conformity of Iraqi Intellectual Property Rights Legislation with the WTO/TRIPS Agreement* to the governmental officials and private sector in Erbil, Iraq (October 29-30, 2006)
- Prepared a specialized training course syllabus with materials and delivered lecture on *Intellectual Property Rights for SMEs in Iraq* to the private sectors of Iraq in Baghdad, Iraq (August 10, 2006)
- Prepared a specialized training course syllabus with materials and delivered lectures on *Iraq's Accession to the WTO and Trademark Issues under the WTO/TRIPS Agreement* to the officials of the Iraqi Ministry of Industry and Minerals in Baghdad, Iraq (May 16-17, 2006)
- Presented an *Introductory Note on World Trade Organization (WTO) and WTO Accession* at the training program

- Presented an *Introductory Note on Trade-Related Aspects of Intellectual Property Rights* at the training program.

**Participation**

- **International Bar Association, International Conference of Judges and Lawyers on *Due Process in International Arbitration*** in Dubai, United Arab Emirates (February 15-16, 2009)
- **Stanford University Law School Symposium on *Securing Privacy in the Internet Age*** (March 13-14, 2004)
- **Golden Gate University School of Law Fulbright Symposiums** on different topics of International Law (2002-2005) and Intellectual Property Rights seminars (2002-2005)
- ***The WIPO Asia-Pacific Regional Seminar on Modernization of the Intellectual Property System for the Least-Developed Countries*** in Kathmandu and others (2000)

**Trainee**

- **International Committee of the Red Cross** in Geneva, Switzerland, Studied International Humanitarian Law (July-Aug. 1991)

**Mr. David Schmid**

LLM in United States Legal Studies Candidate, Golden Gate University School of Law; PhD Candidate, University of Heidelberg, Germany

PhD Candidate, University of Heidelberg, Germany

LLM in United States Legal Studies Candidate, Golden Gate University School of Law

**Topic: Do We Need a European Civil Code?**

Mr. David Schmid studied Law at Ruprecht-Karls-University, Heidelberg, Germany and finished with honors in 2009. He then wrote his dissertation in Business Criminal Law before coming to Golden Gate University School of Law to obtain a Master of Laws (LL.M.) in U.S. Legal Studies. He received scholarships from Baden-Württemberg-Foundation and Golden Gate University. Mr. Schmid interned in law firms in Germany and the US, he was the student president and the leader of several students' clubs; he also served in the youth municipal council.

**Ms. Shufan Sung**

SJD in International Legal Studies Candidate, Golden Gate University School of Law; Attorney at Law in Taiwan, Republic of China

SJD in International Legal Studies Candidate, Golden Gate University School of Law  
LLM, University of California, Los Angeles, Los Angeles (2009)  
LLM, National Tsing Hua University, Hsinchu, Taiwan (2007)  
LLB, National Taiwan University, Taipei, Taiwan (2005)

**Topic: Coal-Fired China: Rethink the Precautionary Principle**

Visiting Scholar, University of California, Berkeley, Berkeley (2010)  
Lecturer I, National Tsing Hua University, Hsinchu (2010)  
Lecturer II, National Chung Shin University, Taichung (2010)

**Publications**

- Shufan Sung & Fan Chief-Te, *Carbon-Based Border Tax Adjustments: The Debate Continues*, unpublished paper presented at the United Nations Framework Convention on Climate Change (UNFCCC), Cancun, Mexico (2010).
- *The Application Research of Canadian Independent Review Committee for Investment Funds*, delegated by SITCA, Securities Investment Trust & Consulting Association of the ROC (2008).
- *The Examination of Draft Greenhouse Gas Emissions Reduction Act*, Taiwan Journal of Law and Technology Policy, Volume 4, Issue 4, 123-171 (2008).
- *The Study of the Draft Greenhouse Gas Emissions Reduction Act* (Master thesis), National Tsing Hua University, Hsinchu, Taiwan (2007).

**(Rapporteur for the Afternoon Session)****Professor Dr. Sophie Clavier**

Adjunct Professor of Law, Golden Gate University School of Law; Associate Professor of International Relations, San Francisco State University

PhD (Doctorat d'Université), International Public Law, University of Paris (2004)  
MA, International Relations, San Francisco State University (1993)  
SJD (Diplome d'Etudes Superieures), International Public Law, Université of Paris- Institut des Hautes Etudes Internationales (1986)  
MA (Diplome d'Etudes Approfondies), International Relations and Diplomacy, Institut Libre d'Etudes de Relations International, Paris (1984)  
Certificate of Proficiency, University of Cambridge, U.K. (1981)

**Awards and Formal Recognition for Teaching and/or Advising**

- IRSA Best Teacher of the Year Award (2010)
- IRSA Best Teacher of the Year Award (2008)
- Student Recognition in Advising from SFSU Advising Center (December 2005)
- IRSA Best Teacher of the Year Award (2002)
- SFSU Outstanding Contribution for Teaching Large Classes Effectively (1998)

**Grants**

- Collaborator of NSF-CDI 0835531 (funding of \$4 million) and recipient of \$20K sub-award

**Peer Reviewed Journal Articles**

- *Discovering Word Associations in News Media via Feature Selection and Sparse Classification*, Gawalt Brian, J. Jia, L. Miratrix, L. El Ghaoui, B. Yu, S. Clavier, Proc. 11th ACM SIGMM International Conference on Multimedia Information Retrieval (2010)
- *Marketing War Policies: the Role of the Media in Constructing Legitimacy*, Clavier, Sophie, and Laurent El Ghaoui, Kansas Journal of Law and Public Policy XIX.2 (2010): 212-33
- *Food Fight at the WTO: Can the Precautionary Principle Reconcile Liberalization and Public Fear?*, Currents: International Trade Law Journal, Vol. XVI, no. 3 (Summer 2008)
- *Contrasting Franco American Perspectives on Sovereignty*, Annual Survey of International and Comparative Law, Golden Gate University School of Law, Vol. XIV (Summer 2008)
- *Contrasting Perspectives on Preemptive Strikes: The United States, France and the War on Terror*, Maine Law Review, Vol. 58 (No. 2, 2006)

**Published Comments**

- *American Society of International Law*, Response To President Alvarez, American Society of International Law, President's Column <http://www.asil.org/ipost/president/pres070807> (August 7, 2007)
- *Chima Centus Nweze, Ed. Contemporary Issues on Public International and Comparative Law: Essays in Honor of Professor Christian Nwachukwu Okeke*, Clavier, Sophie, Annual Survey of International & Comparative Law, Vol. 15: Iss. 1, Article 8 (2009)

**Editor Reviewed Journal Articles**

- *French Elections: Substance, Style and the Media*, Global Politics Magazine, Vol. 4 (October 2007)
- *Veiled Threats: Modifications in Hijab Laws as Indicators of Perceived Imperialism in Iran*, Suzanne Levi Sanchez, Sophie Clavier, Women in International Security, Edmund Walsh School of Foreign Service, Georgetown University (Summer 2007)
- *Perspectives on French Criminal Law*, Curtin, John, ed. Crime and Wealth, American Heritage Custom Publishing (1997)

**Non-Peer Reviewed Journal Articles**

- Strict Scrutiny ([www.strictscrutiny.org](http://www.strictscrutiny.org)): *France's Identity Crisis* (2006)

**Book Reviews**

- *Comparative Criminal Justice Systems*, book review of Reichel, Philip, Prentice Hall (June 2008)
- *World Politics in the 21<sup>st</sup> Century*, book review of Duncan, Raymond W., Jancar-Webster, Barbara and Switky, Bob, Pearson Longman (June 2006)
- *International Politics on the World Stage*, book review of Rourke, John, 11<sup>th</sup> edition (2006)
- *Comparative Criminal Justice Systems*, book review of Fairchild, Erika and Damner, Harry, Wadsworth Thomson Learning (Spring 2002)

**Creative Work/Software**

- With Alexandred' Aspremont, Laurent El Ghaoui, et al, [www.stanews.org](http://www.stanews.org)

**Conference Presentations**

## International Studies Association - National

- "Country Profiling: Media, Foreign Policy Orientation and the Limitations of framing theory," ISA New Orleans (February 2010)
- "Military Intervention, the Media and the Pursuit of Legitimacy," With Laurent El Ghaoui New York (February 2009)
- Chair Panel- International Law
- "Breaking World News: the Computerized Dynamic Visualization of Aggregate Perceptions, Public Opinion and the Making of Foreign Policy," With Laurent El Ghaoui, San Francisco (March 2008)
- "Food Fight at the WTO: The use of the Precautionary Principle," Chicago (March 2007)
- "Contrasting Franco American Perspectives on Sovereignty," San Diego (March 2006)
- "Mickey Mouse and the French Cultural Identity," Honolulu (March 2005)
- Chair of Panel on Identity, Honolulu (March 2005)

## International Studies Association –West

- "Immigration Issues in France," International Studies Association –West, Las Vegas (October 2003)
- Chair of Panel on Genocide.

## American Society of International Law- West

- "Contrasting Franco American Perspectives on Sovereignty" (April 2006)
- "The Use of Force in a Franco American Perspective" (March 2005)
- "When Women ARE the Cultural Heritage" (March 2003)
- "France's Position before the Iraqi Conflict" (March 2002)

## Fulbright Symposium

- The 18<sup>th</sup> Fulbright Symposium on International Legal Problems, Rapporteur on "Politics of International Law" presided by Judge Abdul Korona of the International Court of Justice, San Francisco (April 18, 2008)

**Public Lectures**

Stanford University: Bechtel International Center

- “French Laws against Ostentatious Religious Symbols” (June 2007)
- “Urban Unrest in France and Immigration Policies” (February 2006)
- “Mickey Mouse and the French Identity” (March 2005)

Commonwealth Club of Northern California

- “French Elections and Their Impact on Franco American Relations (October 2007)
- “International Protection of Women’s Rights” (April 2006)
- “France and the U.S.: A Tale of Passions” (November 2006)
- “Impact of American Culture on French Society” (December 2004)
- “French Immigration Policies” (April 2001)

World Affairs Council - Marin Chapter

- “International Law and the Use of Force” (October 30, 2008)
- “ French Elections” (June 2007)

Dominican University Great Decisions Class and Public Lectures

- “Marketing War Policies or Merging New Norms: the Debate Around Humanitarian Intervention,” Dominican University (April 14, 2009)

Amnesty International and USF School of Law

- 40<sup>th</sup> Progressive Lawyering Day – “Violence against Women and the Law” (September 2008)
- 36<sup>th</sup> Progressive Lawyering Day – “CEDAW: Progress and Challenges,” Amnesty International Panel (October 2004)

International Law Society

- “International Women’s Rights,” USF School of Law (March 16 YEAR?)
- “The International Criminal Court,” Golden Gate University School of Law (March 2005)

The Federalist Society

- ”What Role Should Foreign Law Play in US Constitutional Interpretation,” Debate Moderator, San Francisco, CA (February 2008)

San Francisco Arts and Humanities Seminars

- “The European Integration and European Community Law” (Fall 1999)
- “French and American Cultural Differences” (Fall 1998)
- “Assessment of the United Nations” (Fall 1997)

**Media**

- Interview with Nicole Kling for Swedish Foreign Affairs paper: Perpektiv (November 4, 2008)
- “Diplomatic Offensive Needed, Not Offensive Diplomacy,” Suzanne Levi-Sanchez and Sophie Clavier, *SF Chronicle*, Open Forum (October 9, 2007)
- “Iranian Women’s Rights Regress as Rift with West Heats Up,” Suzanne Levi-Sanchez and Sophie Clavier, *SF Chronicle*, Insight Section (August 26, 2007)
- 2 - 30 minutes live interviews *Allo la planete*, France Inter (March 2007)
- CBS News intervention on Military Commissions (November 2006)
- Various TV and radio interviews (2003-2006)

**Miscellaneous Interventions**

- Participation as a moderator in “Women as Instruments of Change for the Bridging of Gaps,” in Peace, Security, and Development Strategies in Africa, at the Sucharitkul Center for the Advanced International Legal Studies, Golden Gate University
- Participation in the 2008 Teaching and Research and International Policy Report <http://irtheoryandpractice.wm.edu/projects/trip>
- International High School, Lecture on International Trade Law, 2008
- Panelist on United Nations 60<sup>th</sup> anniversary symposium, Jewish Community Center (June 2005)
- CARE and Care Action Network, volunteer since 2002 including moderator for workshop Program (March 2005)
- International High School, presentation on Human Rights to high school students (November 2004)
- YMCA Model United Nations for middle schools, consultant (2003)
- United Nations Associations - Judge for High School Essay Contest (2003 and 2004)
- Luncheon keynote speaker and speech contest judge for the Lions Club (2001, 2002, and 2003)

*2010 - 2011*

*Scientiae Juridicae Doctor (SJD) in International Legal  
Studies Graduates*

**Dr. Sylvia Y. Chou**

Dispute Settlement Mechanisms in the East Asian Economic Integration Structure:  
Focus on State-to-State Trade Dispute Resolution

**Dr. Brij Dhir**

Shrimad Bhagwad Gita in Bench and Bar

**Dr. Tiptira Rammaniya**

Extended Producer Responsibility (EPR): An Alternative Solution to Regulate the  
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## *Introduction*

Professor Dr. Christian N. Okeke

Professor of Law; Director of LLM & SJD in International Legal  
Studies Programs; Golden Gate University of Law;  
Director of The Sompong Sucharitkul Center for Advanced  
International Legal Studies

**Introducing**  
**HIS EXCELLENCY, AMBASSADOR ROBERT GUBA AISI**  
Permanent Representative of Papua New Guinea to the United Nations

**1. Introduction:**

I feel very happy to formally welcome, introduce and present to you His Excellency, Ambassador Robert Guba Aisi, Permanent Representative of Papua New Guinea to the United Nations representing our keynote speaker Sir Arnold K. Amet, Minister of Justice and Attorney General of Papua New Guinea.

**2. Education:**

Ambassador Aisi obtained his law degree in 1980 from the University Papua New Guinea. The following year he was admitted to practice to the practice of law in both the National and Supreme Courts of Papua New Guinea. He obtained a Diplome from the prestigious L'Institute d'Administration Publique, Paris, France in 1990 and interned in the Office of the Mayor of Bordeaux and at the Executive and Legal Branch of UNESCO, Paris.

**3. Career**

He has had a rewarding academic, administrative and professional career. He lectured at the post-graduate legal training institute of Papua New Guinea for many years. From 1986 to 1990, he was Principal Legal Officer to the regional authorities in Port Moresby. From 1990 – 1992 he was the Principal Legal Officer and Deputy Commission Secretary to Papua New Guinea's Electricity Commission. He was an Honorary Consul of Papua New Guinea to South Africa, President of the Business Council of Papua New

Guinea and a member of the Australia-Papua New Guinea Business Council. He is the current Ambassador and Permanent Representative of Papua New Guinea to the United Nations in New York, a position he has occupied from June 25, 2002 when he presented his credentials to the Secretary General. In 2004, he was elected the Chairman of the United Nation's Special Committee on decolonization and has served as the Chairman of the Pacific Islands Ambassador's Group at the United Nations.

#### **4. Award**

Ambassador Aisi is a proud holder of the National Order of the League of Honor of France.

#### **5. Conclusion**

Distinguished Ladies and Gentlemen, I now have the pleasant honor and exceptional privilege to present to you our keynote speaker, His Excellency, Ambassador Robert Guba Aisi.

Please join me to usher him to the lectern to deliver the keynote address.

Chris Okeke

Keynote Address

*Terrorism and International Law:*

*Cure the Underlying Problem, Not Just the Symptom*

21<sup>st</sup> Annual Fulbright Symposium on International Legal Problems

Golden Gate University School of Law

April 1, 2011

By

Sir Arnold K. Amet, GCL, Kt. CBE, OStJ, LLD

Minister of Justice and Attorney General of Papua New Guinea.

Previously served in Papua New Guinea as Chief Justice, Governor of Madang Province and Judge of the National and Supreme Courts. Also held positions as a State Attorney and Public Solicitor of Papua New Guinea, as well as Legal Officer and Secretary of Air Niugini and the National Airline Commission

## **Contents**

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## **1.00. Introduction**

Terrorist activities are not of recent origin on the international plane. They have been there since the beginning of humanity. Although international law may not be accused of addressing the issue of terrorism with levity, it was after the 9/11 terrorist attacks on the United States that the international community's efforts toward fighting terrorism garnered more strength and attention.

The debatable critical question is whether terrorism under international law should be studied and treated as a specific subject in developing the legal norms and principles for its fight and regulation, or whether terrorism should be fought and regulated based on the already existing relevant international legal norms and principles. We favor the later approach. Terrorism like piracy, torture, genocide etc. should be examined within the context of the already existing framework of international law since it does not as of the present time have its clear legal norms. Terrorism has become one of the top ranking problems threatening the peace and stability of the international community and challenging international law at the present time. Granted that the international community as a whole has not paid deaf ears to the challenges of this anathema, a lot still needs to be done to adequately combat terrorism. More cooperation among states and international organizations is a sine qua non in this direction. One major impediment to the efforts being made to contain terrorism is the inability of the international community to adopt a comprehensive and generally acceptable definition of terrorism, which would capture its constitutive elements.

The objectives of this paper are: to discuss the genesis of the doctrine of war, use of force, difficulties associated with the definition of terrorism, causes of terrorism, terrorism during both armed conflict and peace time; the United Nations efforts in dealing with the definition of terrorism; the legal responsibility for acts of terrorism; and attempt to outline how best to cure the underlying problem and not just the symptom. Hopefully, these efforts will help in identifying the best ways through which the fight against terrorism would be won ultimately. It is to the examination of these legal issues that we now turn.

## **2.00. The Just War Doctrine**

The origin of the doctrine of just war can be traced to the Greeks and Romans. Thus Greek philosophers, who had striven to bring some reason, order, and essence to their society, tried to justify war on moral, religious, and legal grounds<sup>1</sup>. The Roman writer, Cicero, characterized war as just if it was waged to recover lost goods<sup>2</sup>. Just war doctrine was earlier influenced by the Church's view of natural law. Even though the Romans generally believed that war was an aspect of nature, and was dictated by the natural order to which man had no control, they felt that the only justification for war was an injury accompanied by lack of atonement on the part of the wrongdoer<sup>3</sup>. Among the non-Christian societies, there were thoughts about the need for rules that would reduce the negative effects of war<sup>4</sup>. The authority of the Church became merged with the authority of the state, which led to a Christian pacifism<sup>5</sup> that was later displaced by St. Augustine's view of natural law.

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<sup>1</sup> See Frederick Russell, *The Just War Theory in the Middle Ages*, 1 (Cambridge University Press, 1975)

<sup>2</sup> *Id.* at 5

<sup>3</sup> See Von Elbe, "The Evolution of the Concept of Just War in International Law", 33 *A.J.I.L.*, 665, 666 (1939)

<sup>4</sup> See Maj. Jeffrey f. Addicott & Maj. William A. Hudson, Jr., "The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons", 139 *Mil. L. Rev.* 176-177 (1993)

<sup>5</sup> See Yoram Dinstein, *War, Aggression and Self Defense*, 60, 3<sup>rd</sup> ed. (2001). Under this philosophy, there was in existence, a City of God, in which God Himself ordained wars against evil. See Von Elbe, *supra*, 668

St Augustine, in his natural law thinking, espoused a just war theory under which war could not only be just, but obligatory under certain conditions<sup>6</sup>. In his analysis of the just war doctrine, St Augustine identified the core attribute of a just war, namely, that it must be fought in order to promote or preserve peace, to punish the evil doer, or to recover possessions wrongfully taken<sup>7</sup>. He propagated war as a last resort, and reasoned that a just war must be fought by a sovereign authority.

Following St. Augustine was St. Thomas Aquinas, another philosopher who discussed the just war theory from natural law prism. He elaborated on the work of his predecessor, St Augustine. In offering a negative answer to the question of “whether it is always sinful to wage war”<sup>8</sup>, St Thomas Aquinas, however, identified three conditions that a just war should meet: proper authority, just cause, and rightful intention<sup>9</sup>. He was in agreement with St. Augustine that the authority to fight a just war resided with a sovereign; such war must have been triggered by a just cause, supported by the right intention of those waging the war<sup>10</sup>. The intention referred to here is the advancement of good, or the avoidance of evil<sup>11</sup>. St Thomas Aquinas saw the need to punish both the wrongful conduct of the wrongdoer as well as his guilty mind, and felt that defense of a common good was a

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<sup>6</sup> He noted that: “Just wars are usually defined as those which avenge injuries, when the nation or city against which war-like action is to be directed has neglected either to punish wrongs committed by its own citizens, or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which God Himself ordains”. See Mark Janis, *An Introduction to International Law*, 169, 3<sup>rd</sup> ed. (1999)

<sup>7</sup> Thus, “[P]eace is war's purpose, the scope of all military discipline, and the limit at which all just contentions aim”. See St. Augustine, *The City of God*, (J. Healey trans.), in *Basic Texts in International Relations* 28 (Evan Luard ed., 1992)

<sup>8</sup> See St. Thomas Aquinas, *Summa Theological*, II.2.40, quoted in *St Thomas Aquinas on Politics and Ethics*, 64 (Paul E. Sigmund, ed. & Trans., W.W. Norton & Co. 1988)

<sup>9</sup> *Id.*, at 64-65

<sup>10</sup> See Von Elbe, *supra* 666; Yoram Dinstein, *supra*, 62-63

<sup>11</sup> The practical implication of this is that a war may be waged by a sovereign authority, and with a just cause, yet unlawful where it is fought with a wrong intention. See R.J. Araujo, *Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst*, 30 *VAND Transnat'l L. J.* 1, 8 (1997)

moral obligation to the extent that inaction in the face of a threat to a common good was as sinful as an unwarranted attack<sup>12</sup>.

An important aspect of St. Thomas Aquinas exposition of the just war doctrine is his introduction of the concept of “double effect,” wherein he explained that every course of action undertaken could produce two consequences: the one that is intended, and the other is outside the intended consequence<sup>13</sup>. Thus, to determine the justness of war, an emphasis is placed more on what is intended rather than on the incidental consequence<sup>14</sup>. War attained some secularization with an increase in the European sovereign states, which led to a difficulty in categorizing war. However, Francisco Suarez and Francisco de Victoria discussed the legality of use of force by states<sup>15</sup>, and identified the basis of just war to be a need to redress and defend wrong<sup>16</sup>. Further work was carried out on just war doctrine by other writers. Hugo Grotius' idea had a great impact on the doctrine of just war. He had a passion for regulated war, which led to him to enunciate the grounds upon which just war could be prosecuted, namely: self defense, enforcement of rights, reparation of injury, and punishment for wrongs<sup>17</sup>. Grotius went further to identify three classes of legal frameworks; the first was the law of nations, which he believed was founded on sovereignty; the second was natural law, which was based on nature, and the third was Christian moral theology,

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<sup>12</sup> See Frederick Russell, *supra*, 262

<sup>13</sup> See St. Thomas Aquinas on Politics and Ethics, *supra* 70-71.

<sup>14</sup> This approach is objectionable, for instance, when it is applied to the fight against terrorism since, according to its tenets, a sovereign state may prosecute a war against another state, once there exists in the mind of the sovereign a right intention for so doing, even if there are evil consequences resulting from such war. The concept would seem to give support to a situation where a state abuses the human rights of individuals in the guise of fighting terrorism.

<sup>15</sup> See Alfred Verdross & Heribert Franz Koeck, *Natural Law: The Tradition of Universal Reason and Authority*, in *The Structure and Process of International Law* 17, 19-20 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983)

<sup>16</sup> See Francisco de Victoria, *De Indis et de Jure Belli*, Second Reflection, 429, para 13 (1696); Francisco Suarez, *Selection from Three Works, De Triplicia Virtute Theologica, Fide, Spe, et Charitate* (1621). Suarez maintained that the only just cause for war was a grave injustice which could not be avenged or repaired in any other way.

<sup>17</sup> See Graham Evans and Jeffrey Newnham, *The Dictionary of International Relations*, 288 (1998)

which he said was based on the New Testament<sup>18</sup>. Hugo Grotius' perception of just war theory was not limited to theology, but extended to rationalist considerations<sup>19</sup>.

It would seem that the just war theory lost its relevance following the adoption of the UN Charter, and in fact some writers have maintained this position<sup>20</sup>. However, whether wittingly or unwittingly, reference is still made by academics, authors and even political leaders to the doctrine of just war in their analysis of use of force<sup>21</sup>. Thus, the just war doctrine has not lost total relevance under the current international law regime.

## **2.01. International Law on the Use of Force**

While it was not so clear in the various international law instruments preceding the Charter of the United Nations whether or not the use of force by states was prohibited, owing to the fact that those instruments seemed to have focused on the regulation of war<sup>22</sup>, it became glaring upon the coming into effect of the UN Charter that there is a general prohibition of the use of force in international law. This is by virtue of Article 2(4), which provides that: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. As can be seen from

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<sup>18</sup> See Mark Janis, *An Introduction to International Law*, 162 -167, 3<sup>rd</sup> ed. (1999)

<sup>19</sup> See generally Hugo Grotius, *De Jure Belli Ac Pacis*, 15, Chapter 1. Grotius dealt so much on sovereigns and their obligations in the community of sovereigns, an approach which led to the distinction between positivists and naturalists. See Robert Beck et al, eds., *International Rules: Approaches from International Law and International Relations*, 36 (1996)

<sup>20</sup> See Yoram Dinstein, *The Rule of Law in Conflict and Post-Conflict Situations: Comments on War*, 27 *HARV J.L. & PUB. POL'Y* 877, 879-880 (2004); Interview with Michael Schmitt, Charles H. Stockton Prof. Of International Law, US Naval War College, at TJAGLCS, in Charlottesville, Va (February 22, 2008)

<sup>21</sup> See Michael Walzer, Presentation at Radboud Universiteit Nijmegen: *War and Death: Reflecting on the Meaning of Just War Theory Today* (2007); Paul Ramsey, *War and Argument With Historical Illustrations* (Basic Books 2000) (1997); President W. Bush, Remarks on the War on Terror at Fort Bragg (June 28, 2005), available at <http://thinkprogress.org/2005/06/28/breaking-full-text-of-bush-speech>

<sup>22</sup> See, for example, the Covenant of the League of Nations 1919 and the Kellogg- Briand Pact 1928

that provision, not only is the use of force prohibited, but also the threat of its use. Despite the controversy surrounding what categories of actions by state that will amount to use of force under Article 2(4) and the varying interpretation given to the provision<sup>23</sup>, it is incontestable that an armed attack is a manifestation of use of force<sup>24</sup>. It then follows that a terrorist attack amounts to use of force. The language of Article 2(4) is broad enough to cover any type of military action against another state, and not only war<sup>25</sup>. The prohibition of the use of force is not sacrosanct as it admits two exceptions: the first is the UN Security Council authorized action by virtue of Chapter VII; the second is the use of force in exercise of the right of self defense under Article 51.

### **3.0. International Humanitarian Law and Terrorism**

International humanitarian law has its foundation in the notion that every individual is entitled to some cognizable rights both in times of peace and war<sup>26</sup>. It is essentially the law of war between states<sup>27</sup>. International humanitarian laws exists in two categories: *jus ad bellum* which deals with the rules that govern situations when it is permissible to attack, and *jus in bello* dealing with the rules that govern behavior in situations of war<sup>28</sup>. The problem that will engage the attention of this part of the paper is whether international humanitarian law, especially *jus in bello*, is applicable to terrorism. For this purpose, we would identify

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<sup>23</sup> See Kelsen, "Collective Security Under International Law", International Law Studies, US Naval War College, 57;

Schachter, International Law in Theory and Practice, 110- 113 (1991); the *Corfu Channel Case* ICJ Reports, 1949, 4, 35. A proposal by Brazil for the inclusion of a prohibition against the "use of economic measures" against a state was rejected during the preparation of the UN Charter. See 6 Docs. Of the U.N. Conf. on Int'l Org. 335; Goodrich Hambro and Simons, Charter of the United Nations, 49, 3<sup>rd</sup> ed. (1969)

<sup>24</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* 1986 I.C.J. 14 103-123

<sup>25</sup> See Murphy, "Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter", 43 HARV INT'L L. J. 41, 42

<sup>26</sup> See U. O. Umzurike, Introduction to International Law, 212 (Spectrum Books Limited, Ibadan, 2005)

<sup>27</sup> See generally Pictet, Humanitarian Law and the Protection of War Victims (1976)

<sup>28</sup> See Dan Belz, "Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?", 7 THEORILAW 97, 100 (2006)

terrorist activities under two regimes: terrorism during an armed conflict, and terrorism in peacetime.

### **3.01. Terrorism During Armed Conflict**

Despite the obvious difficulty in adopting a generally acceptable definition of terrorism<sup>29</sup>, it will not be out of place to say that terrorism is an instrument of warfare. It then follows that where terrorist acts are employed as an armed conflict strategy, then international humanitarian law or the law of armed conflict will apply, especially where the terrorism is committed on the territory of a party to the armed conflict<sup>30</sup>. The notion of international armed conflict presupposes the existence of a state of belligerency between two states. There has been a lingering debate as to what will be the position, or rather, the characterization, when one of the parties to the armed conflict is not a state. Where acts of terrorism are used to initiate hostilities, whether or not the methods are lawful, such acts would be in violation of *jus ad bellum* if they are attributable to a state, using the traditional methods of attribution<sup>31</sup>. It has been thought that a terrorist group which is not subject to the control of any state cannot be in violation of *jus ad bellum*, and that its activities do not amount to a use of force that can trigger the exercise of the right to self defense<sup>32</sup>. This view has not escaped opposition<sup>33</sup>. Where terrorism is part of an on-going armed conflict, the

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<sup>29</sup> This paper is yet to attempt a definition of terrorism. This is dedicated to part II

<sup>30</sup> See H.P. Gasser, "Acts of Terrorism and International Humanitarian Law", 84 *Int'l Review of the Red Cross*, 547-570, at 556 (2002)

<sup>31</sup> See Draft Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in United Nations International Law Commission, Report on the Work of its Fifty-Third Session (23 April- 1 June and 2 July- 10 August 2001) UN Doc A/56/10 (Suppl.), 1 Oct. 2001, at 29; Nicaragua case, *supra*, 115

<sup>32</sup> See Randelz Hofer, "Article 51", in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2<sup>nd</sup> ed. (Oxford, OUP, 2002)

<sup>33</sup> See C. Greenwood, "War Terrorism and International Law", 56 *Current Legal Problems*, 515 (2003).

aspect of international humanitarian law that will apply to it is *jus in bello*<sup>34</sup>. The earlier codification of international humanitarian law was done at the Hague Peace Conferences of 1899 and 1907, and later by the four Geneva Conventions and their Additional Protocols of 1977<sup>35</sup>.

A determination of whether or not international humanitarian law or the law of armed conflict applies to terrorism occurring in the course of an armed conflict can be made by examining some of the provisions of the Geneva Conventions and their Additional Protocols. Article 33 of the Geneva Convention No I. provides that:

*No protected person may be punished for an offense he or she has not personally committed. Collective penalties, and likewise all measures of intimidation or terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.*

Article 51(2) of Protocol I. has the following provision:

*The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*

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<sup>34</sup> Although *jus ad bellum* and *jus in bello* are distinct aspects of general international humanitarian law, there is a close relationship between them, in that an armed attack which amounts to use of force, which is governed by *jus ad bellum* often results in armed conflict, which is regulated by *jus in bello*.

<sup>35</sup> See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (Hereinafter Geneva Convention No. I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Hereinafter Geneva Convention No. II); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Hereinafter Geneva Convention No. III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Hereinafter Geneva Convention No. IV); Additional Protocol Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (Hereinafter Protocol I); Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (Hereinafter Protocol II); Additional Protocol Relating to the Adoption of an Additional Distinctive Emblem, December 8, 2005, 2404 U.N.T.S (Hereinafter Protocol III)

Article 4(2) of Protocol II provides that: *“Without prejudice to the generality of the foregoing, the following acts against the persons referred to in Paragraph 1 are and shall remain prohibited at any time and in any place whatsoever.*

*(d) Acts of terrorism*

*(b) Threats to commit any of the following acts.*

Article 13(2) of Protocol II provides that: *“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the purpose of which is to spread terror among the civilian population are prohibited”.*

One striking difficulty from a reading of the above provisions, as they relate to terrorism during an armed conflict, is that the protection from terrorist acts granted to the civilian population is dependent on whether or not those acts are primarily intended to terrorize the civilians. In other words, where combatants carry out some military actions close to the neighborhood of the civilian population, with any purpose other than to terrorize the civilians in the course of a war, the afore-stated provisions will not apply and the combatants will not be in breach of the provisions. This, in effect, is to say that the application of the provisions is a function of the intention or objective of the military in carrying out the supposedly terrorist acts in question, and is independent of the consequences of the acts on the civilian population<sup>36</sup>. This may leave the military with much discretion to determine the purpose of its action taken during armed conflict. The protection from terrorism during an armed conflict offered by international humanitarian law as

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<sup>36</sup> This takes us back to the propositions of St. Thomas Aquinas on the doctrine of just war, precisely his concept of “double-effect”.

contained in the Geneva Conventions and their Additional Protocols, applies only to protected persons, that is, civilians. It would appear that unprivileged combatants who are actively engaged in an armed conflict cannot benefit from this protection.

International humanitarian law generally applies to international armed conflicts, but to some extent it has relevance to non-international armed conflicts pertaining to national liberation and self determination<sup>37</sup>. Article 3 common to the four Geneva Conventions calls for minimal humanitarian considerations in cases of armed conflict not of international character. However, acts of violence committed by private persons or groups, which are considered terrorist acts, internal disturbances and tensions which are sporadic in character and other acts of similar nature, are outside the purview of international humanitarian law<sup>38</sup>.

It is arguable, and in fact was argued by the United States that the terrorist acts of September 11, 2001 against the United States, as at the time they occurred could not be situated under an armed conflict, and so cannot be placed within the *jus in bello* regulation<sup>39</sup>. But those acts fit into the sphere of *jus ad bellum* as they amounted to armed attack, giving rise to the exercise of the right of self defense by the United States, and ultimately marked the beginning of hostilities between the United States and Afghanistan, which had provided shelter for Al Qaeda. So at that point, the law of armed conflict became applicable to the conflict.

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<sup>37</sup> See Article 14 of Protocol II

<sup>38</sup> See Article 2 of Protocol II; *Pan American World Airways v Aetna Casualty & Surety Co.* (1974) 505 F. 2d 299; Green, "Terrorism and Armed Conflict: The Plea and the Verdict", 19 *Israel Y.B.H.R.* 131 (1989)

<sup>39</sup> See *Hamdan v Rumsfeld*, 548 U.S. 557 (2006), where the United States Supreme Court rejected this argument.

It should be noted here that, in spite of what has been stated so far, there is no general agreement as to the propriety and extent of the application of the law of armed conflict to terrorism in international law. One school of thought argues that the scope of the law of armed conflict as it is presently, is inadequate to regulate modern terrorism. It is therefore suggested by the proponents of this view that the law of armed conflict be adjusted for it to be able to grapple with the challenges of contemporary terrorism<sup>40</sup>. The second side of the debate maintains that the rules of international humanitarian law are adequate and wide enough to regulate the gamut of terrorist activities. The representatives of this view express worry over any review of the law of armed conflict on the pretext of combating terrorism, as that may have some unpleasant effects on human rights<sup>41</sup>. There seems to be yet another view that queries the basis for the application of the law of armed conflict to current terrorism, arguing that terrorist acts lack the character of military threat, and therefore should not merit the application of the law of armed conflict<sup>42</sup>. While, not testing the veracity of these positions, it should be stated here that such debate as engaged by writers and commentators, may contribute little or nothing in addressing the current problem of terrorism. Whether or not terrorism is viewed from the context of armed conflicts, or from a combination of perspectives, one thing appears clear, namely that the body of international law rules as currently exists, seems adequate to tackle the incidence of terrorism, so long as there are concerted efforts and cooperation among the subjects, as well as objects, of international law.

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<sup>40</sup> See Rosa Ehrenreich Brooks, "War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror", 153 U. Pa. L. Rev. 675, 755-760; Roy S. Schondorf, Extra-State Armed Conflicts: Is There Need for a New Legal Regime?, 37 N.Y.U.J. Int'l Law & Pol. 1 (2004); Robert Sloane, Prologue to a Voluntarist War Convention, 106 Mich. L. Rev. 443 (2007-2008)

<sup>41</sup> See Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the War on Terror", 27 Fletcher F. World Aff. 55, 57 (2003)

<sup>42</sup> See Matthew C. Waxman, The Structure of Terrorism Threats and the Laws of War, 20 DUKEJCIL 429, 430-431

### 3.02. Terrorism in Peacetime

There is always a purpose for engaging in armed conflicts. Perhaps it is in recognition of this fact that war is not absolutely prohibited in international law. Instead, there exist rules regulating its conduct. While the employment of terrorism in armed conflict situations is allowed as a warfare strategy, except in some circumstances, like its use on the civilian population, the same assertion cannot be made concerning acts of terrorism committed during peacetime. Professor Sompong Sucharitkul contends that peacetime terrorism, being an internationally organized crime, isolates itself from other crimes found in a single legal criminal system, and therefore should be treated separately from sporadic, individual attacks<sup>43</sup>. Peacetime terrorism has some problematic implications on international humanitarian law. Clearly, the Geneva Conventions and their Additional Protocols apply to armed conflicts, but not to “situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence”<sup>44</sup>. A conspicuous element of peacetime terrorism lies in the fact that it is targeted at a community of states. In the midst of the limited application of international humanitarian law to armed conflict situations, an inference could be drawn that terrorism occurring outside war situations is regulated by anti-terrorism conventions<sup>45</sup>,

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<sup>43</sup> See Sompong Sucharitkul, “Applicable Law in International Terrorist Threats and Attacks and the Consequences of Error in Personam”, 11 Ann. Surv. Int'l & Comp. L. 107, 111 (2005)

<sup>44</sup> See Motley, *Terrorist Warfare: Formidable Challenges*, 9 Fletcher F. 295, 297 (1985)

<sup>45</sup> See, for example, International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS 11081, 1316 U.N.T.S. 205; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, I.M.O. Doc. SVA/CON/15; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 482; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 284; Convention on the Physical

supplemented by international criminal law. Some aspects of humanitarian law do apply to armed conflicts as well as in peacetime<sup>46</sup>. A suggestion has been made to treat those categories of terrorism as the “peacetime” equivalent of war crimes<sup>47</sup>. But this approach, if adhered to, may not have good implication. As it entails the application of the law of armed conflict to outside-war-theater- terrorism, it will confer some entitlements on terrorists, such as the status of prisoners of war. It would in addition, increase the incidence of insurrection, as insurgents would be treated as combatants, rather than as common criminals<sup>48</sup>.

#### **4.00. Defining Terrorism**

The problem with a meaningful discussion of international law of terrorism stems from the difficulty of a proper examination of the phenomenon itself. It is a mistake to suppose that merely by describing a group or entity as terrorist one is formulating its capacity in law. The conventional approach to solving a problem has been to first understand its nature, which includes its definition. This approach should equally apply to terrorism. Unfortunately, terrorism in international law admits of no generally acceptable definition. Efforts at defining terrorism have fallen short of adopting a definition that is generally acceptable to the international community. It is ironical that a concept, or rather, a problem that has so much implication on international security is met with this fate. The

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Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 124; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270, 2178 U.N.T.S. 228

<sup>46</sup> See, for example, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 1

<sup>47</sup> See *Sing v Bihar*, 2004 SOL Case No. 264, April 2, 2004, para. 16, available at <http://supremecourtsonline.com> (where the court affirmed a conviction under the Indian Terrorist and Disruptive Activities Act 1987 of some individuals who, while heavily armed, attacked some police officers. See also M.P. Sharf “International Law Weekend Proceedings: Defining Terrorism as the Peacetime Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?”, 7 ILSA Journal of Int'l. & Comp. Law 391, 398 (2002)

<sup>48</sup> See Michael Scharf, “Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects”, 36 CWRJIL 359, 372-373 (2004)

general feeling among writers seems to be that the task of evolving and adopting a definition of terrorism that would be acceptable to international law is not achievable. Thus, so many expressions<sup>49</sup>, funny as they may be, have been crafted by writers and commentators to reflect the seeming impossibility of reaching at a compromise definition of terrorism. Notwithstanding the absence of a comprehensive definition of terrorism, it would be vain to conclude that terrorism lacks a core meaning<sup>50</sup>. The importance of a universally acceptable definition of terrorism cannot be overemphasized, as such definition would enhance intelligence sharing and international cooperation, and bring harmony and unity of purpose in the fight against terrorism<sup>51</sup>. The search for a legal definition of terrorism has led some states to adopt as criminal, acts that do not reveal the intent of the “culprit” to produce a state of terror, and in some situations, those definitions are unnecessarily broad<sup>52</sup>.

In the words of Professor Christopher Blakesley, terrorism amounts to “*...violence committed by any means; causing death, great bodily harm, or serious property damage; to innocent individuals; with the intent to cause those consequences or with wanton disregard for those consequences; and for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, religious, or other philosophical benefit*”<sup>53</sup>. This definition is neutral and

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<sup>49</sup> For example: “The search for a legal definition of terrorism in some way resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy, and self confidence, to succeed where so many others before have tried and failed”. See Geoffrey Levitt, ‘Is “Terrorism” Worth Defining?’, 13 OHIO N.U.L. REV. 97,97 (1986); “[What looks, smells, and kills like terrorism, is terrorism”. See Sir Jeremy Greenstock, KCMG Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, General Assembly Debate on Terrorism, 1 Oct., 2001 (2001) <http://www.un.org/terrorism/statements/UK.html>; Aaron Notebom, “Terrorism: I Know It When I See It”, 81 OR.L. REV. 553, 559 (2002)

<sup>50</sup> See Oscar Schacter, “The Extraterritorial Use of Force Against Terrorist Bases, 11 HOUS. J. INT’L L. 309, 309 (1989)

<sup>51</sup> See Jacqueline Ann Carberry, “Terrorism: A Global Phenomenon Mandating a Unified International Response”, 6 IND J. GLOBAL LEGAL STUD. 685, 711 (1999)

<sup>52</sup> See Jordan Paust, “An Introduction to and Commentary on Terrorism and the Law”, 19 Conn.L.Rev. 697, 703-705 (1987); Naomi Norberg, *supra*, 32-34

<sup>53</sup> See Christopher Blakesley, *Terror and Anti-Terrorism: A Normative and Practical Assessment*, 31 (2006)

covers terrorism by both state and non-state actors. It deviates from the definitions often found in the domestic laws of states<sup>54</sup>.

Terrorism, according to Dinstein constitutes “*acts of violence committed to instill fear (to terrorize) [sic] a state or a social group, where the victims are chosen either at random or because of mere association with a target entity*”<sup>55</sup>.

Terrorism seems to have been first used as a legal term in 1931 at the Third Conference for the Unification of Penal Law at Brussels, where it was defined in terms of “...international use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, property or physical integrity of persons, or directed against private or state property, with the purpose of expressing or executing political or social ideas...”<sup>56</sup>. This definition, by using “terrorism”- the concept being defined, merely begs the question. There have been attempts, both by the UN and international treaties to make provisions on terrorism. The League of Nations in 1937 did produce a treaty- the Convention on the Prevention and Punishment of Terrorism, following the assassination of King Alexander I of Yugoslavia and the French Foreign Minister in October 1934<sup>57</sup>. The Convention defined terrorism to include “all criminal acts directed against a state and intended and calculated to create a state of terror in the minds of

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<sup>54</sup> See, for example, India's Prevention of Terrorism Act, No. 15 of 2002; India Code (2002); El Salvador's Special Law Against Acts of Terrorism, Article 5.

<sup>55</sup> See Yoram Dinstein, “Humanitarian Law on the Conflict in Afghanistan, 96 AM. SOC'Y OF INT'L L. PROC., 23, 23 (2002)

<sup>56</sup> See Bogdan Zlataric, History of International Terrorism and Its Legal Control, in International Terrorism and Political Crimes (M.Charif Bassiouni ed.) 474,479

<sup>57</sup> See V.S. Mani, “International Terrorism: Is a Definition Possible? 18 INDIAN J. INT'L L. 206, 208 (1978)

particular persons or a group of persons or the general public”<sup>58</sup>. This definition, although broad, contemplated terrorism committed by non-state actors and wittingly or unwittingly avoided to include terrorism by state actors. Unfortunately, and perhaps not surprisingly, the 1937 Convention never entered into force, because only few states signed it, with only India ratifying it, apparently owing to its broad definition of terrorism<sup>59</sup>.

The early attempts to define terrorism through the instrumentality of treaties was followed by UN conventions, which provisions relate to only specific acts of terrorism that occur in specific circumstances. The conventions therefore have failed to give a general definition of terrorism. Other UN treaties that can give an insight into a definition of terrorism include conventions concerning nuclear material<sup>60</sup> and plastic explosives<sup>61</sup>. In 1997, the UN General Assembly adopted the International Convention for the Suppression of Terrorist Bombings. Without defining terrorism, Article 2 of the Convention provides that for the purposes of the Convention, a person is guilty of an offense if that person “unlawfully and intentionally delivers, places, discharges or detonates an explosive, or other lethal devices in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious

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<sup>58</sup> See Convention for the Prevention and Punishment of Terrorism, League of Nations Doc. 546(1). M.383.1937.V (1938) (The 1937 Convention)

<sup>59</sup> See J.G. Starke, “The Convention for the Prevention and Punishment of Terrorism”, 19 BRIT. Y.B. INT’L L. 214,215 (1938)

<sup>60</sup> See Convention on the Physical Protection of Nuclear Material, March 3, 1980, T.I.A.S. No 11,080, 1456 U.N.T.S. 101

<sup>61</sup> See Convention on the Marking of Plastic Explosives for the Purpose of Detection, March 1, 1991, S. Treaty Doc. No. 103-8, 30 I.L.M. 726

bodily injury or with the intent to cause excessive destruction of such a place, facility or system, where such destruction results in or is likely to result in, major economic loss<sup>62</sup>.

In 1999, another convention was adopted by the General Assembly- the International Convention for the Suppression of the Financing of Terrorism. By its provisions, it is doubtful if the Convention gave a clear definition of terrorism<sup>63</sup>.

The United Nations has equally resorted to declarations and resolutions in its efforts to provide a definition of terrorism. Thus, in 1994, the General Assembly adopted the Declaration on Measures to Eliminate International Terrorism<sup>64</sup>, the provision of which is: Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

In response to the 9/11 attacks on the United States, the General Assembly set up a working group to fashion out a comprehensive convention on international terrorism. In its deliberations, the group proposed a general definition of terrorism<sup>65</sup>. However, this

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<sup>62</sup> See International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, S. Treaty Doc. No. 106-6, 37 I.L.M. 251

<sup>63</sup> The Convention makes reference to “ An act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex, or ; ... any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”. See G.A. Res. 109, U.N. GAOR, 54<sup>th</sup> Sess., Supp. No. 49, Agenda Item 160, 3, 25, U.N. Doc. A/54/109 (1999).

<sup>64</sup> G.A. Res. 49/60, U.N. GAOR, 49<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/49/743 (1994)

<sup>65</sup> The proposed definition was that: “[Terrorism is an act] intended to cause death or serious bodily injury to any person; or serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility... when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act”.

definition could not be adopted as a result of Malaysia's insistence to add some provisions to the definition to the effect that, *“peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self determination in accordance with the principles of international law shall not be considered a terrorist crime”*<sup>66</sup>. That has been responsible for the failure of the project.

Whatever definition that is ascribed to terrorism, it is worthy to note that terrorism has a core meaning. It is this core meaning that manifests in the objective elements shared by most, if not all, terrorist acts. In the first place, the purpose of a terrorist act is to achieve an outcome of terror on its target. So the mens rea of terrorism as an act is the creation of terror<sup>67</sup>. A definition of terrorism must therefore contain this terror element for it to be objective. Such a definition would exclude acts that are carried out merely to threaten, intimidate, frighten, coerce or for such other purposes that are less serious, which do not reveal the terror motive<sup>68</sup>. Terrorism is not committed by only state actors; rather it is an act that is perpetrated by non state actors as well. Non state actors include private persons and groups, such as insurgents. Another objective element of a terrorist act is that it is aimed at achieving some political, military, ideological, religious, ethnic, or other goals<sup>69</sup>. A definition of terrorism that is bereft of these elements will not be good enough.

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See Measures to Eliminate International Terrorism: Report of the Working Group, U.N. GAOR 6<sup>th</sup> Comm., 55<sup>th</sup> Sess., Agenda Item 164, at 39, U.N. Doc. A/C.6/55/L.2 (2000)

<sup>66</sup> See Surya P. Subedi, The U.N. Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law, 4 INT'L LAW F. DU DROIT INT'L 159, 163 (2002)

<sup>67</sup> This is without prejudice to the fact that terrorism can be a war strategy, for example during an armed conflict. Except in those circumstances where its use is not permitted, the use of terrorism by combatants during an armed conflict is not prohibited.

<sup>68</sup> See International Criminal Law, 842 (Jordan J. Paust et al eds., 3<sup>rd</sup> ed., 2007)

<sup>69</sup> See Beth Van Schaack, “Finding the Tort of Terrorism in International Law”, 28 Rev. Lit. 381,429 (2008)

This paper would like to see terrorism as any act or conduct borne out of political, religious, philosophical, ideological, racial, ethnic, religious or any other motive whatsoever or no motive at all, intended to cause, or capable of causing, terror in, or death or serious bodily injury on, any person, or serious damage to a State or government facility or any public infrastructure facility whatsoever, or intended to intimidate or capable of intimidating a population or part of a population, or to compel, or capable of compelling, a government or a branch of government or an international organization to do or refrain from doing an act.

#### **4.01. Causes of Terrorism**

Terrorism is caused by a number of factors. The first factor that is often linked to terrorism is politics. Dissatisfaction with government policies, or even with a particular regime can lead to terrorism. Where members of a group feel the government in power is insensitive to their welfare, and that they have exhausted all other avenues to attract the attention of that regime to their plight, a resort could be made to terrorism as a way of driving home their grievances. The issue of marginalization, where a minority group feels it is being excluded from the scheme of administration plays itself out in this regard. Many, if not all, attempts at defining terrorism contain this political element. Lack of, or rather, denial of, political participation, and concrete grievances constitute a major factor that leads to the commission of terrorist acts<sup>70</sup>. But, it has been argued that the root causes of terrorism should be disregarded in a consideration of the ways to combat terrorism<sup>71</sup>. This view is rather objectionable. Closely connected to the issue of politics are economic factors. The

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<sup>70</sup> See, generally, Martha Crenshaw, *The Causes of Terrorism*, 13 Comp. Pol. 379 (1981)

<sup>71</sup> See Alan M. Dershowitz, *Why Terrorism Works* 24-25 (2002)

prevalence of poverty and lack of development are other factors contributing to terrorism. Thus, structured inequalities within countries have been identified as breeding grounds for violent political movements in general and terrorism in particular<sup>72</sup>. Social stratification and economic deprivation can lead to terrorist acts. A perception of unfairness or subordination in economic opportunities triggers terrorism.

Another aspect of the economic factor is the financing of terrorism. A successful terrorist outing has some cost implication. And so terrorists are first involved in a cost assessment of their planned activities, and they only proceed if they are able to secure the necessary financing. Thus, terrorism relies on the financial market in order to thrive. This raises the issue of terrorism financing through the use of the banking system and money transfer, including money laundering. However, it has been noted that terror financing is distinguishable from money laundering, in the sense that while money laundering involves illegal funds, terror financing does not necessarily have to do with illegal funds; rather “in terror financing,... the actual illegality often occurs only after the actual transfer, when the money is ultimately used for funding terrorism”<sup>73</sup>. The fact remains that there is a relationship between money laundering and the financing of terrorism.

Another cause of terrorism is religion. It has an interaction with the other factors, and in extreme cases, such as religious fanaticism, religious activists could see as enemies those states or groups of people whom they believe are opposed to their religious practices

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<sup>72</sup> See Addressing the Causes of Terrorism, The International Summit on Democracy, Terrorism and Security, The Club de Madrid Series on Democracy and Terrorism, 20 (2005), available at <http://www.safe-democracy.org/docs/CdM-Series-on-Terrorism-Vol-1.pdf>

<sup>73</sup> See Amos Guiora, “Using and Abusing the Financial Markets: Money as the Achilles' Heel of Terrorism”, 29 U. Pa. J. Int'l L. 59, 75 (2007)

or views. They may use acts of terrorism to show their anger towards them.

### **5.00. Legal Responsibility for Acts of Terrorism**

The fact that terrorist acts are prohibited under international law is not contestable. This is notwithstanding the lack of unanimity surrounding the definition of terrorism, and despite the fact that there is no comprehensive legislation proscribing acts of terrorism. Instead what exist are bits of instruments outlawing terrorism. But the collective effect of these instruments show a consensus that terrorism bodes bad for international law. It is a general principle of international law that a breach by a state of its international law obligation engages the responsibility of that state<sup>74</sup>. The obligation of a state extends to the duty not to commit acts of terrorism, and where terrorism is linked to a state, that state would be responsible for its commission.

### **5.01. Terrorism and Self Defense Against Non-State Actors**

A question may be posed if Article 51 of the United Nations Charter applies to acts of terrorism. In other words, can the provision of Article 51 be invoked in response to terrorist acts? This provision provides for the exercise of the right of self defense by a state if an armed attack occurs. The natural interpretation of Article 51 would be that it is only when a state is a victim of an armed attack that it can take the benefit of the defense of self defense<sup>75</sup>. There is nowhere in the UN Charter that “armed attack” is defined, perhaps because its drafters did not see any reason to do so<sup>76</sup>. It becomes pertinent to determine if terrorism amounts to an armed attack. There is no doubting the fact that modern terrorism

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<sup>74</sup> See the Corfu Channel case (United Kingdom v Albania) 1949 I.C.J. 4, 23

<sup>75</sup> See the Nicaragua case, *supra*

<sup>76</sup> See Ian Brownlie, *International Law and the Use of Force by States*, 278 (Clarendon Press, Oxford, 1963)

is committed with arms, and even sophisticated weapons<sup>77</sup>. The disposition of the UN has led credence to the view that terrorist acts amount to armed attack. This is inferable from the two resolutions passed by the Security Council- Resolution 1368 (2001) and Resolution 1373 (2001), following the September 11 terrorist attacks against the United States, recognizing and reaffirming the inherent right of individual and collective self defense contained in the Charter of the United Nations. There is no better construal that can be given to this action by the Security Council than that the 9/11 terrorist attacks triggered an affirmative right of the United States to use force in self defense<sup>78</sup>. Terrorist attacks therefore amount to armed attacks for purposes of Article 51.

However, a more difficult problem is whether the right of self defense in response to terrorist acts is exercisable with respect to terrorism committed by non-state actors. Would the state from which territory the terrorists operate be responsible for the conduct of the non state actors? This goes to the root of state responsibility, and central to a determination of such responsibility is the principle of attribution. A conservative interpretation of Article 51 would seem to suggest that it applies to armed attack by states to the exclusion of non-state actors<sup>79</sup>, but this interpretation is widened by the invocation of the doctrine of attribution<sup>80</sup>. The attribution principle, which applies the effective control test, essentially

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<sup>77</sup> For a discussion on computer warfare, see Schmit, "Computer Network Attack and the Use of Force in International Law Thoughts on a Normative Framework", 37 Columbia Journal of Transnational Law, 885 (1998-1999)

<sup>78</sup> See Chris Bordelon, "The Illegality of the U.S. Policy of Preemptive Self Defense Under International Law", Chapman Law Rev. 111, 119 (2005)

<sup>79</sup> It is for this reason that it has been asserted that the two resolutions passed by the Security Council in reaction to the 9/11 attacks have added a completely new element to the concept of self defense, one that is not present both in Article 51 and the Nicaragua case examples of armed attack. See Maj. Jennifer Bottoms, "When Close Doesn't Count: An Analysis of Israel's Jus Ad Bellum and Jus In Bello in the 2006 Israel-Lebanon War", 2009-APR ARMLAW 23, 38 (2009)

<sup>80</sup> See Lawrence Azubuike, "Status of Taliban and Al Qaeda Soldiers: Another Viewpoint", 19 Conn. J. Int'l L. 127, 139 (2003); Ian Johnstone, "US-UN Relations After Iraq: The End of the World (Order) as We Know It?", 15 EUR. J. INT'L L. 813,828 (2004)

provides that a state is responsible for the actions of non state-actors in its territory if that state had effective control over the non-state actors<sup>81</sup> . Thus, where a state can attribute the activities of non-state actors to the state from which territory the terrorist attacks emanated, that would engage the responsibility of that state<sup>82</sup> . In the United States- Afghanistan case, the Taliban government provided the needed environment conducive enough for Al Qaeda to execute its terrorist project against the United States, and there is sufficient literature supporting this view<sup>83</sup> . Therefore in the midst of these authorities, an argument to the contrary would surely asphyxiate. Another ground for attributing responsibility for terrorist acts committed by non-state actors to a state is where the state has failed, neglected, or refused to prevent its non-state actors from committing such terrorist acts on another state, or even where the state has lost control over its non-state actors<sup>84</sup> .

It is not always easy to establish this nexus between a state and its non state actors or a particular terrorist group for the purpose of finding responsibility on the part of that state. This results in a state, which has been a victim of terrorist attacks by non-state actors, mounting attacks on another state which it considers as having sponsored the terrorism. This wrong imputation leads to illegal attacks, which can amount to aggression. The United

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<sup>81</sup> See the Nicaragua case, *supra*, para. 99-100

<sup>82</sup> See Allen Weiner, "The Use of Force and Contemporary Security Threats: Old Medicine for New Ills", 59 STAN. L. REV. 415, 431

<sup>83</sup> See Allen Weiner, *supra*, 433; Lawrence Azubuike, *supra*, 134-136, 140

<sup>84</sup> This view seems to be represented in Article 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. See G.A. RES. 56/83, U.N. GAOR, 56<sup>th</sup> Sess., Supp. No. 10, U.N. Doc. A/56/10 (Supp) (Dec. 12, 2001); Tom Roy, "Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self Defense Against Hezbollah", 43 STAN. J. INT'L L. 265, 290 (2007)

States attacks on Iraq in 2003 have been condemned in the light of the foregoing analysis. There was no evidence linking Iraq to the terrorist attacks of 9/11<sup>85</sup>.

The 2006 Israel-Lebanon crisis presents yet another example where a claimed exercise of a right of self defense against terrorists attacks by non-state actors, came into play. While it may appear clear that the actions of the Hezbollah guerillas against Israeli military post amounted to use of force, it appears murky if they qualify as armed attacks giving rise the right of self defense<sup>86</sup>. However, the actions of Hezbollah attracted condemnation from the international community<sup>87</sup>. It was not in doubt that the guerillas operated from Lebanon, but could their actions be attributable to the state of Lebanon? It has been asserted that not only is Hezbollah a terrorist organization, but also a recognized political party in Lebanon, and that no faction in Lebanon is authorized by the government to carry arms except Hezbollah<sup>88</sup>. If this were the case, then its actions can be attributed to the government of Lebanon. Whatever assessment of the situation is to be made, it should not be forgot that prior to the actions of the Hezbollah militants against Israel, there had been a rift between Israel and Lebanon, which has not escaped the consciousness of history<sup>89</sup>. Even if it is conceded that from the circumstances of the Israel-Lebanon crisis, Israel had the right of self defense, the manner in which Israel exercised such right was

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<sup>85</sup> See Mahmoud Hmoud, "The Use of Force Against Iraq: Occupation and Security Council Resolution 1483", 36 CORNELL INT'L L. J. 435, 443 (2004); UK Foreign Affairs Committee, Seventh Report of Session, 2000-02, Foreign Policy Aspects of the War Against Terrorism, HC, 384, para. 215; U. O. Umzurike, *supra*, 207

<sup>86</sup> The I.C.J. has ruled that not every use of force amounts to armed attack. See Sean D. Murphy, "Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter", 43 HARV. INT'L L. J., 41, 44 (2002)

<sup>87</sup> See U.N. Doc. S/PV.5488 (July 13, 2006); U.N. Doc. S/PV.5493 (July 21, 2006)

<sup>88</sup> See Maj. Jennifer Bottoms, *supra*, 24

<sup>89</sup> See Wilson Lam, Hezbollah, Israel, and the Lessons of 1982, ANGUS REID GLOBAL MONITOR, July 26, 2006, available at [http://www.angus-reid.com/analysis/view/hezbollah\\_israel\\_and\\_the\\_lessons\\_of\\_1982/](http://www.angus-reid.com/analysis/view/hezbollah_israel_and_the_lessons_of_1982/); Kathryn Westcott, Who Are Hezbollah?, BBC NEWS ONLINE, Apr. 4, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/1908671.stm](http://news.bbc.co.uk/2/hi/middle_east/1908671.stm); Andrea Levin, Death and Destruction are Hezbollah's Goals, B. GLOBE, Aug. 8, 2006, available at [http://www.boston.com/news/world/middleeast/articles/2006/08/08/death\\_and\\_destruction\\_are\\_hezbollahs\\_goals](http://www.boston.com/news/world/middleeast/articles/2006/08/08/death_and_destruction_are_hezbollahs_goals).

illegal, especially considering the human casualties recorded in that operation, many of whom were innocent civilians. The attack was therefore not proportionate to the raid committed by Hezbollah on the Israeli military outpost.

## **6.00. International Human Rights and Counter Terrorism**

The UN Charter has provisions that make reference to the respect for and promotion of human rights<sup>90</sup>. But there is no agreement on whether or not these provisions confer rights on individuals, and whether they are legally binding or not<sup>91</sup>. Without going into details about the arguments surrounding those provisions, suffice it to say that there are now separate instruments wholly devoted to human rights. First, the Universal Declaration of Human Rights was adopted in 1948<sup>92</sup>, although as a non-binding General Assembly resolution<sup>93</sup>. The Declaration made provisions for political and civil rights, and economic, social and cultural rights<sup>94</sup>. The Declaration has come to be considered as having a great impact on human rights<sup>95</sup>. In 1966, the International Covenant on Civil and Political

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<sup>90</sup> See, for example Articles 1(2,3), 13, 55, 56, and 68

<sup>91</sup> One school of thought argues that the provisions do not create an obligation on states, and that what the provisions confer on individuals are benefits, not rights. See H. Kelsen, *The Law of the United Nations*, 29 (1950); J. G. Starke, *International Law*, 350 (1984). The other view is that the provisions are legally binding on states. See Philip Jessup, *A Modern Law of Nations*, 91 (1949); Ezejiolor, *Protection of Human Rights*, 113 (1962); Schwelb, "The International Court of Justice and the Human Rights Clause of the Charter", 66 *A.J.I.L.* 337 (1972)

<sup>92</sup> See G.A. Res. 217 (III), Pt. A (Dec. 10, 1948)

<sup>93</sup> See Buergenthal, "The Evolving International Human Rights System", 100 *A.J.I.L.* 783, 784-785 (2006); Lauterpacht, *International Law and Human Rights*, 408-417 (1950). In the words of the United States representative to the UN at the time of the adoption of the Declaration, Eleanor Roosevelt: "it is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation". See 19 U.S. Dept. of State Bull. 751 (Dec.9, 1948)

<sup>94</sup> It recognizes the equality of all persons, both in dignity and in rights. It guarantees the right to life, liberty and security of all persons. Under the Declaration, torture or cruel, inhuman or degrading treatment or punishment; slavery, servitude and slave trade, are all prohibited. It prohibits arbitrary arrest and detention, and ensures fair and public hearing, in which the accused person is presumed innocent until the contrary is proved. Other rights are enshrined in the Declaration. See U. O. Umzurike, *supra*, 143-145

<sup>95</sup> See Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in *Realizing Human Rights: Moving From Inspiration to Impact* (Power and Allison, eds.) 3, 11-12 (2000)

Rights<sup>96</sup>(ICCPR) and the International Covenant on Economic, Social and Cultural Rights<sup>97</sup> (ICESCR) were adopted but they did not enter into force until 1976. The two Covenants drew inspiration from the provisions of the Universal Declaration of Human Rights. Among other provisions, the ICCPR states that no one shall be arbitrarily deprived of his life<sup>98</sup>, and that no one shall be subject to torture<sup>99</sup>, and arbitrary arrest or detention<sup>100</sup>. Article 2 provides that state parties undertake to respect and ensure the rights provided by the Covenant to individuals are guaranteed them within their territories, and subject to the jurisdiction of each state. The ICESCR, inter alia, recognizes the right to work<sup>101</sup>, and to just and favorable working condition<sup>102</sup>. It guarantees the right to form and join trade unions<sup>103</sup>, and to social security<sup>104</sup>. It provides for adequate food, clothing and housing<sup>105</sup>, and protects the family, mothers and children<sup>106</sup>. Under the Covenant, adequate standard of living is guaranteed<sup>107</sup>. Apart from these human rights documents, there are other instruments, including those operating on regional level, that make provisions for human rights<sup>108</sup>.

It is thus evident that, international law has much concern, at least theoretically, for the respect and protection of human rights. It is incontestable that terrorism infringes upon

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<sup>96</sup> 999 U.N.S.T. 171, Dec. 16, 1966 (hereinafter, ICCPR)

<sup>97</sup> 993 U.N.T.S. 3, Dec. 16, 1966 (hereinafter, ICESCR)

<sup>98</sup> Article 6(1)

<sup>99</sup> Article 7

<sup>100</sup> Article 9

<sup>101</sup> Article 6

<sup>102</sup> Article 7

<sup>103</sup> Article 8

<sup>104</sup> Article 9

<sup>105</sup> Article 11

<sup>106</sup> Article 10

<sup>107</sup> Article 12. See generally, Eide, Krause & Rosas, *Economic, Social & Cultural Rights*, 2<sup>nd</sup> rev. ed. (2001)

<sup>108</sup> See Lori F. Damrosch, et al, *International Law: Cases and Materials*, Chap. 13 (Minnesota, 2009)

these guaranteed human rights<sup>109</sup>. It has been asserted that “there is probably not a single human right exempt from the impact of terrorism”<sup>110</sup>, and one would have thought or presumed that a move towards countering terrorism, would be a way of ensuring that those human rights are protected. However, the trend of events on the international plane seems to suggest that counter terrorism is used in a way that its effects on human rights coincide with those of terrorism itself. Any measures, including legislation, adopted with a view to combating terrorism, must recognize the importance of human rights. The issues of torture and wrongful prosecution, and repression seem to be central in a discussion of the counter-terrorism- human rights link. It has been asserted that states seem to bask in the belief that as far as counter-terrorism is concerned, their actions cannot amount to terrorism<sup>111</sup>. A situation where governments infringe on human rights, especially on political ground, in the guise of anti-terrorism, is as condemnable as it is appalling. Cardona gives a narrative of how, in El Salvador, the police arrested, and even commenced prosecuting for terrorism, members of a rural organization, who had carried out a demonstration in reaction to a government's administrative program. The arrest and prosecution were even extended to a journalist, who was covering the demonstration, in line with the call of her profession<sup>112</sup>. In November 2010, people who were traveling for the Thanksgiving celebration around the United States were subjected at the airports, to a terrorism security check, which entailed the passing of some radio-active lights through their bodies. This could have some human rights implications. Some counter-terrorism laws contain provisions that are clear violations of

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<sup>109</sup> See William O'Neill, “Terrorism and Human Rights, in Human Rights, The United Nations and the Struggle Against Terrorism 1, 3 (International Peace Academy, 2003)

<sup>110</sup> See U.N. Econ. & Soc. Council, Sub-Comm. On Promotion & Prot. of Human Rights, Terrorism and Human Rights: Progress Report, P. 102, U.N. Doc. E/CN.4/Sub.2/2001/31 (June 27, 2001)

<sup>111</sup> See Mirna Cardona, “El Salvador: Repression in the Name of Anti-Terrorism” 42 CNLILJ 129,137 (2009)

<sup>112</sup> Id, 145-146

human rights.<sup>113</sup> . There were complaints against the United States from the International Committee of the Red Cross indicating how the United States military authorities inflicted torture and degrading treatment on Iraqi detainees in the aftermath of the 9/11 attacks<sup>114</sup> . There was also arbitrary detention of non- United States citizens, secret deportation hearings for persons suspected of having connections to terrorism, the authorization of military commissions to try non-citizens accused of terrorism, and the military detention without charge or access to counsel of United States citizens considered as “enemy combatants”<sup>115</sup> .

It was in recognition of the human rights implications of counter terrorism measures that the immediate past Secretary-General of the United Nations, Kofi Annan, while observing that terrorist acts constitute serious violations of human rights, however cautioned that “...our responses to terrorism, as well as our efforts to thwart it and prevent it should uphold the human rights that terrorists aim to destroy...”<sup>116</sup> . Similarly, the General Assembly's 2004 resolution on human rights and terrorism recognizes that terrorism is a violation of human rights, and should be fought in a such a way that complies with international norms<sup>117</sup> .

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<sup>113</sup> For example, Article 8 of El Salvador's Special Law Against Acts of Terrorism prescribes a five to ten year jail term to anyone who publicly “justifies terrorism or incites another or others to commit any of the crimes listed in the law” . This could lead to a denial of, and an infringement on, the right to freedom of speech. See Mirma Cardona, id, 139

<sup>114</sup> See Int'l Comm. of the Red Cross, Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (2004), available at [http://www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.htm](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm)

<sup>115</sup> See Human Rights Watch, World Report 2003: United States, <http://www.hrw.org/wr2k3/us.html>

<sup>116</sup> See Press Release, The Secretary General, All Must Work Together to Counter Terrorism, Prevent Spread of Weapons of Mass Destruction, Secretary General Says, U.N. Doc. SG/SM/8624-SC/7680 (Mar. 6, 2003), available at <http://www.un.org/News/Press/docs/2003/sigsm8624.doc.htm>

<sup>117</sup> See Human Rights and Terrorism, G.A. Res. 59/195, U.N. GAOR, 59<sup>th</sup> Sess., preamble, U.N. Doc. A/RES/59/195 (2004)

In the efforts to combat terrorism, security and human rights have been treated as if they were mutually exclusive. This should not be so. Embedded in the element of security is the protection of human rights at all times. Those entrusted with the security of state and who by that fact, take up the function of fighting terrorism should not have the impression that the rising wave of terrorism suggests that it be fought by whatever means, even if human rights are violated in the process. Granted, national security is a public concern and for public benefit, and in some situations, override private interest. However, in actual fact, what constitutes public interest is the sum total of the individuals' rights. State security is ultimately for the benefit of the individuals. Of course, a state is an abstraction, and does not exist in vacuum. If the individuals, the ultimate beneficiaries of public security, including security from terrorism, are subjected to the violations of their rights in the guise of counter-terrorism, comparable to the evils of terrorism, a vicious circle would have been established. Therefore, whatever effort that is geared towards combating terrorism should make the issue of the protection of human rights its prime consideration.

#### **7.00. Efforts at Fighting Terrorism: UN Counter-terrorism Measures**

Some measures have been initiated by the UN as a way of combating terrorism. There have been numerous international conventions and other instruments adopted toward fighting terrorism. But it remains to be seen if these initiatives have really produced tangible results. In 2004, the former UN Secretary- General, Kofi Annan constituted the High-level Panel on Threats, Challenges and Change<sup>118</sup> to address the issue of international threat and security. Part of the Panel's recommendations on terrorism included a proposed definition of

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<sup>118</sup> See Kofi Annan, Foreword to Secretary -General's High-level Panel on Threats, Challenges & Change, A More Secure World: Our Shared Responsibility VIII (2004), available at <http://www.un.org/secureworld/report2.pdf>

terrorism and a comprehensive global strategy for combating it. In this regard, efforts are to be made at reversing the causes and facilitators of terrorism by the promotion of social and political rights, the rule of law and democratic reform. The United Nations should also address major political grievances. Included in the recommendations is the need for the United Nations to develop better instruments for global counter-terrorism cooperation, which would equally respect civil liberties and human rights. As a follow-up to the Panel's recommendations, the Secretary-General, Kofi Annan, in his keynote address at the International Summit on Democracy, Terrorism, and Security on March 10, 2005, recognized and included those recommendations in his plan of action<sup>119</sup>. In 2005, the General Assembly adopted a Global Counter-terrorism Strategy<sup>120</sup>, which required every state to implement and fully cooperate with all General Assembly and Security Council resolutions aimed at combating terrorism. The Strategy also require states to address the conditions conducive to the spread of terrorism, to undertake measures to prevent and combat terrorism, and to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism. States are encouraged, under the Strategy, to contribute to measures strengthening the role of the United Nations towards fighting terrorism<sup>121</sup>. International organizations also contribute towards countering terrorism. The World Bank and International Monetary Fund have intensified their initiatives on anti-

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<sup>119</sup> These include: efforts to deter the disaffected from using terrorism as a means of achieving their goals; to deprive terrorists of the means to carry out their attacks; to dissuade states from supporting terrorists; to develop the capacity of states to prevent terrorism; and to protect human rights in the fight against terrorism. See Kofi Annan, The Secretary-General, United Nations, A Global Strategy for Fighting Terrorism, Keynote Address to the Closing Plenary of the International Summit for Democracy, Terrorism and Security (Mar. 10, 2005), available at <http://english.safe-democracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html>

<sup>120</sup> UN Action to Counter Terrorism, <http://www.un.org/terrorism/strategy-counter-terrorism.html>

<sup>121</sup> UN Global Counter-Terrorism Strategy, G.A. Res. 60/288, ¶ 2, U.N. Doc. A/Res/60/288/Annex (Sept. 8, 2005).

money laundering and combating the financing of terrorism<sup>122</sup>. This is in recognition of the fact that money laundering is a means of financing terrorism. These measures still need to be supported with other efforts from all quarters of the international community, in order to achieve the set objectives.

### **7.01. How Best to Combat Terrorism (Curing the Underlying Problem)**

The fact that terrorism still persists despite the efforts made toward combating it, is perhaps a revelation of the inadequacy of those measures. It also underscores the need for a more viable, result-oriented approach to solving the problem of terrorism. There remains the great need to find the right causes of the underlying problems and not just focus on their symptoms. The United Nations Organization has been on the fore-front without success to come up with a universal and comprehensive definition of terrorism, which would serve as a yardstick against which violent actions would be gauged to determine whether or not they amount to terrorism. For fourteen years and more, the United Nations has battled with this task through committee work, resolutions and calls for concerted State actions to fight the problem. The inability of states to adopt a Comprehensive Convention on International Terrorism, which will provide an adequate definition of terrorism owing to unnecessary parochial interest, should be deprecated. Solving the problem of terrorism calls for a multidimensional approach, and does not lie in using only military action, which can only cure the symptom of terrorism- the outward manifestation, and not the problem itself. It is one thing to recognize the need to tackle terrorism using a complex approach, as the UN has observed in the recommendations of the High-level Panel, and it's another thing to take bold steps in the direction of combating terrorism. There is a need for a change in the way people

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<sup>122</sup> See Matthew Levitt, Iraq, U.S., and the War on Terror, Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges, 27 SPG FLETCHER F. WORLD AFF. 59 (2003)

perceive terrorism. This change can be achieved by campaign, both at the grassroots and upper levels. This is where the role of NGOs and other international organizations becomes indispensable. This paper places much premium on this approach.

Having found a link between politics and terrorism, it becomes crucial that those who control the machinery of government should be committed to democracy. A periodic election is a necessary tool for achieving democracy. It is time leaders discarded the idea of clinging to power at the displeasure of the governed. The recent happenings in Egypt are still fresh in the mind, and those of Libya are fresher. They are the conditions that breed terrorism, especially when the individuals feel that the government is being supported by a foreign state. Governments and financial institutions should be more vigilant over, and where necessary, place stricter monitoring, on the transfer of funds. To the extent permissible by international law, states should be more cautious in the area of international trade, so as not to allow the movement of arms which can be used for terrorist purposes. There is the need for promotion of international cooperation in criminal matters, especially as it pertains to terrorism. Criminal sanction still has a deterrent purpose, in spite of whatever objections trailing its application. States and individuals should see themselves as stakeholders in whose hands the task of combating terrorism is entrusted.

Above all, counter terrorism should not be divorced from human rights, rather both are complementary and should be adopted in the cause against terrorism. Anything to the contrary would lead to abuse and denial of human rights, which would have a negative impact on the job at hand. In fact, the efforts at combating terrorism should be given a

human rights approach. Human rights bodies should increase their participation and should liaise with other stakeholders towards achieving a terrorism-free international community.

#### **8.00. Conclusion**

It is important to emphasize one thing which this paper has not done. The position of this paper has not been to write off the efforts so far made by the international community, especially the United Nations, toward combating terrorism. Rather, the paper has called for more activism on the part of states, individuals and international organizations to show more commitment in the cause against terrorism. Until this is done, it is not yet uhuru, and only then can the international community go ahead and beat its chest that it has won the war against terrorism.

**GOLDEN GATE UNIVERSITY**

*School of Law*

**San Francisco, Friday, April 1, 2011**

**THE 21st ANNUAL FULBRIGHT SYMPOSIUM**

**ON**

**HARMONY AND DISSONANCE IN INTERNATIONAL LAW**

**CONFERENCE REPORT**

**BY**

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## I. INTRODUCTION

The President, Golden Gate University, Dr. Dan Angel

The Dean of the School of Law, Dru Ramey(Unavoidably Absent)

The Special Guest of Honor, His Excellency, Robert G. Aisi, Permanent Representative of Papua New Guinea to the United Nations Organization representing the Keynote Speaker, Sir Arnold Amet, Minister of Justice and Attorney General of Papua New Guinea

Chief Consuls and Consul Officers of Foreign States

Fulbright Scholars,

Faculty and Staff,

Law Students,

Ladies and Gentlemen,

The title of this Conference Report is **“Harmony and Dissonance in International Law.”** The conference, as can be seen from the rich program already distributed, is designed to cover a great many interesting areas of international law and related areas that fall within the main theme of the conference. After all, the topics to be presented need not be connected to the general theme of the conference; what is required is that they be current, and of general interest to the conference participants.

Issues relating to harmony and dissonance in international law are not new. Numerous events that take place at the international arena at the moment and on a daily basis call the attention of interested observers of international affairs to this important question. Problems of international law surrounding the conference theme are arguably as old as the discipline of international law itself. Fortunately we have passed the stage when

there was the doubt that the international legal system is indeed an independent legal system. Over the centuries up to contemporary times, many competing notions of international law have emerged. The consequence of these new conceptions has thrown vigorous challenges to the nature of international law and its entrenched normative character. International law was essentially meant to be a legal vehicle for the conduct of the external affairs of the so-called civilized nations in the name of sovereignty. Since then, some huge gaps of questions and issues remain where the impact of international law is minimal, or is still developing. Examples galore - critical perspectives of the future of international law touching on decolonized states; issues of third world and developing countries; question of international economic regulation; challenges in gender equality, etc. continue to present challenges to contemporary international law.

I have chosen as the starting point of my discussion to raise some salient critical questions about international law that touch on harmony and dissonance in the legal system for a closer and more rigorous academic examination. Namely: whether there is international law that must serve social purpose and advance the important goals of peace, equality and freedom, and not simply, a set of principles directed towards the maintenance of minimal order necessary for the co-existence of states; whether there is an emerging proliferation of international laws; does international law have any history, and if so, should it be taught?; has international law really any future given some current developments arising from the conduct of some nation States that tend to disobey or refuse to recognize the importance of the rule of international law or disregard the sanctity of obligations incumbent upon them under international law, thereby contributing to the dichotomy between harmony and dissonance in the law? The questions listed above, though not exhaustive, need to be

pondered over and some answers attempted so as to shed some light on the direction of the nature of international law.

In selecting the questions, we have thought about the tests marking the existence or lack of it of any given legal system, the international legal system inclusive. Three criteria can be used to evaluate the appropriateness or otherwise of these test questions: 1) do States rely, to a major extent, on the rule of international law for the regulation of their relationships and resolution of international problems; 2) has there been a transformation of international law whereby international lawyers are beginning to think about and describe the discipline differently? and 3) are international lawyers not expected to know and respect the basic and fundamental general principles of international law?

To the first question whether there exists international law that must serve social purpose and advance the important goals of peace, equality and freedom, and not simply, a set of principles directed towards the maintenance of minimal order necessary for the co-existence of states, an appropriate beginning will be to discuss the concept and nature of law itself. Without embarking on the never ending debate for a universal definition of “law”, it may be useful for the present purpose to mention that there is a variety of schools of thought on the definition of “law”. Austinian theory of law, defining ‘law’ as a “command” issued by one political superior to another political inferior or subordinate, with a sanction attached in the event of failure to obey or abide by the “command” may not correctly fit the nature of international law. International law is not a command in the sense of Austin’s definition of law. There is no political hierarchy, neither a political superior nor subordinate. All States are equal in the eyes of international law. For this reason, it is neither correct nor

realistic to continue to endorse a limited and narrow positivist sense of law while dealing with international law.

It was commonly held that international law which was essentially based on European principles and notions should be recognized as a world legal order binding on Nation States irrespective of the apparent differences in their ideological, cultural, and historical and many other backgrounds in their relationship with one another. However, contemporary international law has come a very long way through various means of evolution and expansion. No serious international lawyer can doubt that international law originates from different major sources of international law that are outlined under Article 38(b) of the Statute of the International Court of Justice. The sources include: custom, treaties, general principles of law, judicial decisions, and the works and writings of highly qualified scholars and publicists in international law. In like manner, little doubt exists that the subjects of international law have grown to include a host of many other lesser entities other than States who exert significant influences in shaping the progressive development of international law, and that the subject of international law is not entirely reserved for the sovereign state which is obviously the major subject of the law.

It is my considered opinion that international law should no longer be based on the so-called “principles of law recognized by civilized nations.” If contemporary international law is to pursue the direction of harmony and less of dissonance, it should be based on the recognition of the many different human “civilizations” and legal cultures that regulate the affairs of the world’s diverse populations, cultures and backgrounds. The international law that must serve a social purpose and ensure peace, fairness, equality and freedom must of

necessity recognize the diversity of worldwide values. The jurisprudence of contemporary international law ought to, and should recognize the reality of the fact that there are now many other new actors and communities other than States whose activities on the international plane have a lot to contribute to its future growth and development.

The next important question is whether international law has history and if so, should the history of international law be studied? Some international lawyers associate the origin of international law to the Westphalia order and the emergence of the international system of States (1648), or the balance of power after the Congress of Vienna (1815), the result of the First World War (League of Nations), or other systems of international relations in human history many thousands of years ago. To others, the history of international law started with the San Francisco Conference that produced the Charter of the United Nations in 1945. Yet, in the opinion of some other international lawyers, international law has no history as there is no precise date or event from which international law actually commenced.

I am of the opinion that international law has history that should be taught and studied. We cannot talk about international law as a discipline without agreeing first on the definition of what the legal system means and its origin. Writings on the doctrines relevant to international law go back to the Greek and Roman periods of history. There was also evidence of state practice even though some international lawyers hold the view that the history of international law does not necessarily coincide with the history of its doctrine.

The role of international law in any particular region of the world is of particular interest and importance, not necessarily to that region, but to the entire world at large. It is through their experiences in international law and relations for a long period that State practice or customs of the major civilizations (Chinese, Mongol, Persian, Ottoman, Islamic, Central Asian, Caucasian, Indian and African) can be learned and better appreciated. In order to douse the rising signals of efforts to re-write international law by some scholars, renewed attention to the study of the history of international law should form an important part of our teaching syllabus. Happily, there is some reported progress with respect to the production of two excellent treatises on international law in the ancient world of Central and Eastern Europe. Important studies of the history of international law in other regions of the world should be encouraged. Researching the history of international law may not be enough if it is not combined with pedagogy. A student's proper understanding of international law whether private or public requires a good comprehension of the history and developments in the field.

As the world moved into the twenty-first century, questions of state lawlessness in many areas of international relations regrettably appear to be on the increase. Lawlessness should not be an option for any state. This is because there is no credible substitute for international law in the maintenance of international peace and tranquility. There is an inherent tension between States in the pursuit of their national interest hence the need and the effort for an adoption of standard international mechanism for maintenance of peace and justice.

Many issues relating to international law as law have manifested themselves in many respects. First, such manifestations are noticeable in the concepts of sovereignty, democracy, immunity, universal jurisdiction, accountability and so on. Second, modern international law also manifests itself in the area of trial of war crimes. What would have been a historical achievement in the pursuit for universal justice recorded with the establishment of the International Criminal Court to augment the existing ad hoc international war tribunals, turned out otherwise. Regrettably, the United States of America which is the sole super power at the moment has for national interest considerations, withdrawn from the treaty establishing the International Criminal Court which is supported by majority of the States of the international community. Diplomacy and international justice should not be in conflict, but rather, be complementary to each other. Governments, big or small, developed or developing, democratic or monarchical, cannot consider themselves exempt from the application of international law which is legally binding on all the subjects of that law. All States are equal before international law which should be applicable to other subjects of the law.

The crisis in international law has been ascribed to the emergence of the new Afro-Asian and Latin American States. This position presupposes that the so-called new States never had their own independent and pre-existent sense of law, nay international law; that the character of international law is what the West European scholars have conceived it to be; and that these new States therefore either lack respect for international law, or accept it only for financial and other self-aggrandizing reasons and considerations.

The above pre-suppositions ignore an important fact that law is culturally contexted. Those new nations have their own independent conception of international law, practiced long before their colonization by the West. As they gain official membership in the international community, the content and character of international law should naturally reflect the reality and change accordingly.

## **II. WHAT EXPLAINS THE DICHOTOMY BETWEEN HARMONY AND DISSONANCE IN INTERNATIONAL LAW?**

### **1. Introduction**

It seems to me that most of the current conflicts in international law arise from the non-democratic nature of international law itself. International law like any other legal system is non-democratic. Many a time incidents of double standard are noticeable in the application of the rules of that law. In his 1993 inaugural lecture titled: “*Democracy in International Law*”, James Crawford outlined six features of classical international law to illustrate the undemocratic nature of the law:

“First, international law assumes that the executive has comprehensive power in international affairs. Generally, head of State and Minister of foreign affairs, have powers to commit the State internationally, trumping up international law obligations which may affect the rights or claims of individuals without their consent, and even without their knowledge.”

“Second, national law, no matter how democratically established, is not an excuse for failure to comply with international obligations.”

“Third, the individual’s lack of autonomous procedural rights in international law on question of remedies.”

“Fourth, the principle of non-intervention extends to protect even non-democratic regimes in relation to action taken to preserve their own power against their own people.”

“Fifth, the principle of self-determination is not permitted to modify established territorial boundaries without considering the current wishes of its inhabitants.”

“Sixth, the seeming unlimited powers of a government to bind the state for the future”<sup>123</sup>

The above itemized non-democratic principles notwithstanding, the content of international law has changed significantly during the past fifty years. This change was brought about as a result of the successful negotiation and adoption of many multilateral treaties dealing with several issues that are important to mankind. Such questions include: human rights, the environment, trade, investment, outer space, international crime, disarmament. Furthermore, the way the nature of international law is thought about has dramatically changed. Two very important notions, namely *jus cogens* and obligations *erga omnes* have become of utmost importance.

Traditionalists of international law regarded the rules of the system as being neutral and equal in status. States have to expressly give their consent to such rules either by treaty, or by constant and uniform usage evidenced by State practice. It was not the business of other States how a particular State treated its own nationals. This was based on the understanding that a State retained exclusive jurisdiction over persons and events within its

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<sup>123</sup> See, James Crawford, *Democracy in International Law*, Cambridge University Press, 5 March, 1993.

own territory. Most, if not all these have changed in contemporary international law. Some rules of international law, especially rules governing the use of force and human rights, are described as *jus cogens* or peremptory rules of international law. No State has a right to derogate from such rules. They belong to a higher status in the hierarchy of other rules of international law. Thus, there are now on the one hand obligations that involve only the parties to a dispute and on the other, obligations that concern all states – obligations *erga omnes*.

The International Tribunal for the former Yugoslavia clarified the doctrine of *jus cogens* based on the context of the prohibition on torture in *Prosecutor v. Furundzija*, Case No. 17-95-17/IT, Judgment of the Trial Chamber. 10 Dec. 1998 at para. 153:

Because of the importance of the values it projects, [the prohibition of torture] .....has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than the treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with same normative force. (Footnotes omitted).

What may be debatable is whether the municipal courts of nations would strictly follow a *jus cogens* norm if it is found to be in conflict with national law.

Not too long ago, the United States Interrogation Memorandum was declassified exposing the use of unconventional harsh techniques in the interrogation of terror suspects.

Do the harsh methods of interrogation particularly water-boarding and other kinds of inhuman methods violate customary international law? Should a Head of State's war time authority supersede international law on permissible means of interrogation of criminal suspects provided their intention is not for torture? Is it sufficient to posit that customary international law is not federal law and therefore the President is free to override international law at his discretion? It is noteworthy that the United States Military has banned the use of water-boarding which has been condemned by rights groups as torture.

The prosecution of torture in the context of *jus cogens* has become a customary norm of international law. Very recently, the former United States President George W. Bush had to suddenly cancel his planned trip to Switzerland for fear of prosecution for authorizing the use of inhuman methods by the United States Military in the interrogation of suspects during his presidency. It is a fact that over eighty countries among the one hundred and ninety three members of the United Nations Organization, as well as activists within those countries have signified their willingness and readiness to prosecute President Bush for war crimes and for violation of a peremptory norm of international law if he sets his feet in their countries. It can be validly argued that the prohibition of torture has ripened to a *jus cogens* norm under contemporary international law. No State or its head of State is permitted to derogate from a universally accepted *jus cogens* norm of international law. The fact that such a large number of countries are willing to prosecute President Bush clearly signals the positive revival of the 'Universal Jurisdiction' principle of international law by which all States are enjoined to prosecute and punish all heinous crimes against humanity which contravene international law.

The primary aim of today's symposium as borne out of the rich array of diverse scholarly papers listed in the program, is to subject international law and its future direction to a very serious critical re-examination in order to reconcile the conflicts existing in defining and applying international legal principles and norms . It is encouraging that we have started very well and have been treated by Sir Arnold Amet to a well-researched thought-provoking paper by our distinguished special guest keynote speaker who struck at the nerve center of the problem of terrorism and international law.

We should count ourselves most fortunate to be able to learn not only from him, but also hope to learn from our Distinguished Consoeurs here present about the positive areas discernible from the international institutional fronts, and general areas of disappointments in the field of contemporary international law. On an occasion like today, and considering the limited time available speaking to the important theme of harmony and dissonance in international law, one wonders how many of the many pressing and interesting issues of international law we can have the time to discuss adequately.

## **2. Origins of International Human Rights Legal Development**

There are many theories of human rights. While individual rights may be easy to ascertain, what comes under international human rights umbrella governed by international law may not be very easily determined. Do the rights include such things as life, liberty, equality, property as well as human necessities such as food, water, shelter, employment, education or information? What is meant by the idea of rights and where do the rights and freedoms come from?

International law ordinarily governs the relationships and conducts between States and other subjects of international law. Human rights law cuts across State boundaries and aims at ensuring that those rights that are universally recognized by every person irrespective of nationality are respected and upheld.

Where, after all, do universal human rights begin? In small places, close to home- so close and so small that they cannot be seen on any maps of the world. Yet the world of the individual person; the neighborhood he lives in, the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world. ----- *Eleanor Roosevelt*

Historically, the European Convention on Human Rights (1950) was among the first international human rights treaties to be adopted and over the years has come to influence international human rights law more generally. Until 1948, the treatment by a state of its nationals had generally been viewed as a domestic matter outside the realm of international law. In 1948 the United Nations adopted the non-binding Universal Declaration of Human Rights, but it was not until 1966 that the United Nations Declaration was implemented by two binding treaties, namely: International Covenant on Civil and Political Rights, December 16, 1966; and, International Covenant on Economic, Social and Cultural Rights, December 16, 1966.

Since the European Convention on Human Rights, other regions of the world have followed suit. Thus, reference can be made to the ASEAN, Inter-American, and African regions of the world that have also embraced the development of human rights systems seriously. It appears that the United Nations, and indeed, most regional bodies of the world have recognized the importance of the development of human rights and humanitarian law, yet many disappointments still remain in certain areas because of the politics “*in*” international law.

Even though war as a means of settlement of international disputes between people has been long proscribed under international law, national and international armed conflicts still remain the order of the day. The keynote speaker treated some aspects of this problem fairly very extensively in paper on terrorism and international law.

What is certain is that international human rights law is based on the foundation of State responsibility or the legal obligations of States. International law on State responsibility outlines the rules for holding States responsible for violations of international law.

The law of State responsibility for international human rights obligations makes sure that there is always an actor (subject) responsible for upholding human rights standards. This is the case even when private actors that do not have direct relationship with the State are involved. States clearly have a duty to ensure that private actors do not directly violate human rights. States are obligated to prevent private actors from acting contrary to international human rights law.

### **3. Drawbacks and Challenges**

Certain scholars query strongly whether humanitarian intervention is a disguise for military intervention. Humanitarian law has and should have an application even in peace time. Without the United Nations' authorization by way of an affirmative resolution of the Security Council, NATO's humanitarian intervention in Kosovo was vehemently condemned in certain quarters as contrary to international law, but acclaimed as the right course of action in modern international law by others. The establishment of an Agency for Humanitarian Affairs and Assistance in the practice of the United Nations further buttresses the fact that modern international law generally approves of humanitarian intervention. While we subscribe to the view that humanitarian law is vital, regardless of the existence of hostilities or armed conflicts of whatever type, we strongly hold the position that the decision on its application be evenly measured devoid of any double standards.

International human rights law emphasizes tolerance, promotion of equality among peoples, nations and individuals and exclusivity across the world. Regrettably, it is disappointing that these standards do not always apply to the discipline and system of human rights law. Instead, what exists is a hierarchy in international human rights system. For example, two African scholars have pointed out that there is evidence of a one-way traffic, with Western scholars giving the impression that they feel they have little to learn from African institutions and their experiences:

“By constructing the Third World in virtually absolute terms, as a hellish place, the Western ‘teacher’ of human rights, i.e. the international human rights education enthusiast, justifies and secures her or his own experience

and position, as well as secures the unidirectional flow of human rights knowledge from the Western world (the teachers) to the Third World (the students).”

There is no doubt that African and other Third World regional institutions of the world have made significant and important contributions in the development of humanitarian law. A case in point is The African Charter on Human and People’s Rights adopted on June 27, 1981 which evidences the inclusion of some innovative and important provisions. So also, is The African Charter on the Rights and Welfare of the Child adopted in July 1990 and entered into force 29 November, 1999 which elevates the ‘best interests’ principle above that found in the UN Convention on the Rights of the Child. African institutions on human rights constitute a mixture of a variety of good experiences from which human rights can be developed within existing frameworks. The institutions offer some examples of progressive development of international human rights law.

The most critical challenge of international human rights development lies in the double standard noticeable in its practical application. Many now cannot deny the failure of the U.N. and the international community to respond and act in relation to Africa; for example, in relation to the genocide in Rwanda and the allegations that had the same occurred anywhere other than Africa, action would have been taken promptly. Apart from Bosnia, other countries in civil wars in which the UN Peacekeeping failed in recent memory were all in Africa. Specific examples where the international community showed lack of readiness to respond were the break-away Biafra, Somalia, Rwanda, Angola, Ivory Coast, Egypt and Tunisia.

Similar nonchalant attitude was for a long time meted to the serious Darfur human crisis and the Southern Sudanese independent question. Gladly enough, the people of Southern Sudan voted overwhelmingly to establish an independent sovereign State in a United Nations supervised national referendum.

The main issue arises whether the reason for failure of the United Nations to intervene and arrest the ugly situations was because of the inevitable consequences of structural difficulties such as lack of consent of the warring parties for peacekeeping operations? While this may be so, there is also the possibility of Security Council's interest or disinterest combined with organizational dysfunction on the part of the UN Secretariat operations. For human rights development to be wholesome and progressive, neglect and derision of mechanisms of non-western systems like Africa and elsewhere must be avoided at all costs. The double standard approach in handling humanitarian crisis in some areas of the world by the international community is regrettable. It illustrates further the widening gap in the attitudes and practices of States that have in turn negative consequence for general international law development. Cases in point are Egypt, Bahrain, Tunisia, Ivory Coast etc.

#### **4. Encouraging Signs of Progressive Development in the Field of Human Rights Movement and Development during the 21<sup>st</sup> Century**

The high harvest of 29 female heads of State and Government currently in office, including leaders of self governing external territories is very healthy and useful for the better development of the international community. The statistics of their ascendancy to high public office since 1952 has been reasonably stable. Thus, 1952(1); 1972(1); 1980(1) 1997(2);

2000(1); 2005 (1); 2006 (1); 2007(3); 2008(2); 2009(4); 2010 (8); 2011(2). European nations are at the lead, followed by South and Central America countries, then Asia and Africa in that order.

This progressive trend in the important area of women in governance is very important and encouraging for the international community. Further, it has strong positive implication for international law development. It is now widely accepted that women can be important instruments of change for the bridging of gaps in peace, security and development strategies in the world. It must be recalled that on 26-27, 2009, the Sompong Sucharuitkul Center for Advanced International Legal Studies hosted an international conference on Women as Instruments of Change for the Bridging of Gaps in Peace, Security and Development Strategies in Africa which attracted about a dozen First Ladies from different countries in Africa, particularly from Nigeria. At the end of the said conference they issued a very powerful communiqué with a memorable pithy message for practical future action.

## FEMALE HEADS OF STATE AND GOVERNMENT CURRENTLY IN OFFICE

(including leaders of Self-governing External Territories)

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**1952- Queen Elizabeth II of the United Kingdom of Great Britain and Northern Ireland, Head of the Commonwealth, Supreme Governor of the Church of England, Duke of Normandy, Lord of Mann, Paramount Chief of Fiji and Queen of Canada, Australia, New Zealand, Jamaica, Barbados, the Bahamas, Grenada, Papua New Guinea, the Solomon Islands, Tuvalu, Saint Lucia, Saint Vincent and the Grenadines, Belize, Antigua and Barbuda, and Saint Kitts and Nevis**

Until 1953 her title was Queen of Great Britain, Ireland and the British Overseas Dominions. She is head of state in 15 countries apart from Great Britain and as [Head of the Commonwealth](#) she is the front person of the organization of many other former British colonies and territories. Her reign takes place during a period of great social change, she has carried out her political duties as Head of State, the ceremonial responsibilities of the Sovereign and an unprecedented programme of visits in the United Kingdom, Commonwealth and overseas. Elizabeth Alexandra Mary is the mother of three sons and a daughter. Married to Phillip Mountbatten, former Prince of Greece. (b. 1926-).

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**1972- Queen Margrethe 2 of Denmark, Supreme Commander of the Armed Forces and Head of the Evangelical-Lutheran Church**

The Rigsfælleskab - or Commonwealth of the Realm - includes the external territories of The Faero Islands and Greenland. She has engaged in translation work and made her mark artistically in several genres. She has made a point of knowing and reaching out to all parts of the realm, and the Faeroe Islands and Greenland are favourite destinations. The Queen has also succeeded in giving her traditional New Year Message a strongly personal touch, which has helped to consolidate her popularity. She succeeded her father, Frederik 9, and married to Count Henri de Laborde de Monpezat, Prince Henrik. Margrethe Alexandrine Þorhildur Ingrid is mother of two sons. (b. 1940-)

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### 1980-Queen Beatrix of the Netherlands



Queen Beatrix Wilhelmina Armgard is also Princess van Oranje-Nassau, Princess van Lippe-Biesterfeld [etc, etc, etc](#). The Kingdom of The Netherlands includes the external territories of Aruba and The Nederlandse Antillen. She succeeded upon the abdication of her mother, [Queen](#) Juliana, and she closely follows affairs of government and maintains regular contact with ministers, state secretaries, the vice-President of the Council of State, the Queen's Commissioners in the provinces, burgomasters, and Dutch ambassadors etc. She meets the Prime Minister every Monday. Much of her work consists of studying and signing State documents. She regularly receives members of parliament, as well as other authorities on social issues. Widow of Prince Claus of the Netherlands, Jonkheer von Amfeld (1926-2002), and mother of 3 sons. (b. 1938-)

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### 1997- President Mary McAleese, Ireland



She was Professor of Law and 1993-97 Pro-chancellor of University of Belfast. The eldest of nine children, she grew up in Northern Ireland and her family was one of many adversely affected by the conflict. She is an experienced broadcaster, having worked as a current affairs journalist and presenter in radio and television with Radio Telefís Éireann. She has a longstanding interest in many issues concerned with justice, equality, social inclusion, anti-sectarianism and reconciliation but never engaged in party politics. During the 1997-elections 5 candidates were female and there was only one token male candidates finishing a distant last. (b. 1951-)

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### 1997- Governor-General Hon. Dr. *Dame* C. Pearlette Louisy, St. Lucia



A former civil servant, she a non-political appointee. (b. 1946-)

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### 2000- President Tarja Halonen, Finland



Social Democrat member of Parliament 1979-2000, 1984-87 Chairperson of the Social Affairs Committee and Member of the Presidium of the Parliament, 1987-1990 Second Minister of Health and Social Affairs (Health Minister) and 1989-1991 Minister of Nordic Co-operation, 1989-91 Co-leader of Soumen Sosialidemokraattinen Pulolue, The Social Democrats. 1990-1991 Minister of Justice, 1995-2000 [Minister of Foreign Affairs](#). (b. 1943-)

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### **2005- Federal Chancellor Angela Merkel, Germany**

1990 Deputy Spokesperson of the Government of the DDR, 1990-98 Deputy Chairperson of CDU, 1991-94 Federal Minister Women and Youth and 1994-98 Federal Minister of Environment, Protection of Nature and Reactor Safety, 1993-2000 Chairperson of CDU in Mecklenburg-Vorpommern, 1998-2000 Federal Secretary General and since 2000 Federal Chairperson of CDU and 2002-05 also Parliamentary Leader. Bundeskanzlerin in a Grand Coalition between CDU/CSU and SPD. Née Kasner and married secondly to Joachim Sauer, no children. (b. 1954-)

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### **2006- President Ellen Johnson-Sirleaf, Liberia**

1972-73 and 1977-79 Secretary of State of Finance, 1979-80 Minister of Finance, 1980 President of the National Bank, 1980-85 worked for the World Bank, 1985-86 in house arrest after her return, 1990-92 Leading member of exile-government of Amos Sawyer in United States of America, 1992-97 African Director of the UNDP (United Nations Development Program). From 1997 Leader of the Unity Party. Presidential Candidate in 1997, Candidate for the Chairmanship of the National Transitional Government in 2003 and finally won the presidential elections in November 2005. She is divorced, mother of a number of children, and grandmother. (b. 1938-)

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### **2007- President Pratibha Patil, India**

Deputy Minister 1967-72 and Cabinet Minister 1972-83 and Congress Leader and Leader of the Opposition 1979-80 in Maharashtra, Deputy Chairperson of the Union Upper House, the Rajya Sabha 1986-88, Governor of Rajasthan 2004-07. Married to Devisingh Shekhawat, a former Mayor of Amravati. (b. 1934-)

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### **2007- President Cristina E. Fernández de Kirchner, Argentina**

Won the first round of the presidential elections in October 2007 as candidate for Partido Justicialista. She was Member of the Assembly of Santa Cruz 1989-95 and 1. Vice-President of the Assembly in 1990, National Senator 1995-97 and again since 2001, National Deputy 1997-2001. President of the Senate Committee of Constitutional Affairs since 2001. Her husband, Nestor Kirchner was President until 2007.. Mother of 2 children. (b. 1953-)

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**2007- Governor General Dame Louise Lake-Tack, Antigua and Barbuda**

A former nurse and magistrate from 1995. (b. 1944-)

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**2007- President Borjana Kristo, The Federation of Bosnia (Bosnia-Herzegovina)**

2003-07 Minister of Justice of the Bosniak-Croat Federation an entity in The Republic of Bosnia-Herzegovina. The former Vice-President of the Parliament, Spomenka Micic, was elected one of the 2 Vice-Presidents of Federation in 2007. (b. 1961-)

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**2007- Premier Viveca Eriksson, Åland (Finish External Territory)**

Chairperson of the Liberal Parliamentary Group 1999-2001, Member of the Speaker's Conference 1999-2000, Chairperson of the Finance Committee 1999-2001, first Vice-speaker 2000-01 and 2005-07, Speaker 2001-05 and Party Chairperson from 2004. (b. 1956-)

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**2008- Governor-General Dr Quentin Bryce, Australia**

Former lawyer, academic and human rights advocate, Federal Sex Discrimination Commissioner, founding chair and Chief Executive Officer of the National Childcare Accreditation Council and Governor of Queensland 2003-08. (b. 1942-)

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**2008- Leader of the Government Antonella Mularoni, San Marino**

As Secretary of Foreign and Political Affairs she also functions as Leader of the Government even though the Captain Generals are both Heads of State and Government. She was Political Secretary to the Minister of Finance 1986-87, Director of the Office for relations with the associations of San Marino citizens living abroad 1987-90, Deputy Permanent Representative to the Council of Europe, 1989-90, Barrister and public notary in the Republic of San Marino 1991-2001, Member of the General Grand Council 1993-2001 and again from 2008, and Judge of the European Court of Human Rights 2001-08. (b. 1961-)

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**2009- Prime Minister *Sheikh* Hasina Wajed, Bangladesh**

President of the Awami League from 1981, Opposition Leader 1986-87 and 1991-96 and 2001-06 and Prime Minister 1996-2001. Also in charge of a number of other portfolios including that of Defence during both of her tenures as chief of Government. (b. 1947-)

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**2009- Prime Minister Jóhanna Sigurðardóttir, Iceland**

Johanna Sigurdarsottir was Deputy Chairperson of the Social Democrats 1984-93, Chairperson 1994-99 of the National Revival Party until she rejoined the Social Democrats, becoming its leader in 2009. Vice-President of the Lower Chamber 1979 and 1983-84 and Vice-Chairperson of the the Alþing 2003-07, Minister of Social Affairs And Health 1987-91 and Minister of Social Affairs 1991-94 and 2007-09. First married to Þorvaldur Steinar Jóhannesson with whom she has got 2 sons, and in 2010 she married her registered partner since 2002, the author Jónína Leósdóttir, who is mother of 1 son. (b. 1942-)

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**2009- Prime Minister Jadranka Kosor, Croatia**

Vice-President of the Sabor 1995-2000 and Deputy Chairperson of HDZ 1995-97. Minister of War Veterans from 2003, Minister for Family and Inter-Generation Solidarity 2003-08 and responsible for Foreign Policy and Human Rights. Presidential Candidate 2005. (b. 1953-)

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**2009- President Dalia Grybauskaitė, Lithuania**

1994-1995 Extraordinary Envoy and Plenipotentiary Minister at the Lithuanian Mission to the EU and Deputy Head Negotiator for the Europe Agreement with EU, 1996-1999 Plenipotentiary Minister at the Embassy in USA, 1999-2000 Vice-Minister of Finance and 2000-01 Vice-Minister of Foreign Affairs and Deputy Head of the EU Accession negotiations, 2001-04 Minister of Finance and 2004 EU-Commissioner of Financial Programming and Budget 2004-09. Won 69% of the votes in the presidential elections. Unmarried and no children. (b. 1956-)

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**2010- President Roza Otunbayeva, Kyrgyzstan**



Other versions of her surname are Otunbaeva or Otunbajewa. 1983-86 Secretary of the Municipal Communist Central Committee of Frunze, 1986-89 Deputy Prime Minister and Foreign Minister in the Kyrgyz SSR, 1991 Ambassador of the USSR to Malaysia, 1992 Kyrgyz Deputy Premier Minister and Minister of Foreign Affairs, 1992-93 Ambassador to USA and Canada and 1994 to Turkey, Foreign Minister 1994-96, Ambassador to the United Kingdom of Great Britain 1996-2003, Deputy Head of the United Nations special mission to Georgia 2002-04, Acting Foreign Minister 2007, Parliamentary Leader of the Social Democrats 2009-10 and Interim Head of State and Government from April 2010 after the former President was ousted and in May she was named President for the term ending in December 2011. (b. 1950-)

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**2010- President Laura Chinchilla Miranda, Costa Rica**



Vice-Minister of Security 1994-96, Minister of Public Security, Interior and Police 1996-98, 1. Vice-President and Minister of Justice 2006-08 and Acting Minister of Security in 2008. Resigned to become Liberal Party Presidential Candidate for the 2010-elections which she won. (b. 1959-)

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**2010- Prime Minister Kamla Persad-Bissessar, Trinidad and Tobago**



Attorney General (second in Cabinet) 1995-06 and 2001, Minister of Legal Affairs 1996-99 and 2001 and Minister of Education 1999-2001. First appointed acting premier on the absence of the Premier in September 2000. Leader of The United National Congress and Opposition Leader 2006-07 and 2010 and Political Leader from 2010. (b. 1952-)

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**2010- Prime Minister Mari Kiviniemi, Finland**



MP from 1991, Deputy Parliamentary Leader of the Center Party in 2003, Party Vice-Chairperson 2003-08 and Party Chairperson from 2010, Political Advisor of the Prime Minister 2004-07, Minister of Foreign Trade and Development Aid and Minister at the Prime Minister's Office 2005-06 and Minister of Public Administration and Local Government 2007-10. Mother of 2 children. (b. 1968-)

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#### **2010- Prime Minister Julia Gillard, Australia**

MP from 1998, Manager of Opposition Business in the House of Representatives 2003-06 and Deputy Leader of Labor 2006-10, Deputy Leader of the Opposition 2006-07 and Leader of Labour from 2010, Deputy Prime Minister and Minister for Education, Employment and Workplace Relations and Social Inclusion from 2007-10. Her parents immigrated to Australia from Wales. She lives with her partner and has no children. (b. 1961-)

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#### **2010- Prime Minister Iveta Radičová, Slovakia**

Iveta Radicova is Professor of Sociology and Political Sciences at the Comenius University in Bratislava, from 2005 Director of the Institute of Sociology at the Slovak Academy of Sciences, 2005-06 Minister of Labour and Social Affairs, MP from 2006 and Deputy Leader of the Democratic and Christian Union–Democratic Party 2006-10 and Party Leader since 2010. Presidential Candidate for all the opposition parties in 2009 and finished second in the second round of voting, and in 2010 the opposition 4-party coalition won the elections. (b. 1956-)

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#### **2010- Prime Minister Sarah Wescott-Williams, Sint Maarten (Self-governing Part of the Kingdom of the Netherlands)**

Ca. 1995-2009 Commissioner of General Affairs, Education etc., 1999-2009 Leader of the Government, Social and Cultural Development, Finance, Juridical Affairs, Emergency Services, Information, Communication and Protocol, Strategic Policy, Planning and Development of Sint Maartin which was part of the Netherlands Antilles until 2010 when it became a self ruling entity within the Kingdom of the Netherlands. She is Leader of the St. Maarten Party

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#### **2010- Premier Paula A. Cox, Bermuda (British Dependent Territory)**

Succeeded her father, Eugene Cox as Minister of Finance when he died in January 2004. 1998-2002 Minister of Labour and Home Affairs and Public Security, 2002-04 Minister of Education, 2002-03 Minister of Development, 2003-04 Attorney General and Minister of Justice. Minister of Finance since 2004, Deputy Leader of the Progressive Labour Party and Deputy Premier 2006-10, Party Leader and Premier from 2010. (b. 1969-)

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### **2011- President Dilma Vana Linhares Rousseff, Brazil**

Dilma Rousseff is a former student leader who fought Brazil's military dictatorship as a guerrilla during the early 1970s and an economist. Secretary of Mines, Energy and Communication of Rio Grande do Sul 1993-94 and 1999-2002, Minister of Mines and Energy 2003-05 and Minister and Secretary General of the Presidential Staff (Cabinet Chief) 2005-10. (b. 1947-)



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### **2011- President of the Confederation Micheline Calmy-Rey, Switzerland**

Former President of the Socialist Party of Genève, she was President of the Grand Conseil of Genève 1993, Councillor of Finance 1997-2002, Vice-President of the Cantonal Government 2000-01 and President of the Cantonal Government 2001-02. Federal Foreign Minister since 2003 and Vice-President in 2006 and 2010 and President in 2007. Eveline Widmer-Schlumpf was elected Vice-President for 2011, the first time two women would fill the two highest post in the country. (b. 1945-)

The program of our conference displays many women that are participating actively in various capacities today. Senator Hilary Clinton's ascendancy to the very important position of United States Secretary of State and America's topmost diplomat portends well for the positive future of American diplomacy in contemporary international affairs. It is noteworthy that she is the next female to succeed Madeline Albright – a Jewess and Condoleezza Rice- and African American.

## **5. Brief Review of the Works of the UN Human Rights Council**

About three years ago, specifically on March 15, 2006, the United Nations General Assembly created by G.A. Rs. 60/251 the Human Rights Council to replace the UN Commission on Human Rights which came under attack in recent years. There is no doubt that the future of international law shall significantly depend on the success of the activities of the Council. As the Council is a new body, it has embarked on a number of experiments. Apart from setting up a number of Committees, it has also created monitoring groups for

particular hot spots across the world to focus on human rights observations in specific conflict areas of significant unrest such as Darfur, Democratic Republic of Congo, Somalia, Chad, East Timor, Lebanon, Myanmar and Cambodia. The Council condemned recently the human rights breaches being committed in the countries of North Africa and Parts of the Middle East.

The notable UN Committees on Human Rights include: Committee on the Elimination of Discrimination against Women, Committee on the Elimination of Racial Discrimination, and Committee on the Rights of the Child. The Declaration of the Rights of the Indigenous Population is an important addition to the new generation of group rights.

Between the new UN Secretary General Mr. Ban Ki Moon and the UN Human Rights Council, efforts are still being made to address serious human rights breaches based on certain reports submitted to the Council. A few examples are as follows: the UN Investigator found that American Officials were refusing him access to US –run detention facilities in Iraq. UN Human Rights Council denounced Cameroon Government's ill treatment of the Mbororos in the country, following allegations of breach of respect for their human rights and fundamental freedoms as indigenous people of Cameroon. The UN Anti-Torture investigator reported that Nigeria's national police force is committing widespread and systematic torture during investigations and in prison cell.

The effectiveness of the Council is closely being watched by the international community in view of the mounting criticism of the Commission's work for being narrow in

its emphasis- virtually an exclusive focus on the Israeli- Palestine issue. It is strongly hoped that the new Human Right's Council is not just an old wine in a new bottle.

### **III. PRESIDENT BARACK OBAMA ADMINISTRATION'S FIRST VETO OF UN SECURITY COUNCIL RESOLUTION**

With a seeming increase in conflicts and hostilities across the world at national, international and transnational levels how to contain and deal effectively with different kinds of conflicts has become problematic and thrown even more challenges in addition to the existing ones on the international legal system. The patterns of these crises differ according to the regions of their locations. The method of handling some of these crises by the world body further illustrates the harmony and dissonance in international law. The Obama Administration exercised its first U.N. Security Council veto to kill an Arab-backed resolution calling West Bank settlements 'illegal'. The other 14 Security Council members voted in favor of the resolution. It is debatable whether the American veto advances the effort for peace between Israel and Palestine. We hold the view that the exercise of veto by the US does not support the peace process because the veto encourages Israel to continue with the building of settlements expansion, and thus complicate the Middle East situation the more.

### **IV. UNITED NATIONS SECURITY COUNCIL RESOLUTION 1973 AGAINST LIBYA**

At its 6498<sup>th</sup> meeting, the United Nations Security Council adopted Resolution 1973 by 10 votes and 5 abstentions. Since then different interpretations have been given to the said resolution. There is the contention that the UN Security Council authorized unlimited use of force in Libya which sounds doubtful. The language of the resolution allows “all necessary measures ..... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya.” Furthermore, any military measure must immediately be reported to the UN Security Council.

The majority argue that the resolution demonstrates the UNSC and international community’s commitment to protecting civilians from harm. The UNSC has authorized Member States of the United Nations a limited derogation from the prohibition against the use of force to protect direct threats against Libyan civilians. The UNSC Resolution has specifically excluded “a foreign occupation force of any form on any part of Libyan territory.” The enforcement of the no-fly zone through the pre-emptive strikes against anti-aircraft military infrastructures seems to exceed the authority vested by the UNSC Resolution. Some scholars argue that the derogation has gone too far and could be violative of international law principles of non-intervention in a conflict that could be categorized as purely internal sovereign matter.

Sometimes certain sanctions may seem to violate international law, in particular, international humanitarian law and human rights law. In discussing the sanctions regime of the UN during his tenure as the Secretary General, Kofi Annan stated as follows:

“Let me conclude by saying that the humanitarian situation in Iraq poses a serious moral dilemma for this organization. The UN has always been on the side of the vulnerable and the weak, and has always sought to relieve suffering, yet here we are accused of causing suffering to an entire population: We are in danger of losing argument or the propaganda war-if we haven’t lost it-about who is responsible for this situation in Iraq –President Saddam? Hussein or the UN” (citation omitted).

The UNSC Resolution under discussion also imposed arms embargo, ban on flights, asset freeze, travel restrictions. There is an appointment of a panel of experts charged to make a report within 90 days on the progress of the implementation of the resolution. The arms embargo, asset freeze, and travel restrictions are the “smart sanctions” designed to precisely target sanction measures against the elite and ruling members of the Libyan regime.

The UNSC sanctions being applied and enforced against the civilian population of Libyan Arab Jamahiriya Republic at the moment raise question of crimes against humanity when it ignores similar breaches of international law in some other countries ( Israel, Uzbekistan, Belarus, Mexico, Yemen, Bahrain, Burma, Congo, Cote d’Ivoire) and so forth and so on.

The Panelists, participants and the international community are called upon to examine the effect of the UNSC resolution 1973 on the civilian population of Libya. Some critical questions must be addressed. Is it truly possible for precision strikes against targets to protect civilian population? Is the collateral damage resulting from an international coalition

bombing campaign itself more dangerous and harmful to the Libyan civilian population? Is it possible to protect civilians through an air warfare campaign? Can the Libyan civilian population be practically protected without deploying ground troops? I am hopeful that participants at today's conference would discuss these issues carefully in some setting and find some reliable answers to them.

## **V. ACKNOWLEDGEMENTS AND GRATITUDE**

I have the honor to express my gratitude to Dr. Dan Angel, President of Golden Gate University for his welcoming remarks and for opening this year's Fulbright Symposium. The very warm greetings he extended to our very distinguished guests and conference participants are highly appreciated.

It is with a great feeling of pride and gratitude that I once again salute the Special Guests here today. I am delighted and happy that His Excellency, Ambassador Robert G. Aisi, the Permanent Representative of the Papua New Guinea at the United Nations Organization in New York has come to deliver the keynote address on behalf of Sir Arnold Amet. I thank him specially for accepting to come at short notice. There is no doubt that he had to shelve many other important duties on urgent crucial international problems facing the United Nations at this point in time to come deliver the keynote address.

The Sompong Sucharitkul Center for Advanced International Legal Studies has kept alive, as much as possible, the staging of very successful and high standard Annual Fulbright Symposia for the past twenty one years. In my fourth year of service as the second Director of the Center and the LL.M S.J.D. Programs in international legal studies, I have been

privileged to bring notable world renowned jurists to GGU. Some of them served as keynote speakers while Fulbright and other local and foreign scholars handled different important topics. The keynote speakers that have spoken during this period are: His Excellency, Judge Abdul G. Koroma (2008), Distinguished Professor Dr. Sompong Sucharitkul (2009), Professor Michael K. Ntuny (2010). This year, His Excellency Ambassador Aisi representing Sir Arnold Amet has joined the impressive list of keynote speakers. Each of the keynote speakers brought the full weight of their great intellectual and judicial aura and perspective of the respective topics to Golden Gate University. The effort in seeking out such great legal minds to kick off our conference is to maintain the good legacy already established at the Center over so many years and to keep it high and alive.

The Chair of the morning session needs no formal introduction. He has been a great pillar and strong supporter of our programs starting when he was the Dean of the Law School and since I took over as the Director of the Center. I refer to the Golden Gate's School of Law revered and respected Emeritus Dean and Professor Peter Keane, an acknowledged national and international commentator on current national and international legal issues. He is evidently very well qualified and suited to moderate our morning session at which qualified scholars will present their individual papers. Another great supporter of the Center's programs is Professor Bart Selden who has stood stoically behind Golden Gate University School of Law as one of the worthy pioneers during the teething period of the development and advancement of the School's department of international legal studies programs.

I thank all of them very much and hope for a future of continued support for the programs of the department and the Center.

Golden Gate University has worked very hard for the past twenty one years in its effort to disseminate the principles of international law among legal scholars of all nationalities. Our main task lies and still remains in the internationalization of the concept of legal education in the United States of America. In this regard, Professor Jon Sylvester, Associate Dean, Graduate Law Programs has worked very hard to keep the flag flying and to ensure that the ship remains successfully afloat. I thank him immensely.

Among the other Adjunct Professors who have made significant contributions to the growth of our programs over the years are: Barton Selden, Sophie Clavier, Warren Small, Art Gemmell, Remigius Chibueze, Zakia Afrin, Michelle Leighton, Timothy Simons, Hamed Adibnatanzi, Judge Ruth Astle, and Nancy Yonge. They have devoted their time to upholding the International Rule of Law through their dedicated teaching and guidance of students at GGU and in producing future internationalized American scholars. Each of the professors plays key role every year during this annual Fulbright ritual, serving either as presenter, session moderator, or rapporteur, or in some other vital capacity to make the meeting both successful and memorable. This fact is evidenced in this year's program. I thank Professor Selden specially for accepting to play an important role which he had excellently performed in most of the past twenty one years. He is our able Rapporteur for the morning session while Professor Sophie Clavier will handle the afternoon session as the Rapporteur.

Permit me to state that the organization of this year's Symposium could not have been possible without the strong support of the hard core administrative staff of the Graduate Law Programs comprised of Margaret Alice Greene, Director of Graduate Law Programs, John Pluebell, Assistant Director, International Student's Services, Natascha Fastabend, Program Coordinator, Graduate Law Programs, Brad Lai, Program Coordinator, Graduate Law Programs, and Adriana Garcia Dawson, Office Assistant, Graduate Law Programs. We also enjoyed the able assistance of a team of many bright volunteer students drawn mainly from the membership of the International Law Student Association as well as LL.M. and SJD students. I remain heavily indebted to all of them.

This Conference is co-operation with the Section of International Law of the American Bar Association and co-sponsored by the American Branch of the International Law Association, Golden Gate University School of Law, and Golden Gate University International Law Student Association. We heartily express our debt of gratitude to all the co-sponsors of today's academic meeting and to all of you that contributed in one form or another to make it a success and a reality.

The first Annual Fulbright Symposium at Golden Gate University, School of Law was inaugurated in 1991. Since 1996, the annual symposium had always attracted many Fulbright Professors or Research Scholars to participate in the academic discussions of the papers presented. This year we are happy to have three Fulbright Scholars who will make presentations on important subjects of international law piercing through the likely future development of the law and highlighting the harmony and dissonance in the system.

It is pertinent also to note at this point that during the last few years of my directing the organization of this annual conference, we have had the honor of participation of some Consuls General, Consuls and Honorary Consuls of some foreign countries based in California. Today with us are the representatives from the Consulates of Chile, Poland, Switzerland, Papua New Guinea, Philippine and Canada. They are all heartily welcome.

Golden Gate University gratefully appreciates your presence and the invaluable input you make to the discussions at these intellectual conferences, particularly as you officially have to deal with the implementation of some of the many international law principles and norms in the execution of your daily duties.

## **VI. CONCLUSION**

Our conference survey has attempted to advance the main aim of the 21<sup>st</sup> Annual Fulbright Symposium by raising various controversial issues aimed to provoke healthy discussions. Good discussions are also expected of the rich array of many controversial topics listed in our crowded conference program. And controversy is, after all, to be welcomed.

New international law derives its sources from other areas other than the traditional sources. Also, new international law admits of other subjects of the legal system. I see an international lawyer as a conscious social actor. His task just like that of every lawyer is to contribute to reaching acceptable solutions to social problems. A lawyer is essentially a social engineer, a mediator between disputing parties and a manager of disagreements.

I strongly hold the view that the prospects for the progressive development of international law in the world lie in those who teach, adjudicate, research and publish in the area. They play a critical role. There is still much reliance by many jurists on academics and commentators who greatly influence the development of international law significantly and effectively. So too, do those who serve in a representative capacity of their countries as ambassadors and consular officers influence the development of international law.

As I conclude the survey, I urge this august body of fine minds to glean from the proceedings that will follow, and always remember that the forces which shape international law, like the forces which fashion international relations, are many and complex. In spite of the criticisms of the possibility of international law and many charges levied against its effectiveness, there is no alternative available to the international community. An attitude of nonchalance and disobedience for international law apparent from the conduct and statements of some States should not and will not terminate international law from being in existence. More than ever before, the economies, societies and cultures of different nations of the world have become increasingly more inter-connected.

Majority of the topics in the program may be looking at matters familiar to the international lawyer in new ways which, if sometimes unorthodox, are sincerely felt and honestly very persuasively set forth. I feel that all ideas to be presented at the symposium are important and beneficial in themselves. It is my hope that they should contribute in forming the basis for the continued progressive development of international law and for the fostering of individual freedom and peace among nations.

All national and international law societies should re-double their efforts in promoting the study and dissemination of principles of international law. Gladly enough, the American Society of International Law has been very supportive of this effort for more than a century now. It is strongly to be hoped that the Society will remain dogged in this worthy fight for as long as it takes to make every subject of international law accept and respect the principles and the rule of international law in the conduct of their activities.

The right time has come for all States of the world to take seriously the building of a more modern and sustainable international framework on the basis of the universal principle of sovereign equality of States.

*Nwachukwu OKEKE*

San Francisco, April 1, 2011.

*Making Peace with the Past: Federal Republic of  
Germany's Accountability for WWII Massacres before  
the Italian Supreme Court*

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**MAKING PEACE WITH THE PAST: FEDERAL REPUBLIC OF GERMANY'S  
ACCOUNTABILITY FOR WORLD WAR II MASSACRES BEFORE THE ITALIAN SUPREME  
COURT**

**ABSTRACT**

During World War II, the *Hermann Göring* German command settled in Civitella in Val di Chiana, a small village on the mountainsides of Tuscany in Italy. Partisan groups also surrounded the area. On June 18, 1944, four German soldiers entered the community center of Civitella to drink a glass of wine. Among the customers were some partisans who suddenly opened fire on the soldiers. Two of them died instantly, whereas a third passed away after a few hours of agony. The German command threatened to retaliate against the local population within 24 hours if they did not reveal the name of the partisans. Most of the inhabitants of Civitella and the nearby fractions of Cornea and San Pancrazio hastily left their homes fearing reprisal. On June 19, Wilhelm Schmalz, chief of the German command, invited civilians to return to their houses assuring them that no retaliation would follow. However, on June 29--the Saint Peter and Paul public holiday-- three German squadrons suddenly stormed the crowded Civitella church, attacking the worshippers who had come from the nearby countryside to attend the Mass celebration. The death toll reached 244 civilians, including many women and children. The massacres of Civitella, Cornea and San Pancrazio as well as their victims were forgotten for decades except for acknowledgment of the co-responsibility of Italy with Germany for World War II. Only on October 10, 2006, did the Italian military court of La Spezia convict Max Josef Milde, a sergeant from the *Hermann Göring* command, for his role in the massacre. Finally, in October 2008, the Italian Supreme Court ruled that the Federal Republic of Germany must pay one million dollars as reparations to the families of the victims. This article examines the untold story of the Civitella, Cornea and San Pancrazio massacres via the testimony of survivors as well as

the relatives of the victims. The article also provides a detailed analysis of the much anticipated war trial before both the Italian military court of La Spezia and the Italian Supreme Court, acknowledging, for the first time, the Federal Republic of Germany's accountability for the killing of civilians, despite any war agreements between Italy and Germany during the World War II.

*Harmony and Dissonance among International Tax  
Regimes*

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# Harmony and Dissonance Among International Tax Regimes

Prepared for Golden Gate University School of  
Law Fulbright Symposium  
April 1st, 2011

## Why Is It Important to Know about International Tax Regimes?

- ▶ Lawyers
- ▶ Business people
- ▶ Policy makers
- ▶ Scholars

# Our Research Program in Comparative International Tax

- ▶ Objectives
- ▶ Progress to date
- ▶ Next steps

# Similarities Among Tax Regimes

- ▶ Individual and corporate taxes
- ▶ Investment taxes
- ▶ Consumption taxes

## Differences Among Tax Regimes

- ▶ Rates
- ▶ Combinations of taxes
- ▶ Who pays?
- ▶ Tax collection and Administration

## Economic Results for Different Tax Regimes

- ▶ Taxation and economic growth
- ▶ Foreign direct investment
- ▶ Competitiveness
- ▶ International ratings and rankings

## Speculation about Underlying Causes and Results

- ▶ History and culture
- ▶ Political structure and institutions
- ▶ Judicial system
- ▶ Economic policies

## What Have We Learned So Far?

- ▶ Similarities among tax regimes
- ▶ Differences among tax regimes
- ▶ Economic results for different tax regimes
- ▶ Speculation about underlying causes and results

## Next Steps

- ▶ Expand and update tax profile database
- ▶ Distribute data
- ▶ Formulate causal hypotheses

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*Research Freedom to University Scholars*

Associate Dean Mark Perry

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## **Research Freedom to University Scholars: Externalities that Constrain Research**

### **Abstract**

It has been claimed that an essential aspect of the modern university is the freedom for university faculty members is the tenure system that acts as a guarantee for faculty members to engage in research unfettered by external pressures. However, there are changes in the research environment that can be seen as restraints on the scholar's ability to operate unrestrained in their research areas. This paper considers two of such influences.

First, in recent years, particularly in Science and Engineering, there has been growing pressure from university administrations for their faculty to engage in technology transfer initiatives. Often this is expressed in faculty-institution agreements that at a minimum require faculty to disclose to their institutions any work that may be patentable and restrain from publication until either the institution thinks that it is not worthwhile or a patent is filed. A second restraint on research may be patents and material transfer agreements that they are obliged to take heed of when they are engaging in cutting edge research. In today's research environments, particularly in disciplines that involve biological materials, it is inevitable that these issues need to be addressed by researchers.

The demand for technology transfer by institutions, and pressures to abide by, and file for, patents may be a negative influence the activities of researchers.

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*Dissonance in International Law: The Increasing  
Tension Between International Humanitarian Law and  
State Sovereignty*

Professor Warren Small

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School of Law and Monterey College of Law

# **DISSONANCE IN INTERNATIONAL LAW: THE INCREASING TENSION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND STATE SOVEREIGNTY**

## **ABSTRACT**

This paper examines how the changing nature of armed conflict and the attempt to hold accountable those who violate the principles of International Humanitarian Law (The Law of Armed Conflict) in other-than-international armed conflicts create an inevitable tension with the bedrock International Law principle of state sovereignty.

It begins with a discussion of how the nature of armed conflict has evolved from the traditional state-versus-state model to one involving conflict between the regular forces of a sovereign state and loosely organized and structured irregular forces supporting a non-state actor. It discusses how the pertinent principles and instruments of International Humanitarian Law (customary humanitarian law, Hague Regulation IV, the four Geneva Conventions and the Additional Protocols thereto), while applicable to traditional state-versus-state armed conflicts, cannot always be applied to other-than-international armed conflicts. It explains how, as a result, perpetrators of alleged violations of the principles of International Humanitarian Law often escape prosecution because they are subject only to the jurisdiction of the state in which the infraction(s) occurred and that state may (and often does), at its discretion, decide not to prosecute. It also explains how any attempt to apply the provisions of International Humanitarian Law and the principle of universal jurisdiction in such cases inevitably infringes the principle of state sovereignty and is seen as an attempt to interfere in the internal affairs of a sovereign state. It arrives at the disturbing conclusion that many violations of the principles of humanitarian law go unpunished in the name of state sovereignty.

The paper goes on to discuss the attempts to extend the application of International Humanitarian Law to other-than-international armed conflicts and calls for additional efforts in this direction. It also examines the adequacy of current means of adjudication for violations of the principles of International Humanitarian Law including *ad hoc* tribunals, the International Criminal Court, and domestic courts and calls for continued efforts to support the authority of these judicial bodies. The paper concludes with several recommendations for updating International Humanitarian Law in light of this dissonance with International Law. These recommendations include a comprehensive and formal review of humanitarian law instruments to extend the application of this body of law to all conflicts, updated definitions of war crimes to accommodate modern trends, and a re-evaluation of the principle of state sovereignty in light of the numerous and ongoing violations of the principles of International Humanitarian Law in other-than-international armed conflicts.

# **DISSONANCE IN INTERNATIONAL LAW: THE INCREASING TENSION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND STATE SOVEREIGNTY**

## **Introduction**

The attempts by the Libyan government in March, 2011 to forcefully suppress the popular uprising staged by its citizens served to highlight, once again, the tension between international humanitarian concerns and the sovereignty of the State. The Libyan ruler, Col. Muammar Khadafy, used military aircraft, artillery, armored vehicles, tanks, and naval warships to engage Libyan citizens who were seeking to forcefully bring about a change in regime. There are those, in addition to Colonel Khadafy, who would argue that this use of overwhelming military force was justified as the legitimate exercise of the police power of a sovereign state to maintain law, order, and security in the midst of a civil war arguably fomented by foreign intervention. On the other hand, there are those who would argue that the use of such overwhelming force was disproportionate to the threat faced by the Libyan government and that humanitarian intervention by foreign military forces to alleviate or prevent the suffering caused by the use of Libyan military forces was warranted as well as justified.

While the proponents of the use of armed force in the name of humanitarian intervention certainly acknowledge the obligations of states to refrain from the use or threatened use of force and to resolve disputes by peaceful means, they would argue that the use of force in this particular instance could be justified on humanitarian grounds. The passing of the United Nations Security Council Resolution 1973 would seem to validate this position. However, these proponents cannot deny that this uprising was an internal affair and they must realize that any interference in the internal affairs of a sovereign state, such as

that imposed by the use of force for any reason, challenges a bedrock principle of International Law, namely, that of state sovereignty which imparts a duty on all states not to intervene, directly or indirectly, in the internal or external affairs of another state. Hence, there arises a tension between respecting the sovereignty of any given state and using military force to effect humanitarian relief to citizens of that state whose rights are threatened or abused by that state.

This paper carries that tension into the field of International Humanitarian Law and the Law of Armed Conflict which seek to limit or otherwise control the amount of suffering inherent to a state of armed conflict. It begins with a discussion of how the nature of armed conflict has evolved from the traditional state-versus-state model to one involving conflict between the regular forces of a sovereign state and loosely organized and structured irregular forces supporting a non-state actor. It discusses how the pertinent principles and instruments of International Humanitarian Law (customary humanitarian law, Hague Regulation IV, the four Geneva Conventions and the Additional Protocols thereto), while applicable to traditional state-versus-state armed conflicts, cannot always be applied to other-than-international armed conflicts. It explains how, as a result, perpetrators of alleged violations of the principles of International Humanitarian Law often escape prosecution because they are subject only to the jurisdiction of the state in which the infraction(s) occurred and that state may (and often does), at its discretion, decide not to prosecute. It also explains how any attempt to apply the provisions of International Humanitarian Law and the principle of universal jurisdiction in such cases inevitably infringes the principle of state sovereignty and is seen as an attempt to interfere in the internal affairs of a sovereign

state. It arrives at the disturbing conclusion that many violations of the principles of humanitarian law go unpunished in the name of state sovereignty.

The paper goes on to discuss the attempts to extend the application of International Humanitarian Law to other-than-international armed conflicts and calls for additional efforts in this direction. It also examines the adequacy of current means of adjudication for violations of the principles of International Humanitarian Law including *ad hoc* tribunals, the International Criminal Court, and domestic courts and calls for continued efforts to support the authority of these judicial bodies. The paper concludes with several recommendations for updating International Humanitarian Law in light of this dissonance with International Law. These recommendations include a comprehensive and formal review of humanitarian law instruments to extend the application of this body of law to all conflicts, updated definitions of war crimes to accommodate modern trends, and a re-evaluation of the principle of state sovereignty in light of the numerous and ongoing violations of the principles of International Humanitarian Law in other-than-international armed conflicts.

## **International Humanitarian Law and the Law of Armed Conflict**

- A. Principles of International Humanitarian Law and the Law of Armed Conflict (IHL/LOAC)
  - 1. Customary International Law
  - 2. Hague Regulation IV
  - 3. The Geneva Conventions
  - 4. Protocol I and Protocol II Additional to the Geneva Conventions
- B. Violations of IHL/LOAC

Violations of International Humanitarian Law and the Law of Armed Conflict are considered to be war crimes which, as international crimes, impose universal jurisdiction obligations upon all states that are parties to an international armed conflict. Given that most armed conflicts through the middle of the 20<sup>th</sup> century were between two or more sovereign states and that most states recognized war crimes as international crimes, any issues regarding challenges to the sovereignty of a state by the imposition of universal jurisdiction to adjudicate war crimes have been well settled as consistent with general principles of International Law regarding state sovereignty.

However, the proliferation of “other-than-international” armed conflicts since the end of World War II, the realization that the principles of International Humanitarian Law are routinely violated in such armed conflicts, and the obvious need to apply IHL/LOAC to such conflicts, including but certainly not limited to the uprising in Libya, once again highlights the tension between respecting the sovereignty of any given state and enforcing violations of the principles of International Humanitarian Law that occur during an other-than-international armed conflicts taking place within the borders of that given state. There is little argument that conflicts, such as the uprising in Libya, are internal affairs and subject to the national jurisdiction of the state in which they take place. However, there is also little doubt that there are actions taken by the forces of the State (as well as the insurgents) that violate the principles of IHL/LOAC. However, because these conflicts are “other-than-international,” the application of IHL/LOAC, with their resultant invocation of universal jurisdiction for violations, is extremely limited with the result being that numerous violations of the principles of IHL/LOAC can and do go unpunished in the name of sovereignty. Simply put, a State may or may not decide to prosecute such violations or to prosecute them

selectively and absent the imposition of universal jurisdiction, the violations can and do go unpunished.

As mentioned *supra*, universal jurisdiction obligations apply to the adjudication of alleged violations of IHL/LOAC during the course of the international armed conflict. As such, the alleged perpetrator of a war crime has not safe haven and all states, whether they are parties to the armed conflict or not, have an obligation to adjudicate alleged violations of IHL/LOAC or to extradite the alleged perpetrator of such violations to any state making out a *bona fide* case against that individual. However, universal jurisdiction obligations also require states to adopt national legislation to criminalize such acts and to prosecute alleged perpetrators of such acts in their national, domestic courts. Under this system, the alleged perpetrator of a violation of the principles of IHL/LOAC in an other-than-international armed conflict should be subject to the jurisdiction of the state in which the alleged infraction took place. However, if the state in which the alleged infraction chooses not to prosecute to prosecute selectively, these violations of the principles of IHL/LOAC can and do go unpunished and because of the principle of the sovereignty of the State, the alleged perpetrator(s) of such violations will not be surrendered to the jurisdiction of another state unless the first state chooses to do so.

The foregoing realization, that the principles of IHL/LOAC can and do go unpunished in the name of sovereignty, represent a glaring example of dissonance between the principles of International Law and International Humanitarian Law that must be addressed and corrected.

## **Corrective Measures in Place**

### A. Protocol I and Protocol II

The 1977 Additional Protocols to the 1949 Geneva Conventions represented a promising first step toward extending the protective reach of IHL/LOAC to “other-than-international” armed conflicts.

Additional protocols and international agreements are needed to continue this trend.

### B. International Tribunals

The *ad hoc* tribunals and special courts created by the United Nations have made impressive inroads towards adjudicating violations of IHL/LOAC in “other-than-international” armed conflicts.

States have asserted sovereignty and lack of jurisdiction as procedural defenses to such adjudicative efforts, the invocation of universal jurisdiction has resulted in a substantial number of examples where perpetrators of such violations have been held personally accountable for their actions.

Given this positive trend, more tribunals and special courts are needed.

### C. International Criminal Court

Similarly, the International Criminal Court has sought, albeit with limited success, to assert its jurisdiction to adjudicate acts which violate the principles of IHL/LOAC in international as well as “other-than-international” armed conflicts. Once again, states have asserted sovereignty and lack of jurisdiction as procedural defenses to such adjudicative efforts, despite having signed an international agreement agreeing to accept the jurisdiction of the International Criminal Court.

Given the permanent nature of this judicial body, more support for the International Criminal Court is needed.

#### D. National/Domestic Courts

States are obligated to adopt national legislation criminalizing acts rising to the level of international crimes. As such, an act that violates a principle of IHL/LOAC must become part of the criminal code of all States. Accordingly, an act that violates a principle of IHL/LOAC also violates the criminal code of the State(s) in which the act is committed. Regardless of the classification of the armed conflict (international or “other-than-international”) the perpetrator is subject to the jurisdiction of the national courts of the State in which the alleged violation occurred. States must regard the obligation to prosecute these alleged perpetrators accordingly. While progress in this area has improved in the last 25 years, there remain numerous gaps in prosecutorial coverage. More needs to be done.

#### **Recommendations**

- A. Comprehensive and formal review of humanitarian law instruments to extend the application of this body of law to all conflicts.
- B. Updated definitions of war crimes to accommodate modern trends.
- C. Re-evaluation of the principle of state sovereignty in light of the numerous and ongoing violations of the principles of International Humanitarian Law in other-than-international armed conflicts

While we must unfortunately accept the inevitability of the resort to the use of force to settle disputes and while we must accept the reality that violations of the principles of IHL/LOAC will occur in these armed conflicts, we do not have to accept the fact that these violations will go unpunished. Violations of the principles of IHL/LOAC are war crimes and the perpetrators of these crimes deserve no safe haven in the civilized world. More

importantly, the perpetrators should not be able to hide behind the principle of sovereignty to escape prosecution. This is one example of dissonance that must be removed.

## *Non- Majoritarian Difficulty Squared*

Professor Dr. Hubert Smekal

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## **Non-Majoritarian Difficulty Squared**

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The problem with the political power of courts has been discussed both in scientific and popular debates for many decades, especially in the United States. Critics have pointed to many decisions in which unelected judges, lacking democratic legitimacy, ruled on matters which should have been supposedly decided by legislatures directly elected by the people. While there are strong arguments against this type of judicial review given its non-democratic character, proponents of powerful constitutional courts have come out with strong counterarguments. In this article, I seek to discuss the usefulness of the arguments for constitutional review in the case of international courts, specifically the European Court of Human Rights. I will try to assess if the arguments in defense of national judicial review are applicable also as a defense for a regional human rights court.

The choice of the European Court of Human Rights as a court for discussion is obvious – it has developed into the most active, exploited and respected regional human rights judicial body which delivers judgments capable of influencing policies across the whole of Europe.

With the growing influence of courts and their rulings, the question of legitimacy came under review. Alexander Bickel famously coined the situation in which unelected judges have the power to override the will of the direct people's representatives in the

Congress as a countermajoritarian difficulty. The first chapter briefly sketches the problem of the countermajoritarian (or non-majoritarian) difficulty and introduces the most important arguments against the power of courts. The discussion is complimented by arguments of the defenders of judicial review. After a brief introduction to the field, arguments are applied to the situation of the European Courts of Human Rights. Finally, the way in which the Court and its member states try to improve its legitimacy are introduced and discussed.

*Alternative Dispute Resolution as a Catalyst for the  
Promotion of Harmony in International Law: Myth or  
Reality?*

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## **Alternative Dispute Resolution as a Catalyst for the Promotion of Harmony in International Law: Myth or Reality?**

### **Abstract**

The peaceful settlement of disputes through Alternative Dispute Resolution (ADR) methods and procedures is a key aspect of international law, international trade and international relations. International law and ADR share the common goal of preserving international peace and justice, and ADR is becoming increasingly popular in the settlement of disputes arising under international law whether private or public. International institutions, conventions and treaties provide practical channels of communication and thus encourage the use of ADR in the settlement of international disputes.

ADR play a major role towards attaining harmony in international law because ADR procedures are not only convenient, affordable, and expedient but are also confidential and private. Arbitration for example, provides uniform norms and standards which are internationally practicable.

The shortcomings of ADR processes mitigate the positive impact these processes may have on the smooth application of international law and may thus cause dissonance in some cases. But these obstacles can be overcome through greater uniformity of applicable norms and principles, and the efficient functioning of relevant international institutions. A comparative approach in the interpretation and applicability of international rules and procedures can also result in greater predictability and practicability.

*Fitting Square Pegs Into Round Holes – The Vexed  
Question of Harmonizing International Legal  
Regulation of Traditional Cultural Expressions Under  
Intellectual Property Law*

The Honorable Justice Gertrude Araba Esaaba Torkornoo

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2010 – 2011

# **Topic: Fitting Square Pegs Into Round Holes – The Vexed Question of Harmonising International Legal Regulation of Traditional Cultural Expressions in Intellectual Property Law**

## **Introduction**

### LEGAL REGULATION OF TCEs

The movement to protect and regulate use of traditional cultural expressions<sup>124</sup>(TCEs)<sup>125</sup>arose out of experiences encountered by indigenous societies as visitors to their communities translated their cultural manifestations into outputs that not only violated the spiritual and traditional mores of the communities, but also became protected by intellectual property law in favor of the visitors, leaving the creative authors of the original cultural expressions without moral or economic benefits for providing the foundational works. From events as diverse in time and space as the 19<sup>th</sup> – 20<sup>th</sup> century recordings of the music of the Ojibwa of northern Minnesota by ethnomusicologist Frances Densmore who gained fame in the Bureau of American Ethnology for that work housed in the Library of Congress and the famous Native American photos of Edward Curtis over the same period; the pictures of Hopi spiritual rites taken by missionary Reverend H. R. Voth of the Mennonite mission in the early 20<sup>th</sup> century, which brought him enduring valuable rights and recognition for his collection of pictures<sup>126</sup>; to Michel Sanchez and Eriq Mouquet fusing digital samples of the music of Ghana, Solomon Islands and other African tribal communities obtained from a cultural heritage archive where ethnomusicologists had

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<sup>124</sup> In this paper, the words ‘expressions of folklore’ and ‘traditional cultural expressions (TCEs)’ are used interchangeably. Because of the breadth of scope of the subject, this paper does not deal with traditional knowledge in the context of medicines, science and technology but confines itself to literary and artistic expressions. The World Intellectual Property Organization (WIPO) refers to *Traditional Knowledge (TK), genetic resources (GRs), and traditional cultural expressions (TCEs) or ‘expressions of folklore’ as economic and cultural assets of indigenous and local communities and their countries*. <http://www.wipo.int/tk/en/> accessed on 9<sup>th</sup> March 2011

<sup>125</sup> Kamal Puri in ‘*Indigenous Knowledge and Intellectual Property Rights – The Interface*’ defines ‘expressions of culture’ as denoting living, functional traditions, rather than mere souvenirs of the past.; See page 119, Chapter 7 of ‘*Intellectual Property Rights and Communications in Asia, Conflicting Traditions*’, Ed PradipNinan Thomas, Jan Servaes, Sage Publications 2006

<sup>126</sup> See Michael Brown, *Who Owns Native Culture?* Harvard University Press, 2003

recorded music and deposited their recordings, to create successful 'Deep Forest' works with no attribution and returns to the original musicians<sup>127</sup>; indigenous societies were confronted with spiritual, social and economic challenges that birthed the move to regulate their own traditional knowledge, genetic resources and expressions of folklore with intellectual property rights.

This move is no different from the response of Western societies to the piracy that the growth of technology and the internet facilitated against pharmaceutical products, entertainment and software entertainment and software industries, leading to negotiation of global standards for protecting intellectual rights through the TRIPS agreement. But while arriving at TRIPS was achieved in the 8 year Uruguay round of the GATT, culminating in the creation of the WTO to administer the agreement, the issue of a global regime for TCEs through intellectual property rights remains unresolved to date. It is currently expressed in obscure interpretations of one section of the Berne Convention and an array of models laws for national copyright legislations, Declarations such as the Mataatua Declaration on Cultural and Intellectual Property Rights and the Bellagio Declaration, both of 1993, key paragraphs in the 2007 UN Declaration the Rights of Indigenous Peoples, several cultural Conventions by UNESCO, with the latest document being the Swakopmund Protocol of the African Regional Intellectual Property Organisation in August 2010. And these scattered compendia have been achieved over approximately 40 years of concerted efforts with an objective –to establish that expressions of folklore are not material in the public domain<sup>128</sup> to be

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<sup>127</sup> See Torsen Molly and Anderson Jane, *Intellectual Property and the Safeguarding of Traditional Cultures, Legal Issues and Practical Options for Libraries, Museums and Archives*; WIPO Publication December 2010

<sup>128</sup> **Carlos Correa**, *Traditional Knowledge and Intellectual Property, Issues and Options surrounding the protection of traditional knowledge*, page 3, The Quaker United Nations Office (QUNO), Geneva/ Rockefeller Foundation, November 2001 - defines the public domain in these words - 'Public domain in the IPRs field generally includes any information not subject to IPRs or for which IPRs have expired. Thus, to the extent that TK is not covered under any of the IPRs modalities, it

appropriated without consent, but continually evolving creative works, even if by unknown authors, and for which its owners should obtain intellectual property rights that enable them to prevent their appropriation without consent, and receive compensation when used.

## CONSTRAINTS TO THE REGULATION OF EXPRESSIONS OF FOLKLORE

### Authorship

The effort to place the regulation of folklore within intellectual property law has been dogged by controversies. The first is conceptual and succinctly expressed in the words of Michael Brown ‘*Who owns native culture*’<sup>129</sup>? Indeed, in the fundamental issue of even defining what the scope, content and character of folkloric expressions are, there have historically been wide divergences. It is however agreed that the stock of folkloric creativity spans folk literature such as proverbs, riddles, myths, legends, and fables, folk art such as murals, sculptures, jewelry, carvings; folk songs, musical instruments; folk medicine including processes of extraction and procedures of administration of medicines, folk agriculture, folk industries such as pottery making, textile weaving, hair braiding and sculpture, cosmetology, and many more<sup>130</sup>. The 1976 Tunis Model Law on Copyright for Developing Countries defines folklore as ‘*all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and*

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*would belong to the public domain and be freely exploited. However, this technically correct view ignores the fact that TK may be deemed subject to customary laws that recognize other forms of ownership or possession rights’ -* see <http://www.quno.org/geneva/pdf/economic/Discussion/Traditional-Knowledge-IP-English.pdf> accessed 8th December 2011

<sup>129</sup> Harvard University Press, 2003

<sup>130</sup> Mrs. P.V. Valsala G. Kutty, in *National Experiences With The Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and The Philippines*’ WIPO/GRTKF/STUDY/1, dated November 25, 2002; cites the Standard Dictionary of Folklore edited by Marian Leach as providing 25 definitions of folklore. See also Palerthorpe Stephen, VerhurstStefaan; *Report on the International Protection of Expressions of Folklore Under Intellectual Property*, page 6, Program In Comparative Media Law and Policy, University of Oxford, October 2000, Contract Number ETD/2000/B5-3001/E/04

*constituting one of the basic elements of the traditional cultural heritage*<sup>131</sup>. WIPO currently classifies traditional cultural expressions, or expressions of folklore (along with traditional knowledge and genetic resources) as *‘economic and cultural assets of indigenous and local communities and their countries’*. And so the debate looks at this creative framework and articulates a misfit between communally authored expressions emanating from the cultural aspects of human living transmitted trans-generationally, and the arena of time locked private rights that intellectual property protects.

While IP law grants to and protects rights of identifiable authors of original and creative works, folkloric expressions in their broad strokes are created by communities. The identification of members of indigenous communities can be a complex exercise involving private tribal law rules on matri- or patri-lineages, easily obfuscated by inter-ethnic marriages. So it stands to reason that even the basic question of *‘which people form a particular native community?’* is not easily answerable. Emphasizing this circumstance is the fact that folkloric expressions are often not fixed and changed subtly over long periods of time, obscuring the exact moment of innovation for folkloric works that grow out of community activity.

The response to this argument is one articulated by scholars such as Betty Mould Iddrisu, the current Attorney General of Ghana. They clarify that cultural expressions are created on several levels. Although originating from communities, their evolution, especially in contemporary society, is often the work of smaller identifiable groups, including the groups and individuals from whom those who create protected works obtain their

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<sup>131</sup> Section 18

information and knowledge<sup>132</sup>. Thus, when dealing with TCEs, it is important to distinguish between works that are amorously created by the entire group, such as the communal naming of kente designs in Ghana, those created by select groups such as select societies of Shamans or agricultural collectives, and those that are traceable to even narrower groups such as carvings produced within an art enclave. When distinction and clarity is engaged in such articulation, it becomes clear that certain TCEs are not much different from works already protected by intellectual property rights such as geographic indications, trade secrets, and the marks of collectives.

The second argument is that creativity necessarily presupposes authorship, even if the author is not known. In the narrow corridor of unpublished works, this reasoning is backed by Article 15 (4) of the 1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works, which gives states the mandate to vest works of unknown authors of unpublished works in a national authority subject to a declaration made to WIPO on who that national authority is. This interpretation has led to the designation of national authorities as trustees for expressions of folklore in Copyright Laws<sup>133</sup>. By defining folkloric works as “*all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities...*”<sup>134</sup>, the Tunis model law brings a territorial lock to folkloric expressions, thus obviating the diffused and dispersed character of communities as authors.

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<sup>132</sup>Betty Mould Idrissu’s view that all folkloric works are necessarily the creation of the community at large is out of date because it is recognised that works of folklore were created by individuals, if enjoyed and used communally. See ‘*The Experience of Africa*’, WIPO-UNESCO World Forum on the Protection of Folklore, 1997, 18 WIPO Publication No. 758

<sup>133</sup>In Ghana’s 2005 Copyright Act, Act 690, the President is designated as that authority.

<sup>134</sup>Section 18

## **Duration of IPRs**

But the ‘misfit’ controversy goes beyond the recognition of authorship to one of the core policy reasoning behind the grant of intellectual property rights – that intellectual property rights are conferred for a period of time, so that the knowledge created becomes part of the intellectual commons after the expiration of that period. This encourages the exposition of creative and useful information, while preventing rights owners from having an absolute and indefinite grip on the new information and expression of ideas. While IPRs such as copyrights and patents are conferred for defined periods<sup>135</sup>, folkloric expressions are developed over long periods, often spanning centuries and decades. Thus even if the moment of original creation may be identified for a particular work and attributable to a particular group of persons, the space of time it takes for its evolution into different expressions will likely push each stage of the work into the public domain, making it unprotectable by IP law.

There is a clear response to that argument when it comes to expressions that are source indicators or secrets. Protection of marks in trade mark law and that of secrets in trade secret law are not constrained by time such as happens with copyrights and patent grants and so the blanket argument of ‘time misfit’ is not altogether valid. It is in the arena of copyright and patentable TCEs that there is no clear response. What some states such as Ghana have done to maintain control over cultural heritage through IP law is to legislate a position that grants protection over folkloric expressions in perpetuity in their copyright statutes.<sup>136</sup> This has technically been made possible by the wording of Article 7 (6) of the

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<sup>135</sup> Under Article 7 (6) of the Berne Convention, copyrights are for the lifetime of the author and 50 years after their death, a period of time that may be extended through national legislation

<sup>136</sup> See provisions on folkloric expressions in Ghana’s Act 690

Berne Convention which allows States to fix copyright protection for a period longer than in the Convention, and Article 18 (1) which provides that the Berne Convention applies to “*all works which, at the moment of [the Convention’s] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.*” The argument is made that works in the public domain are works for which no one can claim authorship, or whose protection has expired, whereas TCEs are continually evolving within defined communities and as such, at no time do they fall in the public domain.

The perpetual protection of folkloric expressions in copyright law is also supported by the 1976 Tunis Model Law on Copyright for Developing Countries which declares ‘works of national folklore protected by all means....without limitation in time’<sup>137</sup> and the 1985 Model Provisions for National Law on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, both developed under the auspices of WIPO and UNESCO.

A second approach has been to introduce a model of dealing with TCEs within the ambit of the law of contract instead of intellectual property law. Kamal Puri<sup>138</sup> points out an approach taken in the draft of a Model Law for the Protection of Traditional Knowledge and Expressions of Culture in 2002 under the auspices of the Pacific Islands Forum Secretariat and the Secretariat of the Pacific Community, together with UNESCO. The rights created in this Model Law fall into two categories: traditional cultural rights – which is

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<sup>137</sup>Section 6(2)

<sup>138</sup>Pages 124 to 126, ‘*Indigenous Knowledge and Intellectual Property Rights – The Interface*’ Chapter 7 of ‘*Intellectual Property Rights and Communications in Asia, Conflicting Traditions*’, Ed Pradip Ninan Thomas, Jan Servaes, Sage Publications 2006

the protection provided to traditional knowledge and expressions of culture, and moral rights. Traditional cultural rights, while analogous to current intellectual property rights in that they grant exclusive rights to reproduce, publish, perform and make available online traditional knowledge and cultural expressions, are distinguishable in that they are inalienable and perpetual. The rights created are in addition to and not in substitution of existing intellectual property rights. To access such TCEs, detailed procedures require applying to a 'Cultural Authority' that has function in relation to identifying traditional owners and acting as a liaison between prospective users and traditional owners or dealing directly with the traditional owners and ensure that prior informed consent for non-customary use of TCEs as well as well profit sharing arrangements for derivative works are reached between the prospective user of the TCEs and the traditional cultural rights holders.

It is noteworthy that even in jurisdictions that purport to strictly apply IP rules within their known architecture, exceptions have been made to this basic rule of duration in the cultural arena. By the operation of legislation, royalty rights from use of parts of the famous work "Peter Pan" subsist in perpetuity under United Kingdom copyright law for the benefit of a charitable cause<sup>139</sup>, and Molly Torsen and Jane Anderson report of a proposal put forward in 2003 in Australia to grant perpetual protection for the artwork of the

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<sup>139</sup>[http://en.wikipedia.org/wiki/Peter\\_and\\_Wendy#Copyright\\_status](http://en.wikipedia.org/wiki/Peter_and_Wendy#Copyright_status) informs that '...1988, former Prime Minister James Callaghan sponsored a Parliamentary Bill granting a perpetual extension of some of the rights to the work, entitling the hospital to royalties for any performance, publication, or adaptation of the play...'. Section 301 of, and Schedule 6 to, the Copyright, Designs and Patents Act 1988: *'The provisions of Schedule 6 have effect for conferring on trustees for the benefit of the Hospital for Sick Children, Great Ormond Street, London, a right to a royalty in respect of the public performance, commercial publication, broadcasting or inclusion in a cable program service of the play 'Peter Pan' by Sir James Matthew Barrie, or of any adaptation of that work, notwithstanding that copyright in the work expired on 31 December 1987'*

renowned indigenous artist Albert Namatjira<sup>140</sup>. The US's Copyright Term Extension Act of 1998 is believed to have been aimed at extending copyright protection over works held by the entertainment industry<sup>141</sup>. These examples show that the central principle of limited duration in copyright law may, albeit in rare circumstances, be changed to support the larger interest.

### **Tangibility and Fixation**

Another noteworthy divergence between the architectures of intellectual property law and folkloric expressions is that IPRs are conferred on tangible and fixed works, while many expressions of folklore, such as dances, stories, recipes and medical procedures are usually not fixed in form through writing or recording. In claiming a right to a particular expression, a real problem could arise as to the boundaries of the creative expression. The Berne Convention leaves room on this matter, which makes copyright law the one regime of IP law amenable to protection of folkloric works – Article 2 (2) makes it a matter of national legislation to prescribe whether works will or not be protected unless they have been fixed in some material form. Section 5 (bis) of the Tunis Model law builds on this and categorically elides fixation as a requirement of protect ability for only expressions of folklore. It should however be valid concession from existing IP architecture that the law consistently evolves doctrines to support elasticity in the boundaries of protection in other IP areas such as the doctrine of equivalents in patent law, and substantial similarity in copyright and trademark and as such, there exists enough framework for IP protection to be given to TCEs in whichever arena of IP they fit.

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<sup>140</sup>Torsen, Andersen, page 37 *supra*, citing from M. Rimmer (2003), 'Albert Namatjira: *Copyright Estates and Traditional Knowledge*' Australian Library and Information Association, June 2003, 1-2.

<sup>141</sup>[http://en.wikipedia.org/wiki/Sonny\\_Bono\\_Copyright\\_Term\\_Extension\\_Act#cite\\_note-1](http://en.wikipedia.org/wiki/Sonny_Bono_Copyright_Term_Extension_Act#cite_note-1)

## **Rights of Peoples**

The phenomenon of protecting traditional cultural expressions with property law is supported in human rights law. Article 15 (c) of the International Covenant of Economic, Social and Cultural Rights lays the foundation for the right to the products of one's creative authorship as a human right. Article 31 of the UN Declaration on the Rights of Indigenous Peoples affirms the right to creative output as a right of peoples- and frames the operation of the right within intellectual property law. It says- *Indigenous people have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control and protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.*

The thrust of these human rights instruments is shored up by UNESCO Conventions for protecting cultural expressions from appropriation and distortion. These are the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970); the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995), the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003), and the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions (2005).

The human rights argument underscores the validity in recognising the creative and intellectual outputs of a known or unknown author, or a group, through communal living under IP law. To my mind, it is further justified if one appreciates that communities interacting closely enough to produce creative works through joint efforts fit into modern frameworks of corporate structures, bound by what is akin to the common mission, vision, values and goals found in corporate organisations. The reality of the need to compel the conferring of intellectual property rights on the creative outcomes of communal living is expressed in the third of the Bellagio Declaration of 1993 – *‘increasingly, traditional knowledge, folklore, genetic material and native medical knowledge flow out of their countries of origin unprotected by intellectual property, while works from developed countries flow in, well protected by international intellectual property agreements, backed by the threat of trade sanctions’*. James Boyle puts it more expressively: *“Curare, batik, myths, and the dance ‘lambada’ flow out of developing countries . . . while Prozac, Levis, Grisham, and the movie Lambada! flow in . . .” The former are unprotected by intellectual property rights, while the latter are protected.*<sup>142</sup>

The challenge arises from how to fit ‘rights of peoples’ neatly into the architecture of intellectual property law, a matter provoked by human rights law, and resolvable in intellectual property law, which makes the length of resolution of TCEs within IP law a conundrum.

### **Copyrights or Intellectual Property Law**

Perhaps the greatest controversy that has slowed the achievement of harmony in the international regulation of TCEs has come from the trend of states situating their regulation

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<sup>142</sup>*Shamans, Software, and Spleens: Law and the Construction of the Information Society*. Harvard University Press 1996

in copyright law. By 1994, twenty four developing countries had enacted copyright legislation protecting expressions of folklore<sup>143, 144</sup>. An explanation may be found in the predominant conceptualization of folkloric expressions within artistic, literary and scientific works and the early protection of works by unknown authors in the Berne Convention. The 1976 Tunis Model Law on Copyright for Developing Countries and 1982 WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions were framed to fit within copyright legislation. The UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore adopted at the 1989 UNESCO General Conference gave the following broad examples of expressions of folklore: *“language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts”*. .... attenuating the positioning of folkloric expressions within copyright law. However expressions of folklore span every aspect of human resourcefulness, and do not constitute a genre of a particular store that makes them amenable to regulation in any one area of IP law, such as copyright. As much as they are often artistic, literary, graphical, or made up of performances, which technically ought to make them protectable under copyright law, they could be of a source indicating nature which would make them amenable to protection in trade mark law, or even consist of carefully guarded commercially viable secret processes, which should qualify for protection

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<sup>143</sup>Tunisia (1967, 1994); Bolivia (1968, 1992); Chile (1970); Iran (1970), Morocco (1970), Algeria (1973); Senegal, Kenya, Mali, Burundi, Cote D'Ivoire, Sri Lanka, Guinea, Barbados, Cameroon, Colombia, Congo, Madagascar, Rwanda, Benin, Burkina Faso, Central African Republic, Ghana, (1985) Dominican Republic, Zaire, Indonesia, Nigeria, Lesotho, Malawi, Angola, Togo, Niger, Panama (1994). See Long, D'Amato, p. 159-160, *CULTURAL RIGHTS: APPLICATIONS* Supplement to Course book in International Intellectual Property, West Group, 2002

<sup>144</sup> For legislative texts of countries regulating traditional cultural expressions through the law of copyright and current sui generis regimes, led by the Swakopmund Protocol, see <http://www.wipo.int/tk/en/laws/folklore.html> accessed 27th February 2011

in trade secret law, or inventive and utilitarian in character such as should qualify for grant of patents.

By the 1990s, it had become evident that copyright law could not by itself, appropriately and adequately protect expressions of folklore and WIPO/UNESCO initiatives involved regional consultations for the development of an appropriate legal framework after the April 1997 UNESCO/WIPO World Forum on the Protection of Folklore held in Phuket, Thailand. This led to nine global fact finding missions<sup>145</sup> and four regional consultations for developing countries on protection of folklore in Africa, Asia Pacific, Arab Region, and Latin, Americas and Caribbean countries in 1999,<sup>146</sup> in the quest to find an appropriate legal architecture for regulation of folkloric expressions which will ensure that its users achieve the objectives of a balanced IP system. The significant outcome from those consultations was not a query about the fit of TCEs into IP law, but the practical measures needed for collection, classification, identification and documentation of TCEs in order to ensure not only their conservation and dissemination, but their effective protection through various forms of IP law. The mission to move the discussions forward is currently being handled by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions set up by the WIPO General Assembly, and it remains actively engaged in this more than 40 year old endeavour to achieve a global consensus for a workable framework.

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<sup>145</sup>1998-1999 Fact- finding Missions – WIPO’s nine fact finding missions on traditional knowledge, innovations and creativity took place in 27 countries: 4 developed, 19 developing and 4 least developed dispersed in North America, Central America, South America, West Africa, Southern and Eastern Africa, Caribbean Countries, Arab Countries, South Asia, and the South Pacific, thus covering gathering information globally

<sup>146</sup> Richard Owens, “Protection of Traditional Knowledge: A Global Intellectual Property Issue,” See also [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_ipk\\_rt\\_99/wipo\\_ipk\\_rt\\_99\\_2.ppt](http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_rt_99/wipo_ipk_rt_99_2.ppt)

In the meantime, units of the international community are creating sui generis hybrid models as can be found in Panama, Philippines' and the Swakopmund Protocol of the ARIPO.

### **Conclusion**

Through all these debates, there is an over-arching voice of restraint. In recognising communally created expressions as intellectual assets to be protected by intellectual property rights, would we not be encroaching on the intellectual commons of the public domain? Scholars such as James Boyle and Michael Brown ask. Michael Brown has suggested that we should not be asking '*who owns native culture*' but '*how can we promote respectful treatment of native cultures and indigenous forms of self-expression within mass societies?*' I disagree with him. And I do so because by reason of the structure of the globalized economy, now firmly grounded in TRIPS, which operates on the issue of 'who gets capital from what?' the matter of ownership is paramount when it comes to any form of creative venture and enquiries about same. Hernando de Soto in his '*The Mystery of Capital, why capitalism triumphs in the west and fails everywhere else*<sup>147</sup>' has made clear the extreme leakage that poorer societies experience just by a failure to articulate in clear terms, who owns what. As long as what has always been agreed as outside the scope of intellectual property rights is 'the idea' and never the manifestation, and rights are centred around those who produce new expressions, and to the extent that traditional cultural expressions have been authored from ideas, they are creative works and may be protected by intellectual property law, if agreement is reached about other conditions necessary for conferring entitlements. The challenge remains in how consensus on these conditions are achieved internationally for a global framework, and how effectively national

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<sup>147</sup>Basic Books, 2000

legislatures use existing instruments to achieve the best means of protection while encouraging and rewarding creativity and innovation.

The motivation for the task remains strong, whether it is found in the need to preserve the authenticity of cultural expressions and restrain their distortion and inappropriate communication, or to receive market value rewards for their creation. A visit to the website of Sotheby's and Christies' auction houses reveals the high values placed on native arts in world markets today. A 2006 painting named *Waltijatt* by Australian Aboriginal artist Tommy Watson is recorded as having been sold for \$197,160 at an auction sale in Sydney, and yet he is described as traveling between Irruntya, a small community of 150 people, and Alice Springs, a regional center, and reportedly receives approximately \$1000 per painting from a local art gallery. An Australian Torres Strait Islander drum is said to have been sold for a world record sum €818,400 at Christie's in Paris in 2006. A Blackfoot Beaded Hide Man's wearing shirt sold at Sotheby's New York for \$800,000; and Sotheby's October 2006 sale of American Indian art achieved a total of \$7 million and is said to have set a new world record for the sale of a Native object - a Tsimshian face mask - for \$1.8 million<sup>148</sup>. Judith Miller's *Tribal Art*<sup>149</sup> provides a collector's guide to tribal art complete with the significant values placed on a vast array of artistic works, used as part of daily life in indigenous communities, and yet desired at a price by the world community. In such an economic arena, it is not expected that efforts to ensure that the creators of folkloric works are recognized and adequately compensated will abate unless achieved. One of the objectives of the 2005 UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions bears special attention in the current discussion –

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<sup>148</sup>Torsen Molly & Andersen Jane, *supra*

<sup>149</sup>Dorling Kindersley Ltd, 2006

*‘...Recognizing the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion...’*

Thus the efforts to protect and promote the traditional knowledge of indigenous peoples as a source of material wealth is an endeavor that is coalescing from several angles, especially when one considers the contribution made to the discussion by Article 31 of the UNDRIP in 2007, two years after the UNESCO Convention for the Promotion and Protection of the Diversity of Cultural Expressions.

## **GLOSSARY**

ARIPO	African Regional Intellectual Property Organisation
Bellagio Declaration	Declaration following Bellagio Conference on Intellectual Property
Berne Convention	1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works
GATT	General Agreement on Trade and Tariffs
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions
IP	Intellectual Property
IPR	Intellectual Property Rights
SWAKOPMUND	Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore
TRIPS	Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods
TUNIS MODEL	Tunis Model Law on Copyright for Developing Countries
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Economic, Social and Cultural Organisation
UNESCO REC.	Recommendation on the Safeguarding of Traditional Culture and Folklore
WIPO	World Intellectual Property Organisation
WIPO/UNESCO	Model Provisions - Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions
WTO	World Trade Organisation

***“International (In)Justice: Six Decades After, Have we  
Progressed Significantly Since Nuremberg?”***

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**“International (In)Justice: Six Decades After, Have We Progressed Significantly Since Nuremberg?”** by Professor Dr. JohnG. Rodden

**ABSTRACT**

After the Second World War, an “internationalization” of human rights occurred, with states beginning to accept that human rights were not mere matters of domestic (internal) concern, but rather the responsibility of all states committed to international world peace and security. The trials held at Nuremberg and Tokyo marked an important turning point in the history of international relations in the field of human rights. Individuals were held accountable for internal acts that amounted to gross violations of human rights.

My paper topic: “International (In)Justice: Six Decades After, Have we progressed significantly since Nuremberg?” attempts to address the significance of those historic trials. Was the criminal trial framework at Nuremberg a blueprint for how to carry out international justice today? Was it somehow flawed?

The paper focuses on what has happened since the occupation of Iraq and how the competing arguments for and against U.S. policy since 2003 have been framed. My aim thereby is to sharpen our understanding of what precisely is at issue by discussing the ongoing controversies about “the war on terrorism” from a heightened perspective, whereby the implications, politically and morally and historically, of both our conduct and choices might be illuminated.

My aspiration in the paper is to present both sides without coming down on either one, given the complexity of the issues, the dangers of historical analogies, and the fact that

these complex questions are still fully in process and unresolved. We need more mutual understanding and less hard position-taking these days, with the arguments on both sides presented via a contextualized perspective that includes critical self-reflection, that is, reflection by us Americans and the U.S. government on the limitations and possible hypocrisy of our own perspective.

The main theme of the paper is to examine the hypocrisies of nations, especially their questionable moral stature to impose equitable judgment on a defeated nation, and my ultimate aim is to stimulate consideration of international justice and to call for an engaged, moral response to those chauvinistic blinders that preclude fairness.

*An Issue of Invocability of Provisions of the WTO  
Covered Agreements Before Domestic Courts*

Dr. Ramesh Karky

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**Abstract of the presentation on “An Issue of Invocability of Provisions of the WTO Covered Agreements Before Domestic Courts”**

Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) is one of the major agreements of the WTO agreement. Article 27:1 of the TRIPS agreement states that patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Can a citizen of the WTO Member state claim patent in the field of biotechnology in his home country based on Article 27:1 of the TRIPS agreement? A system of invoking provisions of the WTO Agreements before domestic courts may be a good starting point to the WTO Dispute Settlement System because it will help to reduce the burden of certain types of cases on the international plane. A study on whether provisions of the WTO Agreements are invocable to the court of Member States under the WTO Agreements and national laws is valuable and contributes to the WTO system. This presentation covers relevant provisions of the Uruguay Round Agreements including TRIPS agreement, provides arguments favoring and opposing invocability and non-invocability, the direct applicability of the Uruguay Round Agreements in domestic law, and the invocability of the provisions of the Uruguay Round Agreements before domestic courts, and finally draws conclusion on the issue.

*Dr. Karky thanks Professor Dr. Christian N. Okeke for inviting and making it possible to participate at the 21<sup>st</sup> Annual Fulbright Symposium on International Legal Problems*

*Do We Need a European Civil Code?*

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**Distinguished President Angel, Dean Ramey, Special Guest of Honor and Keynote Speaker Sir Arnold Amet, Professors, fellow Students of Golden Gate University, Ladies and Gentlemen,**

I am very honored to speak to you today at the 21<sup>st</sup> Annual Fulbright Symposium. Before starting my speech, allow me to thank the President and Staff of GGU, in particular the organizers of the Symposium for this wonderful event.

In line with today's theme, Harmony and Dissonance in International Law, I would like to share my thoughts with you on the question: Do We need a European Civil Code? In order to maintain the time limit of 15 minutes, I will only talk about three major points of my paper but will not be able to go into depth in any of them.

When I talk about a European Civil Code, I mean an all-embracing Civil Codification for all the Member States of the European Union.

Let me begin with the competence.

### 1. Competence

Art. 114 TFEU, together with Art. 26 TFEU offers a competence for actions to establish and administer the internal market. The object of a European Civil Code would therefore have to be the establishment and functioning of the internal market. "The measure has to be designed to remove *genuine obstacles to the completion of the internal market*", the ECJ held.

Such genuine obstacles can be seen in higher transaction costs. They result from the need of legal advice if one is doing business with someone from a different legal order. Furthermore, differences in the law make more detailed contracts necessary, which also leads to higher transaction costs. Moreover, it's an obstacle to the internal market if consumers are held from dealing cross-border because for example product liability law is not unified. Last but not least, a European Civil Code would create the possibility to use a piece of real estate as a lien for a cross border credit.

As a result, there are concrete hindrances to the completion of the internal market, a European Civil Code would remove. Therefore the European Union would have a competence for the measure.

## 2. Advantages and Disadvantages

Due to the limited amount of time, I can only touch on the first five of the major points from my paper today. I hope this will at least give an impression of how closely related the points are and that they have to be regarded as parts of one line of argument.

### a) Signal

First and foremost, a European Civil Code would be an enormous signal of strength, unity and togetherness to the rest of the world and would enlarge Europe's importance in the world market. Together with the Euro, it could be the greatest milestone of European integration as it would affect the people in their everyday life, creating a European identity. So far, every European citizen only sees himself as a member of his own country but not as

a European.

However, the Motto of the EU is “Unified in Diversity”. Europe is not and shall not be one SuperState (United States of Europe). Its core identity does not lie in uniformity and conformity but rather in cherishing the differences of its Members. Therefore, one could argue that the signal a European Civil Code would send out to the world is not the signal the European Union wants to send out.

b) Outcome

A further advantage would be that by mandating the brightest and most recognized legal scholars of the European Union to draft and revise the European Civil Code, the outcome would most likely be a masterpiece of legislation. It would enhance the quality of the law in most of the European Member States regarding fairness and proportionality but also consistency and coverage.

c) Language

Due to this diversity, there are twenty-three different official languages in the EU. Critics always mention that it would not be possible that all the scholars who work on the development of the law work in their language and the results would be translated into the other languages instantly. As a result, no one could keep track of the mass of publications. Therefore the European Civil Code would start to drift apart from the first day on.

To propose that the people of the European Union should agree to only one language is not only foolhardy but also undesirable as the Member States would lose a great party of their cultural identity. But there is another way: the Europeans would not have to

agree to one language of everyday life but only to one language for science and business. The Code would still be published in twenty-three languages, but scholars would work on the development of the law in English only. In this way, the efforts would be combined; all European scholars would work on the development of the law together. And it is not so unthinkable to make English the language of science and business in the EU; it is happening already anyway.

Besides, to agree to one language for business and science would, once again, show strength and unity and would enhance trade between the Member States. Last but not least, the different languages could even be seen as another obstacle to the internal market/trade (and therefore giving the European Union a competence to enact a European Civil Code).

#### d) Common Law Countries

Another major problem is that there are three common law countries in the European Union (England, Ireland and Cyprus). In order not to split the EU, these countries cannot be left out of the European Civil Code endeavors.

But I think that the language argument could be used here once again. All those countries are English speaking. It would be a tremendous advantage for them, if English becomes the language of business and science in the European Union. Therefore, this could be used as a bargaining power. In order to get their mother tongue established as the European language of science and business, they would have to switch their legal system to a civil law system. After all, there are not too many advantages of the common law legal system. It is very hard to always find the right precedents.

Unfortunately, I don't have the time to go into this deeper today.

#### e) Culture

Finally, the differences in the culture of the Member States, which shall be kept alive as the diversity is what makes Europe unique, could be the hindrance. A Civil Codes needs, at least to a certain degree, open clauses and indefinite concepts of law. But interpreting them is always a matter of cultural background. Therefore, even uniform rules would not lead to unified law in Europe due to the differences in the cultural background.

But it has to be borne in mind to what extent a common cultural background is necessary at all. It is not necessary to try to establish a common culture in Europe. Law is not only folklore! The cultural background only has to be common *enough* to come to *similar* interpretations of the open clauses in the civil code. Slight differences in the law of the European Member States have to be accepted; as already mentioned, Europe shall not be one SuperState! Besides, slight differences are better than completely different systems anyway.

Last but not least, one way of eliminating problems in that regard would be to leave out family and inheritance law. Those sections are on the one hand deeply rooted in the national traditions and on the other hand not of great importance for the completion of the internal market anyway. Again, I do not have the time to go into this any deeper.

### 3. Further Proceedings

Let me finish with a word about the further proceedings. The further proceedings

are very important in order to make the European Civil Code a success. A failed try to implement such a code would be an as negative signal as the success would be a positive one. Therefore, I suggest at least four steps to be followed. It should be announced that a European Civil Code will be passed according to the four steps laid out in the following.

**Step 1:** After the announcement, a group of scholars from every Member State should be put in charge of writing down the Code. They could benefit largely from work already done by other groups (a separate section of my paper discusses those efforts).

**Step 2:** In phase two, the European Civil Code should be passed as a non-binding, optional source of law. This period should last for a long enough time (e.g. two decades) to give every Member State the chance to change their education of jurists, to give the population the possibility to get used to the new code and to give the legislature the possibility to change the code easily and bring it into its final shape so it doesn't have to be changed a lot as soon as it becomes binding.

**Step 3:** In phase three, after for example one decade, the commercial part should become binding as well as the basic legal principles and definitions.

**Step 4:** In phase four, the European Civil Code should become the only binding source of Civil Law in Europe.

I hope that despite the time limit, I could at least provide an overview of the complex of problems.

Thank you very much for your attention.

*Coal-fired China: Rethink the Precautionary Principle*

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**Coal-fired China: Rethink the Precautionary Principle**, by Ms. Shufan Sung

The international environmental issues such as the ozone depletion and climate change have given us lessons that our current activities might have long term impacts to our environment. The multi-boundary environmental problems have increased quickly in recent years, and because of its complexity, the calls for international cooperation appear urgently. As a result, the international environmental law has developed since 1970s under the need to seek the most possible international cooperation. One of the most controversial and broadly discussed principles is the precautionary principle. It states that if an action or policy has a suspected risk of causing harm to the public or to the environment, in the absence of scientific consensus that the action or policy is harmful, the burden of proof that it is not harmful falls on those taking the action. The value of this principle is to ensure the environmental justice would be carried out and taken into account in a policy-making process concerning the harm that may have occurred.

Though the explanation and exact wording are slightly different in international treaties, the precautionary principle addresses how environmental decisions are made in the face of scientific uncertainty. The principle is concerned with taking anticipatory actions to avoid environmental harm *before* it occurs<sup>1</sup>. Principle 15 of the *1992 Rio Declaration* is the most widely accepted elaboration of the precautionary principle:

*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

The principle speaks of “when” policy measures can be taken and on what basis, but it did not specify to “what” type of measures should be taken. The principle only illustrates that such measures should be “cost-effective” when there are “threats of serious or irreversible damage.” However, it was criticized because it “leads to nowhere<sup>2</sup>.” On the other hand, people endorsing the idea defend that the precautionary principle should be applied and shift the burden to those taking action as it is the only way to prevent the irreversible harm. The dispute lasts until today and is even more intense because of conflicts of interest among different countries. Particularly, speaking of the duty to reduce the greenhouse gas (GHG) emissions, China and the US are the two major countries responsible for more than half of the anthropogenic GHG emissions in the world, but failed to sign the Kyoto Protocol, the only binding international treaty aiming to address the issue of climate change. As the world’s factory, China has consumed the most energy in the world<sup>3</sup>. Around 70% of China’s energy supply is from coal, and half of the energy supply goes to the power sector while the remaining half of the energy supply goes to the industry. At ports in Canada, Australia, Indonesia, Colombia and South Africa, ships are lining up to load coal for furnaces in China, which has evolved virtually overnight from a coal exporter to one of the world’s leading purchasers<sup>4</sup>. Not surprisingly, following the prosperity in its economy, China emitted the most greenhouse gas (GHG) since 2007. Meanwhile, China’s GDP growth rate runs at 7%-10% annually from 2000. With such rapidly growing economic development as the leading developing country, China plays an indispensable role both in the international trade negotiation and international environmental cooperation.

To support its economy, authorities in China have made the policy to build more large scale coal-fired power plants integrated with other industries. Though China

government won the war on the renewable energy investment in 2009 by investing more capitals than the US government<sup>5</sup>, it did not let go of the coal. Instead, China is implementing a policy that promotes together the clean coal and renewable energy to satisfy vastly emerging energy demands. Coal is the most abundant and cheap fuel in China, as its reserves account for 14% of the world total, trailing only Russia and the U.S. Accordingly, to use coal for the purpose of energy security and economic development is clear and encouraging in China's 11th Five-Year Plan for the year 2006-2010, as well as the proposal for the 12th Five-Year Plan for the year 2011-2015.

However, coal is also the dirtiest and most plentiful energy source on Earth. It is the leading source of the global warming pollution. So how does China commit on voluntary carbon reduction action as it mentioned at the Copenhagen summit, while it builds two coal-fired power stations every week<sup>6</sup>? Actually the only feasible way is to adopt the clean coal policy and deploy the technology such as the carbon capture and sequestration (CCS). Its high potential to co-exist with the current infrastructures is its great advantage. Not only jurisdictions depending heavily on domestic coal see the CCS as essential to combat climate change, others not heavily relying on domestic coal also move towards CCS by developing relevant regulatory frameworks. Up to today, there are at least 17 government organizations making progress and finalizing roadmaps for CCS, while many others are interested in participation. Among these jurisdictions, China and the US are the two avid members eager to invest and cooperate together on the deployment of CCS technology. In November 2009, the two Presidents of China and the US established the US-China Clean Energy Research Center funded by public and private funding for at least \$150 million over five years, and the mission is to focus on clean technology such as the CCS technology. Further, the 21st

century coal program will bring scientists and engineers from both countries to work together on large scale CCS projects. There is a clear path that the U.S. and China will strengthen their cooperation in the CCS technology more than ever.

CCS can make the coal-fired power plant cleaner by capturing the carbon emission from the stack before it was emitted into the atmosphere. Then the captured carbon would be stored underground for millions of years. The benefit in doing this is to decrease the amount of carbon emission in the atmosphere and therefore relieve the climate change, while the disadvantage is the jeopardy of leakage, contamination of underground water, and the uncertain long term storage liability allocation.

Some people argue, the risk to deploy the CCS is even greater than the risk from the global warming. While others consider that the CCS technology, as well as nucleus power station and the deep water oil drilling, is worth trying as long as there is adequate risk assessment and risk management. If we use the CCS properly and carefully, it could be a significant technique to help us combating climate change. Nevertheless, there is no doubt that it could be even more harmful to our environment if we cannot implement an efficient risk management strategy.

In this paper, we hold a positive attitude to the deployment of the clean coal technology as the CCS in China, and we think it is necessary for many developing and developed countries to promote the technology. As an application of the precautionary principle to avoid irreversible damage as global warming, we consider the CCS to be a valid approach toward a low carbon economy. However, the precautionary principle, which

requires the policy to be made before any actual risk has occurred, is simultaneously applicable to the risk brought by the deployment of the CCS, such as the jeopardy of leakage, contamination of underground water, and the uncertain long term storage liability sharing. These long term risks are severe and irreversible to our environment, if there is any. While the precautionary principle requires that any measure taken be “cost-effective,” it is essential to balance the pros and the cons between the benefit and the cost, so we could choose between different approaches. Furthermore, based on the *1992 Rio Declaration*, we must consider if there is any alternative that would achieve a similar result, while it could result in the least harm. Last, the *1992 Rio Declaration* also requires any measure taken to be according to each country’s capability. While each country has a different ability and willingness to reduce the carbon emission, the spirit of “common but differentiated responsibilities” was well set out in the Kyoto Protocol. Thus we must ask, is China truly capable of adopting the CCS technology for its major low carbon strategy? We need to examine these questions as we ponder the value and the limitations of the precautionary principle, the most important rule to deal with concerning international environmental issues.