Protecting animal welfare: Overview and future prospects

In recent years, more and more nations have passed laws protecting animal welfare. But the extent of such protection has varied widely among different jurisdictions. What kinds of laws currently oversee animal welfare in various nations? Have they been effective? And what are the prospects for creating a uniform set of animal welfare standards through international law?

Does greater use of criminal law prevent the spread of HIV?

Individual nations have taken many different approaches in trying to stop the spread of HIV. But experts say that the world community has increasingly relied on the use of criminal laws to do so. Is the use of criminal law effective in stopping the spread of HIV? Are there international treaties which guide nations on how they should respond to and treat people with HIV/AIDS? And what is the status of the debate?

“Vulture funds”: Preying on poor countries or pursuing deadbeat nations?

As debt burdens increased among the world’s poorest nations, many lenders created debt reduction programs to forgive some of the loans. But other lenders – described as “vulture funds” – sued these indebted nations for repayment far exceeding the original loan amount. What are vulture funds? How many lawsuits have they filed against poor nations? And how is the world community responding to such lawsuits?

Protecting migrant workers: The legal framework and status of debate

Every year, hundreds of millions of migrants cross international borders in search of work in other nations. Human rights groups say that migrant workers face many dangers, including labor exploitation and abuse, kidnapping, and sexual assault. What international treaties currently regulate how nations should treat migrants? Have they been effective? Should nations do more to protect migrants?

“Ideological exclusion”: Keeping out people who don’t share your views?

In the past, the United States had actively barred the entry of many foreigners because of their political viewpoints. While the use of “ideological exclusion” later fell out of favor, some believe that the government had revived this practice to keep out critics of U.S. anti-terrorism policies. Can the United States keep out foreigners for their viewpoints? Have there been recent cases where the government had barred critics from entering the nation?
IMMIGRATION LAW

Asylum in the United States for foreign homeschoolers?................................. PAGE 35
A U.S. immigration law judge, for the first time, granted asylum to a family who endured what they described as persecution in their home nation for home-schooling their children. Some hope this ruling will clear a path for other homeschoolers seeking asylum, but others note that the federal government has appealed the ruling.

Does Arizona’s anti-illegal immigrant law violate international law?.................. PAGE 37
After passing what has been described as the nation’s toughest anti-illegal immigration law, Arizona is facing a court battle against the federal government, which argues that the law not only violates the U.S. Constitution, but also American obligations under a major international treaty.

Kosovo: A license for more independence days around the world?......................... PAGE 40
The International Court of Justice issued a decision on whether Kosovo’s declaration of independence in 2008 from Serbia conformed to international law. The court’s ruling, however, created not only more questions than it had answered, but also greater worries that it would encourage secessionist movements around the world.

IMMIGRATION LAW

The crime of aggression on the slow road to becoming a crime........................ PAGE 42
The world community reached a long-sought agreement which will allow the International Criminal Court to prosecute government officials and even world leaders for committing the “crime of aggression.” Several procedural hurdles, however, will delay its implementation for what could be many, many years.

INTERNATIONAL ENVIRONMENTAL LAW

More protection for salamanders, but not for coral, polar bears, sharks, and tunas .......... PAGE 46
The world community voted to prohibit the international trade of several endangered animal and plant species, including salamanders, but rejected similar protection for others. Conservation groups added that many nations had probably based their votes on economic rather than scientific reasons.

INTERNATIONAL INTELLECTUAL PROPERTY

Will a new agreement finally stop counterfeiting and piracy?.............................. PAGE 48
Those nations dominating intellectual property commerce recently completed negotiations on a global agreement which will create a uniform and much stronger set of standards in enforcing intellectual property rights. While business groups praised the agreement, others say that its legal implications are still unknown.

SUPREME COURT DECISION

Teaching international law to terrorists can be a federal crime.............................. PAGE 51
The U.S. Supreme Court upheld a law which makes it a crime to give certain training and advice (including those involving specialized knowledge of international law) to terrorist groups – even if those activities are intended for legal and peaceful purposes.

UNITED NATIONS

Right to water and sanitation officially recognized as human rights...................... PAGE 53
For the first time, the UN General Assembly passed a resolution which declared access to safe and clean drinking water and access to sanitation as fundamental human rights. But a large percentage of nations did not vote for the resolution, and questioned whether those rights have a legitimate basis under international law.

UNITED NATIONS

Fewer tour boats, but cleaner sailing around Antarctica................................. PAGE 54
An international treaty will soon prohibit nearly all ships from sailing around the region of Antarctica while using or even carrying heavy fuels. While tour operators complain that these restrictions will hurt their business, experts say that the new agreement will protect an environment teeming with wildlife.
In August 2010, a German court convicted Nadja Benaissa – a singer for No Angels, described as the most popular girl band in Germany – for causing grievous bodily harm and attempted bodily harm when she infected several partners with HIV, but did not tell them about her condition. The court, according to news reports, imposed a suspended two-year prison sentence and 300 hours of community service, saying that the singer (who denied “deliberately infecting anyone”) had expressed remorse, acknowledged her reckless behavior, and agreed to counseling.

Along with Germany, most other nations use their criminal laws to prevent and punish the spread of HIV. Singapore, for instance, imposes much harsher criminal penalties on individuals who infect others with HIV, even if they are unaware of their status. In the United States, some jurisdictions prosecute HIV-positive individuals who spit on or bite law enforcement officers. Another jurisdiction had prosecuted an individual with HIV for “using a harmful biological device” when he bit someone in a fight.

While different nations have taken varying approaches in trying to prevent the spread of HIV, legal analysts believe that they are coming to rely primarily on the use of criminal laws to address HIV. But many health officials and legal advocates have criticized the effectiveness of using criminal laws in stopping the spread of HIV. In fact, some have argued that relying on criminal laws could unintentionally have the opposite effect.

What various methods have nations used to prevent the spread of HIV? Compared to these approaches, is the use of criminal law effective in stopping HIV? What do supporters and critics say? And are there currently any international treaties which guide nations on how they should respond to and treat people with HIV/AIDS?

**HIV/AIDS: Fact, fiction, and other concerns**

First discovered by scientists in the early 1980s, HIV (or the human immunodeficiency virus) itself does not cause death. Rather, HIV severely weakens the body’s immune system to fight infections and diseases. Experts say that a person who has HIV along with certain infections and diseases will be diagnosed as having AIDS (or acquired immunodeficiency syndrome). It is these infections which can eventually lead to death within one to three years.

Health officials say that people can spread HIV only through unprotected sex; through pregnancy, childbirth, or breast feeding from an HIV-infected mother; or through blood-to-blood contact such as cases where a person comes into contact with a needle which had been used by an HIV-infected person.

HIV/AIDS is a global pandemic affecting every region of the world, according to a UN-led group called the Joint United Nations Programme on HIV/AIDS (or UNAIDS). At the end of 2008, approximately 33.4 million people worldwide were living with HIV/AIDS, and around 2 million people had died from AIDS. Over two-thirds of people with HIV/AIDS (or 22 million) live in sub-Saharan Africa, giving that region the highest concentration of people living with HIV/AIDS in the world today. South and Southeast Asia host the second largest concentration of persons living with HIV/AIDS with an estimated 3.8 million people followed by Latin America with 2 million people. Eastern Europe and Central Asia have 1.5 people living with HIV/AIDS while North America and the Caribbean region have 1.4 million and 240,000 people, respectively, reported UNAIDS.

According to the U.S. Center for Disease Control and Prevention (or CDC), approximately 600,000 people in the United States were diagnosed as having HIV. But the CDC believes that this number is much higher (probably closer to one million), saying that 20 percent of Americans infected with HIV don’t realize that they are carrying the virus and are probably transmitting it to others.

Researchers say that certain socially marginalized populations face the highest risk of transmitting or becoming infected with HIV/AIDS, including migrant workers, gay men, men who have sex with men (or MSM), intravenous drug users, sex workers, prisoners, and women. The World Health Organization (or WHO) recently listed HIV as the main cause of death and disease in women of childbearing age while the CDC estimated that MSM accounted for half of all the cases of HIV in the United States.

Even though people know more about HIV/AIDS than in past decades, health experts say that many misconceptions surround the virus and its transmission. For example, many believe that:

- Kissing can transmit HIV: But the CDC said that people cannot transmit HIV through kissing unless there is contact with blood.
• HIV can be transmitted through casual contact, including the sharing of utensils or food, hugging, coughing, and sitting on a toilet seat: Unless these situations also involve the exchange of bodily fluids which are known to carry HIV (including blood, semen, vaginal fluid, or breast milk), transmission is nearly impossible. But the CDC also reported that researchers have found HIV in saliva, tears, and sweat, though there are no data showing that HIV can be transmitted through these fluids.

• HIV-infected people can infect others through biting: The CDC says HIV transmission through biting is only likely in cases involving severe blood trauma.

• An HIV infection immediately leads to AIDS: Experts say that HIV can lay dormant for long periods of time, and that advances in medicine have partially prevented HIV from developing into AIDS, allowing HIV-infected people to lead productive lives.

Still, people living with HIV/AIDS – in both the developing and industrialized nations – face rampant discrimination and persecution. For example, HIV-positive individuals in Haiti said that they did not receive aid in the aftermath of a devastating earthquake in January 2010. But some nations are changing how they address people with HIV/AIDS. In April 2010, for instance, the Chinese government lifted a 20-year ban on the entry of HIV-positive individuals. The United States in January 2010 ended its policy of requiring foreigners with HIV/AIDS to get special waivers before applying for tourist and permanent resident visas.

Effects in stopping the spread of HIV

Nations around the world are taking different approaches in curbing the spread of HIV/AIDS. One approach involves medical treatment. Currently, no vaccine can cure or prevent the transmission of HIV. (Scientists note that while the body can destroy many viruses, it cannot expel HIV.) But recently, the WHO and UNAIDS noted an experimental vaccine created in Thailand which reduced the risk of contracting HIV by one-third in a trial administered to 16,000 participants. In another development, a South African AIDS research center (called Caprisa) announced in July 2010 that it had created an experimental vaginal microbical gel which reduced the likelihood of HIV transmission by almost 54 percent.

In the meantime, many HIV-infected people depend on antiretroviral therapy (or ART) – the leading treatment of HIV/AIDS – where a person takes a combination of drugs to decrease HIV levels in the body. But many note that ART is very expensive (costing up to $15,000 each year for an individual), hence placing it out of range of people in poor nations such as those in sub-Saharan Africa.

Nations also rely on non-medical approaches to curb the spread of AIDS/HIV, including educational programs and counseling where agencies and clinics provide information to those who are most likely to become infected, including gay men, sex workers, drug users, and other people whom society has marginalized such as migrants and minority populations. According to the Global Campaign for Education (an education advocacy group), illiterate women were four times more likely to believe that there was no way to prevent the spread of HIV than women with a post-primary education.

In combination with these efforts, nations are using different areas of the law to prevent the spread of HIV. For instance, analysts say that public health laws in certain nations empower health officials to carry out testing and treatment of HIV, and also require HIV-infected people to disclose their status to sexual partners.

Using criminal law to prevent the spread of HIV

In addition to public health laws, many nations use their existing criminal laws (such as those already codified in a penal code) to prosecute people who transmit or expose HIV to others. For example, governments around the world have charged such individuals with offenses ranging from grievous bodily harm, assault, and manslaughter to poisoning, child neglect, murder, and even bio-terrorism, reports various groups. Some cases from around the world include:

• Canada: The government can charge people with criminal negligence under Sections 215 and 219 of the country’s Criminal Code for transmitting HIV. In 2005, prosecutors charged an HIV-positive mother for failing to provide “the necessaries of life for a child under the age of 16 years” when she did not seek services to prevent mother-to-child HIV transmission during her pregnancy.

• Colombia: Under Article 369 of the country’s Penal Code, the government can charge those who transmit HIV for the “spread of an epidemic,” an offense punishable by prison sentences ranging from one to five years.

• England: Under Sections 18 and 20 the Offences Against the Persons Act (1861), the government can charge those who transmit HIV with “inflicting grievous bodily harm” and “intentional or malicious infliction of bodily harm.” Persons convicted under this statute could face a penalty of five years to life imprisonment.

• Italy: The government can charge individuals who transmit HIV with culpable homicide under Article 589 the Penal Code. In 2000, a court convicted an HIV-positive man to 14 years in prison for infecting his wife who later died of AIDS.

• Samoa: Under the country’s Crime Ordinance (1961), the government can prosecute those who transmit HIV for inflicting “grievous bodily harm” or “bodily harm,” which is punishable by penalties ranging from two to seven years imprisonment.

• United States: In 2009, Michigan charged an HIV-positive man for violating Section 750.200i of a 2004 bio-terrorism law, which, in part, prohibits people from using “a harmful biological substance or a harmful biological device.” (The defendant allegedly bit his neighbor during a fight.) Penalties include a 25-year prison sentence and/or a $20,000 fine. In addition to using their existing criminal laws to prevent the spread of HIV, scores of nations have also passed laws which specifically single out HIV (out of the millions of other viruses) and make it a crime to transmit or expose others to it. (These are known as HIV-specific criminal laws.) For example:

• Cambodia: Under the country’s Law on the Prevention and Control of HIV/AIDS (2002), an infected person who transmits HIV can be imprisoned for up to 15 years.

• Russia: Article 122 of the Russian Criminal Code (“Infection
by HIV”) imposes a maximum five-year prison sentence on people who transmit HIV and are aware of their infected status.

- Singapore: Chapter 137 of the country’s Infectious Diseases Act (1977) allows for the prosecution of people who are unaware of their HIV-positive status if they had “reason to believe that he has been exposed to a significant risk of transmission.” Penalties can include a fine of $50,000 and/or imprisonment up to 10 years.

- Pennsylvania: Under 18 Pa. Cons. Stat. § 2703, it is a second degree felony for an HIV-positive prisoner who is aware of his status to spit on other people or have them come into contact with blood, seminal fluid, urine, or feces “by throwing, tossing, spitting, or expelling such fluid.”

- Louisiana: Under La. Rev. Stat. Ann. § 14:43.5, it is illegal for a person to “intentionally expose another to HIV through sexual contact or through any means or contact (including spitting, biting, stabbing with an HIV contaminated object, or throwing of blood or other bodily substances) without the knowing and lawful consent of the victim.” Penalties could include a $6,000 fine, 11 years imprisonment, or both, if the person affected is a police officer.

Nations in western Africa currently have the most HIV-specific legislation in Sub-Saharan Africa, reports Plus News, a UN-affiliated news service which covers HIV/AIDS news. Guinea’s HIV-specific legislation, for instance, imposes criminal penalties for exposing others to HIV, regardless of “whether the person knew she or he had HIV or was aware of the risk of transmission.” In Tanzania, an HIV-positive individual who intentionally transmits HIV can be imprisoned for life under that country’s HIV and AIDS (Prevention Control Act) of 2008. Under Sierra Leone’s Prevention and Control of HIV and AIDS Act (2007), an infected mother who transmits HIV to her fetus can be imprisoned for up to seven years.

Experts say that the foundation of these HIV-specific laws comes from a model law created by government delegates at a 2004 workshop held in Chad by a group called Action for West Africa Region-HIV/AIDS. The delegates, they say, wanted to create a model law primarily to protect the human rights of HIV-positive individuals and those at risk of exposure. However, one provision (Article 36) suggested that nations criminalize the “willful transmission” of HIV.

Arguments for and against using criminal laws in stopping HIV

Many people around the world support laws which criminalize the transmission of and exposure to HIV. They argue, for example, that doing so will punish those HIV-positive individuals who put the lives of others at risk by not revealing their status. In addition, others believe that the consequences of transmitting HIV are so grave that criminalizing such acts will serve as an effective deterrent against reckless or careless behavior. Furthermore, having laws which specifically criminalize, say, willful and deliberate HIV transmission will provide governments with a solid legal basis to prosecute individuals who carry out such acts and also reduce the chances of misapplying existing criminal laws in those cases, according to supporters.

Groups such as London-based National AIDS Manual have described the increasing use of this approach as “criminalization creep,” and note that nations on every continent now have legislation which makes it a crime to transmit and expose others to HIV. But as more and more countries pass such laws, people are now debating whether this approach is the most effective way to curb the spread of HIV. Opponents argue that broadly criminalizing the transmission of and exposure to HIV will:

- Deter those who carry HIV from seeking treatment and also prevent getting information to people who are most at risk of becoming infected such as gay men, sex workers, and drug users. Analysts say that these people fear that their very status in society – for instance, simply being a gay man or a sex worker – will automatically lead to their imprisonment if they seek HIV treatment or information.

- Make it less likely that those with the infection will inform their sexual partners. Matthew Weait, Senior lecturer in Law and Legal Studies at the University of London, said that people who fear that they may have transmitted their infection will be less likely to inform their sexual partners, fearing that doing so will amount to “confessing to the commission of an offense.”

- Not prevent the spread of HIV. UNAIDS analysts say that no research has shown that the behavior of people in nations which criminalize the transmission of and exposure to HIV is different from nations which don’t. In fact, they say that no one has proven that criminalizing HIV transmission has actually prevented the spread of HIV. “The public health goals of legal sanctions are not realized by criminalization,” said the UN Special Rapporteur on the Human Right to Health. “In fact, they are often undermined by it . . .”

- Lead to discriminatory treatment because HIV-specific laws are based on erroneous beliefs about the virus itself and its transmission. Some analysts say that many legislatures had passed HIV laws in an environment where scientists knew little about HIV and where those who carried the virus faced intense fear and hostility. Many laws, for example, currently make it a crime for an HIV-positive person to bite, spit on, or scratch someone else. But scientists now say that transmitting HIV through those acts is highly unlikely. So criminalizing such actions only for those who have HIV (and not another virus) is discriminatory.

- Lead to unjust treatment. Critics point out that many governments will punish individuals who did not know that they were HIV-positive or did not intend to transmit the virus such as cases where HIV-positive mothers pass along the virus to their fetus. (Whether there are exceptions to prosecution depends on a country’s laws.) Others argue that some HIV-laws are poorly worded and don’t clearly indicate when the government may prosecute a person for transmitting or exposing others to HIV.

Few people have argued against punishing people who had willfully and deliberately infected others with HIV. For instance, UNAIDS has called on governments to repeal all legislation criminalizing HIV transmission and exposure except in “rare and egregious cases of intentional HIV transmission,” which it defines as situations where “a person knows his or her HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit
it.” UNAIDS also recommends that nations not apply criminal law to cases in which “there is no significant risk of transmission or where the person did not know s/he was HIV-positive, did not understand how HIV is transmitted, disclosed HIV-positive status to the person at risk or honestly believes the other person was aware . . .”

More and more nations are relying primarily on the use of criminal laws to curb the spread of HIV, say analysts. But health officials and legal advocates have criticized the effectiveness of using criminal laws, saying that doing so can actually produce the opposite effect.

Stopping HIV using a human rights-based approach?

Many groups say that governments must address the spread of HIV using not only public health and criminal laws in combination with treatment and counseling, but also human rights laws, which call on governments to respect the human rights of all individuals including the right to privacy, freedom of movement, the right to obtain information, and the right to be free of discrimination. Enforcing these rights, they say, will encourage HIV-positive individuals and those most at risk of infection to seek treatment and counseling without fear of retribution, thereby reducing the likelihood that they will infect others.

In 2007, the UNAIDS Reference Group on HIV and Human Rights – an advisory body created in 2002 to promote the protection of the human rights of those living with HIV/AIDS – issued a report describing the status of human rights of those living with HIV. Examples included:

- South Africa: The report noted that HIV-positive people in South Africa faced extreme discrimination and stigmatization in the region, but that the courts were trying to protect their rights. For example, in 2000, the Constitutional Court of South Africa overturned a decision by a lower court which held that South African Airways may refuse employment to an HIV-positive man, ruling that doing so violated his right to non-discrimination and equality guaranteed in the constitution. “HIV is a virus, not a crime,” said Edwin Cameron, a justice of the Supreme Court of South Africa. “That fact is elementary, and all-important. Too often, lawmakers and prosecutors overlook it.”

- Latin America: The report highlighted a high rate of violence against women who were HIV-positive in Latin America, and expressed concern over mandatory HIV-testing for employment in some countries in the region. But it noted a 1999 supreme court decision in Venezuela which ruled that the Ministry of Health had violated the constitution’s right to life, health, and access to scientific advances for persons having HIV/AIDS and ordered free HIV testing and ART treatment.

- India: The report noted that the Bombay High Court in 1999 ruled that a public corporation had violated the rights of an HIV-positive individual under that country’s constitution with HIV, a local province had violated a national law which prohibits any institution or individual from “[discriminating] against people living with HIV, AIDS patients, and their relatives.” Analysts say that this is the first time that China’s legal system agreed to hear an HIV discrimination case.

How does international law address HIV/AIDS?

While many nations are taking their own legal and non-legal initiatives in addressing HIV/AIDS, the world community has collectively undertaken several initiatives to alleviate this health crisis. For example:

**International Guidelines on HIV/AIDS and Human Rights:**

In 2006, the Office of the United Nations High Commissioner for Human Rights and UNAIDS issued 12 nonbinding guidelines for nations to refer to when creating their HIV/AIDS-related policy and legislation – all in an effort to protect the fundamental human rights of people living with HIV/AIDS.

For example, Guideline 3 calls on nations to reform their public health laws “so that their provisions . . . are consistent with international human rights obligations.” Guideline 4 says that states should “review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups.” Specifically, Guideline 4 says that nations should use their existing criminal laws (instead of HIV-specific laws) to prosecute only deliberate and intentional transmission of HIV. Under Guideline 5, nations “should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV, and people with disabilities from discrimination.”

**UN resolutions:** In 2001, the General Assembly unanimously passed a nonbinding resolution (called S-26/2, Declaration of Commitment on HIV/AIDS) which called on its 189 signatory nations to fight HIV/AIDS by setting specific time targets for them to expand education and counseling for people with HIV/AIDS, and also to increase access to treatment within their respective jurisdictions. Specifically, it recommended that a nation should
“strengthen health-care systems and address factors affecting the provision of HIV-related drugs, including anti-retroviral drugs, inter alia, affordability and pricing, including differential pricing, and technical and health-care system capacity.”

In a 2010 progress report on implementing S-26/2, South Africa noted that it had implemented a new policy of increasing access to ART therapy for pregnant women and HIV-positive infants. By the end of 2009, its public health facilities were treating approximately one million people with HIV/AIDS. A progress report submitted by India in 2010 showed a doubling of integrated counseling and HIV testing centers in the past five years. Russia and Chile had also submitted reports documenting increased testing and treatment for people living with HIV/AIDS in their respective jurisdictions.

In a separate resolution (called 60/262, or Political Declaration on HIV/AIDS) adopted in 2006, the General Assembly once again called on nations to provide universal access to HIV/AIDS treatment, care, and prevention programs by 2010. Specifically, it recommended that nations remove all legal barriers impeding such access, and that they give special attention to women and children living with HIV/AIDS. A progress report (A/63/812) issued in 2009 by the General Assembly revealed that nations were providing millions more people with ART and also increased access to HIV treatment for pregnant women. But it also noted that “in countries without laws to protect sex workers, drug users, and men who have sex with men, only a fraction of the population has access to prevention.”

**International treaties:** Currently, there is no international treaty which specifically addresses how nations must address HIV/AIDS, how they treat people with HIV/AIDS, or whether nations should use criminal laws to prevent the spread of HIV. But many legal experts believe that existing human rights treaties provide guidance in this area, according to an extensive analysis conducted by New York-based non-profit Center for HIV Law & Policy.

For example, the 1966 International Covenant on Economic, Social, and Cultural Rights (or ICESCR) calls on nations to ensure basic economic, social, and cultural rights of individuals in their jurisdiction. While the ICESCR does not specifically mention HIV/AIDS, legal analysts have claimed that many of its provisions are indirectly applicable to people living with HIV/AIDS, including the right to the highest attainable standard of health (Article 12), the right to enjoy the benefits of scientific progress and its applications (Article 15), the right to participate in cultural life (Article 15), the right to work (Article 7), and right to education (Article 13).

In 2000, the Committee on Economic, Social, and Cultural Rights – an independent body of experts monitoring the implementation of ICESCR – issued an official interpretation (known as General Comment No. 14) where it stated that the right to the highest attainable standard of health under Article 12 required “the establishment of prevention and education programs for behavior-related health concerns . . . in particular HIV/AIDS.” Moreover, it specifically prohibited discrimination against people based on their health status, including those infected with HIV/AIDS, saying that the “Covenant proscribes any discrimination in access to health care and underlying determinants of health . . . on the grounds of race, colour, sex, . . . [and] health status (including HIV/AIDS),” among many other factors.

Many legal analysts also say that the provisions the 1979 Convention on the Elimination of All forms of Discrimination Against Women (or CEDAW) – which calls on nations to end discrimination against women in all aspects of society – are also applicable to people living with HIV/AIDS, including the right to maternal health (Article 11) and a requirement to eliminate healthcare discrimination (Article 12).

According to General Recommendation No. 24 issued in 1999, the Committee on the Elimination of Racial Discrimination (which monitors the implementation of CEDAW) said that Article 12 calls on nations to remove barriers which prevent people from accessing treatment, education, and information “in the area of sexual and reproductive health, and, in particular, allocate resources for programmes directed at adolescents for the prevention and treatment of sexually transmitted diseases, including HIV/AIDS.”

Experts also say that several provisions in the 1989 Convention on the Rights of the Child call on nations to recognize and protect the basic human rights of children, including those living with HIV/AIDS. These rights, among many others, include the right to non-discrimination (Article 2), life, survival, and development (Article 6), and the right to health (Article 24).

In 2005, the Committee on the Rights of the Child (which is responsible for the oversight of the Convention’s implementation) issued General Comment No. 3 which said that these rights applied to children living with HIV/AIDS. The “laws, policies, strategies and practices [of nations] should address all forms of discrimination that contribute to increasing the impact of the epidemic,” it stated. “Strategies should also promote education and training programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS.”

The 1966 International Covenant on Civil and Political Rights calls on nations to recognize and protect fundamental civil and political rights, including the right to privacy (Article 17), which states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” Many legal analysts say that this right to privacy also extends to people living with HIV/AIDS. Under the right to privacy, according to the views of the UNAIDS Bureau for Development Policy, people living with HIV/AIDS should not have to disclose their health status to anyone except their sexual partners. Also, under this right to privacy, doctors also cannot reveal their status to family members.

Still, despite these various interpretations, advocates for people who have HIV/AIDS point out that many nations continue to carry out policies, including the extensive use of criminal law, which they believe is counterproductive to efforts in fighting the spread of HIV. According to research by the Council on Foreign Relations, “HIV incidence in the United States rose by nearly 50 percent between 2005 and 2009,” and that “data also suggest minimal success at preventing infected mothers from passing HIV to their children during birth, despite the availability of proven and inexpensive interventions.”
As the protection of animal welfare becoming a much greater concern around the world? In July 2010, the region of Catalonia (which includes the city of Barcelona) in Spain voted to ban bullfighting starting in January 2012, arguing that the killing of bulls for sport was cruel. In June 2010, farmers in the state of Ohio, under pressure from animal advocacy groups, agreed to phase out the use farming practices considered by many people to be cruel to animals. In September 2009, China unveiled a draft of its first animal protection law which would cover pet and some farm animals.

Compared to past decades, more and more governments around the world have been passing domestic laws which protect animal welfare and set standards for humane treatment. There are now regulations which prohibit cruelty to pets, guidelines for using animals in scientific experiments, and mandatory inspections of farms where animals are raised or slaughtered. Some nations, including Switzerland, even have specific requirements on how to take care of certain animals, including rhinoceroses. Still, critics say that many of these laws don’t apply to certain animals or are not regularly enforced.

While more governments are passing domestic legislation to protect animal welfare, many animal advocacy groups are supporting the creation of uniform standards on a global level. What laws currently oversee animal welfare in the United States and other nations? Are there currently any regional or international treaties which set broader protections? What are some of their requirements? Have they been effective in protecting animals from abuse and inhumane treatment? And have there been any unique developments in the area of animal protection in recent years?

United States: Federal and state animal welfare laws

The U.S. government currently enforces three federal laws concerning different aspects of animal welfare. But each law places limits on the extent of such protection. For example, the 1966 U.S. Animal Welfare Act regulates the treatment of animals used in experiments and research (excluding rats, mice, and farm animals), the display of animals in exhibitions such as zoos, and also oversees animal breeders, dealers, and animal auctions. The act also prohibits animal fighting where people deliberately prod animals to fight each other in contests.

The Twenty-Eight Hour Law (amended in 1994) regulates the interstate transportation of animals raised for food. Under this law, people transporting animals may do so for 28 consecutive hours, and must afterwards unload their animals for feeding and rest for five consecutive hours. The federal government may impose civil penalties on violators.

The 1901 Human Methods of Slaughter Act regulates the slaughter of only those animals in federally supervised slaughterhouses to prevent their needless suffering. (It also calls for improvements in slaughtering techniques.) For instance, under the act, if animals are held for more than 24 hours before their slaughter, they must be given access to water and food, and their holding pens must be large enough so that animals may lie down. The act also requires people to drive animals to slaughter no faster than walking speed. While people may use prods to drive them forward (the use of pipes and sharp objects are prohibited), these instruments must be seldom used.

While these federal laws protect the welfare of millions of animals, critics point out that such protection does not extend, for instance, to slaughterhouses and animals being transported within individual states. They also don’t apply to companion animals which are those animals that people keep as pets. (According to the Humane Society, one of the largest animal protection groups, people in the United States own over 77 million dogs and 93 million cats, along with many other kinds of animals kept as pets.) In fact, no federal law generally regulates the treatment of pets or animals being raised on farms. Furthermore, many say that the high volume of animals being transported and slaughtered every day makes it difficult for the federal government to detect violations of these laws.
So how do people protect the welfare of the hundreds of millions of pets and other farm animals in the United States? Under the American system of government, each state largely protects the welfare of animals within its jurisdiction by passing its own anti-cruelty laws. The U.S. Constitution does not (under Article I, Section 8) give Congress any specific authority to regulate the treatment of companion animals and other animals for the entire country, though that body may pass laws regulating such treatment if it involves interstate commerce, for example.

While anti-cruelty statutes differ among states, they generally prohibit the intentional harming, torturing, or killing of an animal, as well as animal fighting. For example, New York’s anti-cruelty laws – which are found in § 331 – 379 in Chapter 69 of its consolidated laws – prohibit a person from abandoning an animal, hurting an animal without any justification, or depriving it of food and water, among other prohibitions. In Washington, a person cannot deprive an animal of food, water, shelter, rest, sanitation, ventilation, space, or medical attention. In Maine, a person who keeps or leaves an animal on a barren island off its coast from December through March without necessary shelter and provisions can be prosecuted for cruelty.

States may impose a wide variety of civil and/or criminal penalties for violations of its anti-cruelty laws. In New York, abandoning an animal is a misdemeanor punishable by a $1,000 fine and/or up to a year in jail. Under §353-a (known as “Buster’s Law”), a person may be sent to prison for up to two years if he is guilty of aggravated cruelty to animals with no justifiable purpose. Under Florida’s anti-cruelty law (FL ST §828.12), people who are guilty of depriving animals of necessary sustenance or tormenting them may have to pay a $5,000 fine or face a jail term not exceeding 5 years, or both. Thirty states even have provisions in their anti-cruelty laws prohibiting bestiality. Sixteen of them classify the act of bestiality as a felony and the remainder as a misdemeanor.

While anti-cruelty laws apply to companion animals, observers note that they cover neither farm animals nor specific farming practices (broadly known as “animal husbandry”). In fact, according to legal observers, 30 states have specifically exempted farm animals and certain farming practices – such as dehorning, castrating, and branding, which many animal protection groups consider inhumane – from their anti-cruelty laws.

Farms throughout the United States also use other practices which animal advocates describe as cruel, but are exempt from state anti-cruelty laws. For example, many farms house their poultry in battery cages where six to seven chickens are crowded into a single wired cage – “about the size of an open newspaper,” according to the New York Times – and are stacked on top of other cages during egg production. Farmers sometimes “debeak” chickens in battery cages so that they will not peck each other.

Another practice largely exempt from anti-cruelty laws is the use of sow stalls where individual pregnant pigs are confined to small stalls providing just enough space to stand up or lie down, but not move around. (In the same way, veal crates restrict the movement of calves until they are ready for slaughter.) These stalls also have slotted floors allowing feces and urine to fall through, but which animal protection groups say can cause health problems if such wastes accumulate under the floors.

Because a majority of states exempt these and other farming practices from their anti-cruelty laws, animal advocates such as the Humane Society say that there is little legal protection for the People in the United States own over 77 million dogs and 93 million cats, along with many other kinds of animals kept as pets. But no federal law generally regulates the treatment of pets or those animals being raised on farms. Rather, each state largely protects animal welfare by passing its own anti-cruelty laws.

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Because a majority of states exempt these and other farming practices from their anti-cruelty laws, animal advocates such as the Humane Society say that there is little legal protection for the over 10 billion land animals raised for human consumption in the United States. Even in states where anti-cruelty laws apply to certain farming practices, their provisions are worded vaguely and under-enforced, argue some legal experts. They also believe that the fines for violating anti-cruelty laws are not sufficiently high to act as a deterrent, and that many farming operations consider them a cost of doing business.

Rather than waiting for state governments to take action, animal rights organizations led by the Humane Society have, in recent years, supported ballot measures across the nation to phase out the use of certain farming methods which they consider cruel. For example:

• In June 2010, the state of Ohio, farm organizations, and the Humane Society reached an agreement where the Humane Society would abandon a ballot initiative which would have prohibited the use of battery cages and sow stalls, among other practices, within just a few years. In return, farm groups would voluntarily phase out the use of veal crates by 2017, pig stalls by 2025, and agree not to use battery cages in new egg facilities.

• In 2008, voters in California passed a ballot measure – known as Proposition 2 – which now prohibits “the cruel confinement of farm animals in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs.” Advocates say that it effectively prohibits the use of bat-
tory cages and pig stalls beginning in 2015.

- Since 2002, various states—including Arizona, Florida, and Oregon—have passed laws which restrict the use of specific confinement methods for certain farm animals.

The European Union: A more comprehensive approach to animal protection and welfare

Legal analysts say that, compared to the United States, the European Union (or EU) addresses animal protection and welfare using a broader and more comprehensive approach. The EU is an economic and political union of 27 independent nations (the largest in the world) bound together by a series of complex international conventions where they have agreed to manage certain economic and political areas of mutual concern such as trade, finance, environmental protection, and agricultural policy. The EU also passed many conventions addressing particular aspects of animal protection and welfare. For example:

Under Swiss law, potential dog owners must take a two-part class which focuses on the theoretical and practical aspects of dog ownership. Animals classified as “social species” (including dogs and horses) must interact with others of the same species. The law even provides guidance on the proper care of rhinoceroses.

The 1987 European Convention for the Protection of Pet Animals: calls on EU member nations to set minimum domestic standards to protect the welfare of pets. Article 3, for instance, says that nations must pass laws which prohibit people from abandoning a pet animal, or inflicting on them unnecessary pain, suffering, or distress. Under Article 4, pet owners must provide their pets with sufficient food, water, and exercise appropriate for their species, and Article 6 prohibits the sale of pets to people under the age of 16 “without the express consent of their parents.” Article 10 prohibits surgical operations simply to modify an animal’s appearance such as tail docking and declawing unless they are done for medical reasons. Article 11, which regulates the killing of pets, says that – under most circumstances – only a veterinarian or other competent person may kill a pet using certain methods. (Drowning and suffocation are prohibited.)

The 1976 European Convention for the Protection of Animals Kept for Farming Purposes: calls on nations to set minimum standards for the care and housing of farm animals (including animals farmed for their fur, wool, and skin) in accordance with the needs of individual species, among other factors. For example, Article 4 says that “the freedom of movement appropriate to an animal – having regard to its species and in accordance with established experience and scientific knowledge – shall not be restricted in such a manner as to cause it unnecessary suffering or injury.” Under Article 5, nations must provide species-appropriate temperature, lighting, and ventilation in animal housing determined by “experience and scientific knowledge.” Over the last few years, the EU also passed several recommendations on how to treat specific animal species kept for farming purposes such as fish, turkeys, ducks, geese, and fowl.

The 1968 European Convention for the Protection of Animals for Slaughter: sets detailed standards for the protection of animals before and during their slaughter in an effort to reduce their pain, fear, and distress. Article 4, for instance, requires farms to move animals with care and ensure that they are not frightened or excited, and also prohibits them from being “lifted by the head, feet, or tail in a manner which will cause them pain or suffering.” Article 6 says that animals must not be taken to a slaugh-
• In 2009, a French lawmaker proposed legislation to ban the sale of horse meat by reclassifying horses from “animals used to generate income” to “domesticated animals.” TIME magazine reported that Lionel Luca, board member of the Bridgette Bardot Foundation (an animal protection group) claimed that classifying horses as pets would offer them protection under the European Convention for the Protection of Pet Animals.

Switzerland: The best place for animals?
While many have praised the EU and its animal welfare regulations, others believe that Switzerland (which is not part of the EU) has the world’s most comprehensive and detailed animal protection laws, covering areas ranging from research and farming to companion animals and breeding, according to the Animal Legal & Historical Center.

Legal experts note that while Switzerland already had long-standing legislation protecting animal welfare (embodied in the Federal Act on Animal Protection and the Animal Protection Ordinance), it passed even more legislation in recent years.

For example, in 2008, the Swiss legislature passed a 150-page law which gives further protections to various animals. For example, under the new laws, potential dog owners must take a two-part class which focuses on the theoretical and practical aspects of dog ownership. It also classifies certain animals as “social species” (including horses, dogs, and pigs), and requires owners to allow these animals to interact with others of the same species. The law even provides guidance on the proper care for rhinoceroses, according to reports by several news outlets.

But in a setback for animal welfare groups, Swiss voters in 2010 decisively defeated a referendum (by a 70-30 margin) which would have required each canton (or state) in Switzerland to retain an “animal advocate.” Contrary to popular belief, an animal advocate would not serve as a prosecutor or a defense attorney for animals. Rather, that person would be a lawyer providing guidance and information to other lawyers and judges on legal cases concerning animals. Currently, the canton of Zurich is the only canton with a full-time animal advocate.

Animal welfare laws throughout the world
In addition to the United States and EU member nations, many other countries have enacted new laws or amended existing ones in recent years to provide more protection to animals. But others have taken a more cautious approach, and still others don’t have any animal welfare laws. For example:
• Taiwan amended its animal protection law in April 2007 to make animal cruelty a criminal offense punishable by a one-year jail sentence if a person commits a cruel act twice within a 5-year period.
• In September 2009, China unveiled a draft of its first animal protection law which would cover pet animals and provide guidelines on how farms must raise, transport, and slaughter animals. According to the Royal Society for the Prevention of Cruelty to Animals, China’s laws had only protected endangered species and provided “no penalty for abusing or killing other animals.” The draft law also requires the implant of electronic data chips in pets to discourage their abandonment.
• Bolivia enacted in July 2009 what some believe is the world’s first ban on animals in circuses, which has been described as “groundbreaking” by groups such as Animal Defenders International. Although other countries had banned wild animals, Bolivia became the first nation to enact a ban on all animals in circuses. While llamas, horses, and dogs have quickly found new homes, others animals such as lions and primates have not fared as well. Some say that these animals should be placed in sanctuaries, but others note that they are not large enough to accommodate more animals.
• In addition to Germany, other nations have included clauses in their constitutions to ensure animal welfare. For instance, Article 51-A(g) of India’s constitution states: “It shall be the fundamental duty of every citizen of India to protect and improve Natural Environment including forests, lakes, rivers and wildlife, and to have compassion for all living creatures.” Article 31 of the Serbian constitution states that “animals, both species and individual, are protected from extinction, destruction, and abuse.”
• In October 2009, Israel’s legislature (called the Knesset) rejected a bill to change the name of the “Animal Welfare Law” to the “Animal Rights Law.” Animals, under Israeli law, are not recognized as legal entities having rights similar to those given to people, according to media outlet Haaretz. While Israel has two main laws which protect the welfare of animals, municipalities do not strictly enforce these laws, and also make exceptions for slaughterhouses, say groups such as Concern for Helping Animals in Israel.

The Universal Declaration on Animal Welfare
While a patchwork of local, national, and regional laws calls on nations to protect the welfare of companion and farm animals, there is no international agreement which sets a single guideline or standard for all nations. Also, no existing treaty requires countries to protect animal welfare. But since 2007, an international animal welfare organization called the World Society for the Protection of Animals (or WSPA) has been promoting what it calls the Universal Declaration on Animal Welfare (or UDAW).

Unlike agreements passed by, say, the EU, the UDAW is not a treaty which establishes a single standard on how nations must protect animal welfare, gives specific rights to animals on par with those of humans, or seeks to prohibit the use of animals for food, work, or in scientific research.

Instead, the UDAW is a non-binding statement under which governments agree to prevent cruelty to and reduce suffering of animals by developing, promoting, and gradually improving standards of animal welfare within their respective jurisdictions. Protection would extend – but would not be limited – to farm animals, companion animals, and animals used in research and recreation.

While the UDAW does not define the term “standards,” it says that certain principles should guide and inform nations when they use animals. They should, for instance, make sure that animals are free from hunger, distress, pain, and injury, and that
people should strive to replace animals with “non-animal techniques” when conducting experiments. Nations would also have to take what the declaration calls “appropriate steps” – a term also left undefined – to protect animal welfare.

The WSPA began drafting the UDAW in 2003 at the Manila Conference on Animal Welfare, which was attended by 19 government delegations (including representatives from the EU and the United States who served as observers), and completed its work on a draft text in 2007.

Many groups argue that greater efforts to promote animal welfare will lead to substantial benefits for both animals and people.

While a patchwork of local, national, and regional laws calls on nations to protect the welfare of pets and farm animals, there is no single international agreement which sets a single guideline or standard for all nations. Many groups are now promoting what it calls the Universal Declaration on Animal Welfare.

For example:

• Disease prevention: WSPA argues that promoting animal welfare in farming operations by providing, for instance, cleaner and more spacious facilities will decrease the spread of diseases, including bird flu and mad cow disease, among others.

• Recovery from disasters: The WSPA also says that consideration of animal welfare after a disaster – such as those caused by floods or earthquakes – can help local populations (which depend on animals for food and their livelihood) recover much more quickly. Currently, many governments give little or no thought in protecting animals in the wake of a disaster, and many animals die from injuries or simply wander off.

• Food security and economic benefits: Observers point out that half the world’s population is involved in agriculture, and that animals play a vital role in this area by providing people with a source of labor. “Over one billion people in the world rely directly on their animals for survival,” said an official from Kenya. “When there is a drought, we will often give water to our animals before we give it to ourselves.” By ensuring animal welfare (by prohibiting people from deliberately hurting animals for no reason, for instance), animals such as those which plow fields or pull carriages will be more productive, says the WSPA. Also, better animal welfare standards can lead to healthier livestock used in a nation’s food supply.

In an ongoing campaign, WSPA is trying to build more support for the UDAW. Currently, 40 nations support the UDAW in principle, including the European Union as well as over 2 million individual supporters worldwide. Advocates say that, with sufficient support, they hope to present the UDAW to the UN General Assembly for a formal vote. Still, critics have questioned whether passing a declaration will actually promote animal welfare around the world. The UDAW is not enforceable, and many of its terms remain vague, they point out. Also, the declaration is simply a draft document, and the General Assembly will most likely make substantive changes if it ever decides to address the declaration.

But supporters note that previous declarations issued by the General Assembly had served as the foundations for the creation and passage of legally binding international treaties in the areas covered by the original declarations. For example, in 1967, it passed the Declaration on the Elimination of Discrimination against Women, a non-binding statement calling on nations to abolish laws, customs, regulations, and practices which discriminate against women. The declaration paved the way for the passage of the Convention on the Elimination of All Forms of Discrimination against Women in 1979, a treaty which requires its 186 signatory nations to take measures to end discrimination against women in various fields and areas of life, including employment, education, health care, family life, among many others; create national action plans for countries to end such discrimination; incorporate the principle of equality of men and women into their laws; and establish tribunals or public institutions to ensure the protection of women against discrimination by persons, organizations, or businesses.

In 1959, the General Assembly passed the Declaration on the Rights of the Child, which says that children have a right to adequate nutrition, housing, medical services, and education, among other rights and benefits. Then, using this declaration as a foundation, it passed the Convention on the Rights of the Child in 1989, which lists the basic rights of people under the age of 18, including the right to life, right to identity, right to express their own opinions, and the right to privacy.

But many argue that declarations and treaties will only be effective if signatory nations are willing to enforce their provisions. They point out, for example, that the general status of women has not improved significantly around the world, and that discrimination against them runs rampant. But proponents of the UDAW respond that establishing a standard will set expectations for nations, and that improving protections for women, children, and even animals is a long-term and gradual goal.

The International Convention for the Protection of Animals

While the UDAW provides broad and unenforceable guidelines, the 1988 International Convention for the Protection of Animals (or simply the Convention) establishes a single and legally-binding global standard which nations must adopt in their legal systems to protect animal welfare. It does so through four protocols:

• Companion Animal Protocol: sets minimum standards for the protection of pet animals, which nations must adopt in their respective jurisdictions. For instance, Article 1 prohibits a pet owner from causing “a companion animal unnecessary pain, suffering or distress.” Under Article 4, a pet owner must provide their pets with food, water, shelter, and opportunities for exercise. Article 5, prohibits people
from keeping certain animals as pets, including an animal which is an endangered species, presents a physical danger to others, and those who are unlikely to adjust to any kind of confinement. The Protocol also prohibits surgical operations for aesthetic reasons and sets strict guidelines for the killing of companion animals.

- **Protocol for the Care of Exhibited Wildlife:** specifies how nations must exhibit and care for animals in zoos and aquariums. (It excludes traveling carnivals, circuses, county fairs, and livestock shows.) For example, Article 1 says that caretakers must provide exhibition animals with an environment similar to their natural environment, and also put them under the care and control of people who are competent to do so. Under Article 5, a governing authority may give permission to people who want to exhibit wildlife only if they provide the animals with adequate food, water, ventilation, bedding, and also protection from stress, overcrowding, and isolation, among many other requirements.

- **Protocol for the Taking of Wild Animals:** calls on nations to adopt specific standards for people who forcibly take wildlife from their habitats. For instance, Article 1 permits the taking of wildlife only when necessary, and says that such action must be carried out by licensed individuals in the most “humane manner possible.” Article 3 says that the taking must also be done in a manner that inflicts the least amount of stress on the target animal.

- **Protocol for the International Transportation of Animals:** sets standards on how nations must transport animals internationally by land, sea, or air. Article 1 requires those people who are transporting animals to do so in a way which will not cause their death or suffering, and also to transport animals using the “most direct, safe route of transportation of shortest duration” to reduce stress and risk of injury. Article 3 prohibits the transport of animals under specific conditions, including extreme temperature variations, inadequate ventilation, and overcrowding, among others.

Like the UDAW, the Convention does not grant animals any legal rights. It also would not prohibit the use of animals for food, work, or in research. Although the Convention does not have a formal enforcement mechanism, it calls on signatory nations to prohibit the trade of animals and animal parts with nations which don’t comply with the Convention’s provisions, which analysts say could encourage participation.

But the Convention faces many hurdles. For instance, it currently lacks any broad support among nations. In fact, not a single government had participated in drafting the treaty text. Instead, an informal group of academics, professors, and animal rights activists and groups — collectively known as the International Committee for a Convention for the Protection of Animals — drafted the text on their own initiative through a series of meetings which concluded in 1988. In addition, others say that nations are reluctant to support the treaty because its requirements are too specific and don’t allow them to opt-out of certain provisions. Furthermore, the committee which drafted the Convention does not have any active campaign to build public support for it.

**Legal rights for animals?**

Experts say that nations still largely classify animals as property, which generally don’t have their own rights. But government efforts to protect animal welfare around the world have led to some initiatives to grant limited legal rights to them. According to various media sources, an animal welfare group in Austria unsuccessfully petitioned a court in 2007 to grant personhood to a chimpanzee.

In 2008, lawmakers in Spain had proposed a law which would give chimpanzees, gorillas, and orangutans a right to life and protection from torture, and also ban their use in experiments, circuses, and television commercials or films. It would also be illegal to kill an ape except in self-defense. One supporter described the passage of the proposed law in committee as “a historic day in the struggle for animal rights in defense of our evolutionary comrades, which doubtless go down in the history of humanity.”

In the United States, pet and animal owners may seek monetary compensation if another person injures or kills an animal. But because animals are still classified as property, most states limit damages to the market value of the animal. However, some states have passed laws which allow people to sue for other kinds of damages. For example, in 2000, Tennessee passed a law (known popularly as the “T-Bo Act”) which allows animals owners to seek “noneconomic damages” of up to $4,000 from a person who causes the death of an animal cause by negligence.

Also, many municipalities are promoting efforts to encourage pet owners to see themselves as more than just property owners. For example, Boulder, CO — later joined by San Francisco, CA, and Amherst, MA, among other cities — passed an ordinance in July 2000 which changed the title of “pet owner” to “pet guardian.” Supporters such as the American Veterinary Medical Association say that doing so would, in their opinion, promote “greater responsibility and respect for pets without granting them additional protections or changing their legal status.”

Opponents of this movement fear that these developments will embolden animal rights groups to push for laws making it illegal to kill and eat animals, keep them as pets, and use them in scientific research. Others say that while many people believe that their nation’s laws should protect animal welfare, they don’t necessarily agree with the idea of granting animals specific rights akin to human rights.

Antoine Goetschel, an animal advocate in Zurich, Switzerland, noted that officials had unsuccessfully prosecuted a fisherman in 2010 for causing excessive suffering to a fish because the fisherman had taken too long to reel it in. In an interview, Goetschel said that publicity in the fish case may have caused public opinion to turn against Switzerland’s referendum for more animal advocates in that nation. 🌐
There has been and continues to be a debate on the extent to which impoverished nations must pay back their debts to their creditors and lenders. While many argue that these countries have a legal obligation to pay back all of their debts, others say that some debt loads have become so large that a borrowing nation will – in all likelihood – never pay them off. Many also believe that, by continuing to make large debt payments, poor governments are left with few resources to lift their populations out of poverty.

In recent years, the world community created many debt reduction programs where various creditors and lenders have agreed voluntarily to cancel a portion of their loans to the world’s poorest and most indebted nations so that their governments can devote more money to anti-poverty programs while still paying back a smaller portion of their debts.

But humanitarian groups say that a minority of creditors – whom they have broadly labeled as “vulture funds” – have filed lawsuits demanding full payment of their loans (plus interest and fees), but only after an indebted nation had received relief from a debt reduction program. Courts around the world have awarded lenders with awards far larger than the original amount of the loans, and analysts note that many of these awards make up a substantial portion of a nation’s health and education budgets.

What are “vulture funds”? How many lawsuits have they filed against impoverished debtor nations? Are these lawsuits legal and ethical? What are some arguments in favor of and against these kinds of lawsuits? Are some nations and groups taking measures to restrict such lawsuits? What is the status of the debate?

Lending money to governments

Individuals and companies borrow money from various lenders, including banks and private investment funds, to undertake activities (such as buying a house or expanding a business) requiring more money than they have available. Even nations (both rich and poor) may not have enough funds to pay for substantial undertakings such as massive public works projects, which can cost billions of dollars. To raise funds for such projects, nations (otherwise known as “sovereigns”) borrow money from commercial banks, other private lenders, and even other governments, and pay it back (with interest) according to an agreed-upon time schedule. “Debt has been the largest source of capital flows to developing countries in the past 50 years,” said Randall Dodd of the Derivative Study Center.

Nations also borrow money from multilateral organizations such as the International Monetary Fund (or IMF) and the World Bank. But one analyst said that developing nations receive far more funds from private markets than they do from these groups, both of which call on borrowers to undertake what could be painful economic reforms, among other stringent measures, as a condition for simply receiving funds.

A nation may also decide to issue government-backed bonds which are purchased by hundreds and even thousands of individuals, institutional investors, and other financial organizations in jurisdictions all around the world. (Even other governments may purchase these bonds.) That nation makes regular interest payments to its bond holders and then pays back the full amount when the bond reaches its maturity date. Analysts generally view sovereign bonds and other government-backed debt as safe and stable investments. While governments have certainly defaulted on their bond payments and other loans in the past, they are less likely to do so than businesses. “Sovereign default rates,” according to a March 2009 analysis by Moody’s Investor Services, “have generally been lower than corporate default rates.”

After a government issues its bonds, investors and lenders may decide to sell those debt instruments and even buy others in what is called “secondary markets,” which are markets (such as stock exchanges) where investors can buy and sell a wide variety of already-issued assets, including stocks, bonds, and options. Just as investors can buy and sell stocks of individual companies, they can also buy and sell government debt. (In a primary market, investors buy securities and bonds issued directly by companies and governments.)
The prices for sovereign debts traded on secondary markets fluctuate daily depending on the economic health of the issuing nation, among many other factors. While these prices constantly fluctuate, the face value (i.e., the original amount) of the loan remains the same, and the investor holding that debt is entitled to receive the face value on its due date.

**Getting governments to pay back their debts**

As in the case of individuals and companies, governments may go through financial difficulties and sometimes face default where they miss or delay their loan payments to lenders. Debts which are headed toward or are in default – whether they are issued by a company or a country – are known as “distressed debt.” One analyst said that the “most common distressed securities are bonds and bank debt.”

When individuals and companies can’t pay back their debts, they may declare bankruptcy. Under this legal process, a borrower and its lenders may restructure (i.e., modify) the terms of the loan agreement so that the borrower can continue making debt payments. The lender may allow the borrower, for example, to make scheduled payments in lower amounts while extending the time in which the borrower must pay off the debt. Also, in the case where parties restructure a debt, certain legal provisions may prevent the debtor from favoring certain creditors while others bind all creditors to a new debt agreement if a qualified majority agrees to do so. In another separate approach, a bankruptcy court may liquidate some of the borrower’s assets (such as selling property and other possessions) and use the proceeds to pay off the lenders.

In cases where government-backed debt is headed toward or actually in default, lenders may take various courses of action:

**Reorganizing sovereign debt:** Many, for instance, try to restructure the loan agreement so that the sovereign can continue making debt payments. But unlike individual nations which have their own bankruptcy process for individuals and companies, there is no international bankruptcy process for a national government having trouble paying its debts. Instead, governments have restructured their debt agreements with lenders in an ad hoc manner. Also, lenders cannot ask a court to liquidate a government’s holdings.

But the lack of a sovereign bankruptcy process creates situations where one lender may try to gain an advantage over other lenders, according to experts. For example, because there are no set international rules which bind a minority of lenders to an agreement reached by a qualified majority, this minority can deliberately hold up an agreement (for better terms) or even refuse to participate in debt restructuring negotiations.

**Selling sovereign debt in secondary markets:** A lender may conclude that it will never recover the face value of the defaulted debt, and may not want to go through the time and expense of doing so. But instead of taking a complete loss, it may sell the defaulted debt on secondary markets. (That way, it can get something back.) Even in cases where a government defaults on paying its debt holders, these defaulted debts neither disappear from existence nor do their values fall to zero (in contrast to the value of stocks for bankrupt companies). Secondary markets continue to trade them at very low prices – and with the same face values – because investors expect governments eventually to pay back their lenders. Why?

Investors point out that governments have the authority to raise taxes to pay off their debts, and that successor governments have historically honored the debts of previous regimes. Also, if a government wants to sell new bonds to investors or borrow money from existing creditors in the future, it must pay back its defaulted loans. By completely repudiating its debts, a government will shut itself out of global financial markets because lenders and investors would view it as an unreliable borrower.

Investors who buy distressed debt on the secondary markets are known as “distressed debt investors or funds,” and believe that they can get the original issuer to pay back some portion of the face value of the debt. “Because they buy the debt cheap,” said one analyst, “they’re often willing to settle at much less than face value.” So while the distressed debt investor usually will not receive the face value of, say, a defaulted bond, it could receive a payment larger than the price it had paid so that it can make a profit.

**Litigating debt payments:** Because there is no formal international mechanism in place to bind all parties to a sovereign debt restructuring agreement, many original creditors simply decide to pursue the full amount of their loans. Distressed debt investors may also decide to do the same. In either case, if the owner of the debt cannot reach a repayment agreement with the borrowing nation, it may ultimately decide to sue that nation in court for the face value of the debt, and also interest and fees. As in the case of individuals and companies which don’t make their debt payments, analysts say that lenders have a legal right to take such action, and many have done so.

For example, in 2000, a court awarded Elliott Associates (which is now a $14 billion hedge fund) with a $58 million judgment against Peru. It had bought for $11.4 million an unpaid Peruvian debt with a face value of $20 million. According to the
Debt reduction programs for the poorest nations

Over the past several decades, many poor nations have borrowed hundreds of billions of dollars from private lenders (such as commercial banks) and multilateral institutions, including the IMF and the World Bank. (They have come to be known as heavily indebted poor countries or HIPCs, and have the highest levels of poverty in the world.) Many then had great difficulties in paying back their loans. In some cases, HIPC governments had to take out new loans to continue paying existing ones.

As debt burdens became larger and larger, HIPC governments began spending more money paying their debts than on domestic services, which critics say exacerbated poverty levels and impeded economic development. Many nations were, “on average, spending slightly more on debt service than on health and education combined,” according to the IMF. The Economic Secretary to the UK Treasury, Ian Pearson, said “a country that is forced to spend more servicing historical debt than it is able to spend on education and health services combined faces a self-reinforcing cycle of poverty.” Many also began to default on their debt payments to their lenders.

As these debt burdens grew larger and as default rates increased, many lenders realized that there was little chance that their borrowers would ever pay back the full amount of their loans. In an effort to address these unmanageable debt burdens, the IMF and the World Bank, along with major creditor nations and private lenders, created several debt reduction programs. For instance:

**HIPC Initiative:** Created in 1996, the HIPC Initiative calls on all creditors – including multilateral institutions, commercial and other private lenders, and even sovereign lenders – to cancel voluntarily part of their loans to HIPCs to more “sustainable” levels so that these countries may continue paying back their debts, but also allow them to direct more of their resources toward social and economic development programs.

Only the world’s poorest countries meeting certain criteria may participate in the HIPC Initiative, which applies only to debts borrowed or guaranteed by a government from external (and not domestic) creditors. After these nations carry out certain economic reforms and devise a poverty reduction program, all creditors must cancel parts of their loans by certain proportions so that a nation can make debt payments again without jeopardizing their poverty-reduction efforts.

As of March 2010, 28 countries (with an overwhelming majority from Africa) had completed the HIPC Initiative and received debt reductions of around $72 billion. For countries that have participated in this initiative, debt payments have “dropped from 3.2 percent of GDP in 2001 to 1.0 percent of GDP in 2009,” said the World Bank.

The HIPC Initiative also expects its participating nations to use their newly available resources (which had once gone toward debt payments) for development programs. “For debt reduction to have a tangible impact on poverty, the additional money needs to be spent on programs that benefit the poor,” said the IMF, which noted that countries participating in the HIPC Initiative had “increased markedly their expenditures on health, education, and other social services, and that “on average, such spending is about six times the amount of debt-service payments.”

Many debt collectors are buying (for low prices) defaulted government bonds owed specifically by a poor country participating in a global debt reduction program – with the sole intent of collecting the entire amount, plus substantial interest and fees, once that nation has more available resources.

**Multilateral Debt Relief Initiative (or MDRI):** This debt reduction program (created by the world community in 2005) complements the HIPC Initiative. Under the MDRI, four public multilateral lenders – the African Development Bank (or AfDB), the Inter-American Development Bank, the IMF, and the World Bank – will forgive 100 percent of debts taken out from those agencies (before 2004), but only if a debtor nation had completed the HIPC Initiative. At the end of 2009, the MDRI had forgiven about $45 billion in debt.

Since the implementation of these programs, “over $100 billion of debt relief has been delivered or committed worldwide,” said the UK Treasury. According to Debt Relief International, a non-profit research group, HIPCs in 2007 had a total debt load of $188.6 billion. But the HIPC Initiative and similar programs will cancel 92 percent of this amount, it said.

**“Vulture funds”: Collecting unpaid debt from the poorest nations**

While many have lauded the HIPC Initiative and the MDRI, analysts note that creditor participation is completely voluntary. In fact, only 33 percent of commercial lenders are participating in global debt reduction programs, notes the IMF. The administrators of the HIPC Initiative had expected commercial creditors to reduce their loans by $4.3 billion, but they had cancelled only one-third of that amount. They added that while many of the world’s largest creditors have cancelled substantial portions of their loans to HIPCs, smaller multilateral organizations, commercial lenders, and several lender governments “have only delivered a small share of their expected relief so far.”

Instead, many original creditors and distressed debt funds are demanding the full amount of the defaulted debt during restructuring negotiations, including substantial interest payments and fees, the total of which sometimes far exceeds the original value of the loans themselves.

While lenders have a legal right to collect defaulted debt, the
circumstances under which they are doing so have raised concerns among various governments and members of civil society. In the case of companies which have defaulted on their loan payments, original creditors and distressed debt funds realize that these businesses probably don’t have the resources or assets to pay the face value of the debt. So, instead, they try to collect on a portion of the debt which will allow them to make a profit.

On the other hand, they change their approach when dealing with defaulted debt of impoverished nations, claim critics. Many original creditors pursue the full repayment of the debt only after a nation gets relief through global debt reduction programs. (As other participating creditors in such programs cancel a portion of their loans, indebted nations can use newly-available resources for other purposes.) In a similar fashion, many distressed debt investors will buy defaulted sovereign debts (on the secondary markets at very low prices) which are owed specifically by a poor country now participating in debt reduction programs – with the sole intent of collecting the entire amount, plus substantial interest and fees, once that nation has more available resources.

In either the case of an original creditor or a distressed debt fund, the owners of the debt have tried to collect the full amount mainly through litigation in various courts around the world. According to Debt Relief International, various creditors have filed lawsuits claiming $1.99 billion in debt payments since 2007. Critics widely cite a lawsuit filed by Donegal International Ltd., which states on its homepage that “Donegal International Ltd., incorporated in the British Virgin Islands on December 18, 1997, was established for the purpose of holding and managing the defaulted debt [which it held] purchased from Romania [for $3.28 million] and owed by Zambia.” (Analysts say that Zambia’s original debt was $15 million.) Although Donegal had demanded $55 million in repayment (which included accrued interest), a U.S. court ultimately awarded a $15.4 million settlement to that fund.

Debt Relief International says that “more than two-thirds of lawsuits” against HIPCs for debt collection are filed in American courts or those in the United Kingdom. Even though the original loan agreement may not indicate the exact jurisdiction where parties can adjudicate their differences concerning loan repayments, Debt Relief International said that many creditors have chosen courts in the United Kingdom and the United States, describing them as “creditor-friendly” and having a “speedier trial process,” among other reasons. Other cases are adjudicated in countries such as France, Norway, Russia, South Africa, Switzerland, and even in HIPCs themselves.

Debt holders have even asked courts to seize HIPC government assets located in other countries:

• In November 2005, the UK High Court of Justice ordered that $39 million in payments owed by Glencore

International AG (a Swiss company) to the Republic of Congo should, instead, be given to Kensington International, Ltd., an investment fund which had purchased unpaid debts owed by that nation. Kensington had also tried unsuccessfully in 2001 to garnish payments that CMS Nomeco (a company based in Michigan) owed to the Republic of Congo, according to Jubilee Debt Campaign, a non-profit organization which calls for sovereign debt reduction for poor and developing nations.

• In 2008, investment fund FG Hemisphere Associates called on the High Court in Hong Kong to rule that the China Railway Group must hand over part of its investment in the Democratic Republic of the Congo to pay for that government’s unpaid debts (which FG had purchased). That court declined to do so.

Critics have referred to these creditors using derogatory terms such as “vulture funds” who engage in so-called “vulture fund activities.” (Neither term has a legal definition.) Just as a vulture will feed on severely ailing or dead animals, so-called vulture funds pursue debt payments from ailing and impoverished nations once these nations get some debt relief, say critics.

But distressed debt funds are not the only entities trying to collect full debt payments from HIPCs receiving relief from global debt reduction programs. As previously mentioned, original creditors – such as banks – also pursue debt claims against poor nations. Also, contrary to popular perception in civil society, distressed debt funds have not bought a substantial portion of the defaulted debts owed by HIPCs. According to a report issued by Debt Relief International, HIPCs still owe the “vast bulk” of their debts to the original commercial and sovereign lenders. Furthermore, distressed debt funds have not filed all of the lawsuits demanding full debt repayment. In a July 2009 report, the UK Treasury said that “data from the World Bank surveys suggests that over half of creditor litigation against HIPCs involves original creditors.”

If certain debt collectors win their current lawsuits, their claims would represent a significant portion of a poor country’s revenues, say various groups. For example, if Nicaragua had settled its debt lawsuits in 2007, the settlement would have represented 93.5 percent of its health and educational expenditures for that year.

But unlike original creditors such as banks and governments, activists point out that distressed debt funds have registered themselves in tax haven countries whose laws prohibit the disclosure of information identifying the owners of the funds. (Such laws will prevent the public from identifying and shaming those involved in litigation against poor nations, say analysts.)

Pursuing debt claims against impoverished nations: Legal and ethical?

When original creditors and distressed debt funds try to collect their debts in court, such activities are “completely legal,” say groups such as Jubilee UK. But, in their opinion, doing so is “profoundly unjust.” Another analyst said that the activities of vulture funds “are legal, but not ethical.” Why?

First, critics argue that vulture fund activity undermines the
benefits of global debt reduction programs because indebted nations may have to use a large portion of their newly available resources to pay for court judgments awarded to debt owners who had refused to participate in debt reduction programs. “Debt relief from others gives the debtor countries resources that can be siphoned off by non-participating creditors pursuing full payment of their debt,” said a July 2009 report issued by the UK Treasury. “These lawsuits effectively reduce the impact of the debt relief for the HIPCs,” added the AfDB.

In its analysis, Debt Relief International said that if certain creditors win their current lawsuits, their claims would – in many cases – represent a significant portion of a poor country’s government revenues, and also its health and education expenditures. For example, if Nicaragua had settled its lawsuit with creditors in 2007, its settlement would have represented 63.9 percent of its budget revenues and 93.5 percent of its health and educational expenditures for that year. Niger would have paid a settlement representing 28.3 percent of its budget revenues and 52.2 percent of its health and educational expenditures.

Second, critics believe that vulture funds take advantage of those creditors who had voluntarily cancelled a large portion of their loans and agreed to receive a much smaller payout.

**Statistics on lawsuits filed by vulture funds**

Jubilee UK said that it is difficult to determine the exact number of lawsuits filed against HIPCs for unpaid debts and also whether these lawsuits have been successful. Many have relied on an annual IMF survey (called “Heavily Indebted Poor Countries (HIPC) and Multilateral Debt Relief Initiative (MDRI) – Status of Implementation”) which, in part, asks HIPCs whether a commercial creditor is suing them for unpaid debts.

But even the information in this survey is incomplete. To avoid attention and negative publicity, many debt holders don’t publicize their lawsuits, say analysts. Also, many HIPCs are reluctant to disclose these lawsuits because they don’t want to encourage other creditors to file suit against them, believing that they now have more resources to pay off their debts.

Still, various groups have compiled various (and sometimes conflicting) statistics concerning lawsuits against HIPCs. For example:

- “The World Bank estimates that more than one-third of the countries which have qualified for its debt relief have been targeted with lawsuits by at least 38 litigating creditors with judgments totaling $1 billion in 26 of these cases,” said the AfDB. It added that 72 percent of the judgments have been against countries in Africa.
- In their 2007 report concerning the implementation of the HIPC Initiative and the MDRI, the IMF and the World Bank reported that “24 creditors have obtained court judgments against eight HIPCs . . . amounting to about $1 billion on original claims of US$434 million.” (The AfDB said that vulture funds have “averaged recovery rates of about three to 20 times their investment.”)
- Jubilee UK said that “at least 54 companies are known to have taken legal action against 12 of the world’s poorest countries for claims amounting to $1.5 billion.” According to Debt Relief International, “debtor have almost universally lost lawsuits when these have come to court, whether in international courts or in national courts.” The chart on page 19 contains information from several annual reports – issued by Debt Relief International, the IMF, and the World Bank – listing only lawsuits initiated by commercial creditors and distressed debt funds against HIPCs, and does not include lawsuits filed by sovereign lenders or smaller multilateral institutions which may have also lent money to HIPCs.
Because of these awards, a growing chorus of critics has called on the world community to curb so-called vulture fund activities. Still, data from the IMF and World Bank annual reports show that while many creditors are claiming amounts which far exceed the original debt, an equivalent number of creditors are asking courts to award them only the original amount of the claims, though it is unclear whether they had filed their lawsuits only after a debtor nation had participated in a global debt reduction program.

### Defending litigation against HIPC countries

While many have criticized vulture fund activity, others have defended the right of debt holders to pursue the full amount of the defaulted debt and also any interest and fees (regardless of whether an HIPC is participating in a debt reduction program). First, some analysts say that lenders (whether they are the original creditors or distressed debt funds) must be able to collect their loans (through litigation, if necessary) so that markets can run smoothly and non-paying governments can be held accountable. Allowing companies and nations to run away from their debts would hurt investors all over the world, they say. Thousands of bond investors – both big and small – depend on regular payments from a bond issuer, and could face financial hardship if these payments stopped. The effects of these hardships could then ripple throughout a nation’s economy and then affect others as well.

“Poverty activists say these so-called vulture funds are preying on the impoverished. But they are only doing what the international financial system can’t – holding [what some believe are] corrupt and irresponsible regimes to account,” argues Professor David Bosco of American University. “They sue, harass, and shame debtor governments into paying at least a chunk of what they owe.”

Second, many believe that making it more difficult for original creditors and distressed debt investors to collect defaulted sovereign debts will increase borrowing costs for poor and even developing nations because very few creditors would want to lend money in the first place. Alternatively, they may charge prohibitively high interest rates or require substantial assets as collateral in the event of a default.

Third, others argue that original creditors and distressed debt funds do not file lawsuits against sovereign nations on a whim,

### Table: Commercial creditor lawsuits against HIPC countries (2006-2009)

<table>
<thead>
<tr>
<th>Name of HIPC</th>
<th>Creditor</th>
<th>Status of legal action</th>
<th>Original claim (in millions of U.S. dollars)</th>
<th>Amount claimed by and awarded to creditor (in millions of U.S. dollars)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cameroon</td>
<td>Winslow Bank</td>
<td>Judgment awarded</td>
<td>9.0</td>
<td>46.3</td>
</tr>
<tr>
<td>Democratic Republic of the Congo</td>
<td>Frans Edward Prins Rootman</td>
<td>Judgment awarded</td>
<td>12.5</td>
<td>43.5</td>
</tr>
<tr>
<td></td>
<td>FG Hemisphere</td>
<td>Judgment awarded</td>
<td>44.1</td>
<td>100.0</td>
</tr>
<tr>
<td></td>
<td>KHD Humboldt</td>
<td>Creditor won (not yet paid)</td>
<td>23.5</td>
<td>80.4</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>LNC Investment, Inc.</td>
<td>Out of court settlement</td>
<td>26.3</td>
<td>177.9</td>
</tr>
<tr>
<td></td>
<td>Hemisphere Associates, L.L.C.</td>
<td>Out of court settlement</td>
<td>30.9</td>
<td>209.6</td>
</tr>
<tr>
<td></td>
<td>Greylock Global Opportunity Master Fund, Ltd.</td>
<td>Out of court settlement</td>
<td>10.5</td>
<td>182.2</td>
</tr>
<tr>
<td>Republic of the Congo</td>
<td>AF CAP, Inc.</td>
<td>Creditor won (not yet paid)</td>
<td>5.9</td>
<td>19.2</td>
</tr>
<tr>
<td></td>
<td>FG Hemisphere Associates, L.L.C.</td>
<td>Judgment awarded</td>
<td>35.9</td>
<td>152.0</td>
</tr>
<tr>
<td></td>
<td>Kensington International, Ltd.</td>
<td>Judgment awarded</td>
<td>29.6</td>
<td>118.6</td>
</tr>
<tr>
<td></td>
<td>Walker International Holdings</td>
<td>Creditor won (not yet paid)</td>
<td>12.9</td>
<td>38.7</td>
</tr>
<tr>
<td>Uganda</td>
<td>Transroad, Ltd.</td>
<td>Judgment awarded</td>
<td>4.0</td>
<td>16.7</td>
</tr>
<tr>
<td>Zambia</td>
<td>Camdex</td>
<td>Out of court settlement</td>
<td>40.0 – 45.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

and that the circumstances leading up to litigation are much more complex than the accounts provided by various critics. For example, analysts say that Zambia had reached an agreement with Donegal to repay a portion of its debt, but that Zambia had later defaulted on its obligations, which then led to litigation.

“Zambia’s apologists would have you believe,” said analyst Felix Salmon, “that we should pay no attention to the country’s previous promises.” He added that “much of the literature on this case makes it seem as though Donegal simply bought debt from Romania for about $3.3 million, then turned around and sued Zambia for over $50 million. In fact, Donegal spent many years in negotiation with Zambia before it ever sued anybody for anything.”

Fourth, some believe that certain HIPCs do, in fact, have the resources to pay their defaulted debts (pointing out that they devote a large portion of their budgets to military spending, for example), but are participating in debt reduction programs simply as a cover to avoid paying their debts in full.

**Measures to curb vulture fund activities**

Despite these arguments, lawmakers and several multilateral institutions have undertaken various measures to limit the amount of defaulted debt which certain creditors may collect from HIPCs.

**Passing domestic legislation in the UK:** In April 2010, the UK Parliament passed a law called the Debt Relief (Developing Countries) Act 2010. (One-fifth of commercial creditor lawsuits, according to Jubilee UK, are adjudicated in UK courts.) The Act neither allows HIPCs to repudiate all of their defaulted debts nor completely prohibit commercial creditors from pursuing their legitimate debt claims in a UK court. Instead, using a mathematical formula, the Act limits debt claims in a UK court to a proportion which a commercial creditor would have received if it had simply participated in the HIPC Initiative.

The Act applies to external commercial creditors only – whether they are commercial banks or distressed debt funds, but not to sovereign lenders – for debts incurred only by HIPC governments before the passage of the law. It also applies only to those HIPC nations which have agreed to pay back their debts to commercial creditors at levels established by the HIPC Initiative. (Analysts say that this provision will discourage HIPCs from paying back debts at lower levels if they want the protections afforded by the Act.) The Act expires one year after its passage, and the UK Parliament must then decide whether to renew or make it permanent.

What do critics say about the Act? They argue that it could add uncertainty in the UK secondary debt markets if investors believe that debtor nations can use the Act as an excuse not to pay back their debts. But the government responded that the Act applies only to those long-standing debts which, in all likelihood, will never be repaid in full.

Opponents also believe that the Act violates the *Convention for the Protection of Human Rights and Fundamental Freedoms* (often referred to as the *European Convention on Human Rights* or ECHR), which came into force in 1953 and calls on its member states, including the UK, to protect and enforce a wide variety of individual rights, including the right to association, expression, privacy, religion, and a fair trial, among many others). Signatory nations later passed the *First Protocol*, which calls on them to protect additional rights not mentioned in the ECHR. For instance, Article 1 states, in part, that “every natural or legal person is entitled to the peaceful enjoyment of his possessions.”

By reducing the debt which a debt owner may collect, argue opponents, the Act denies investors the right to enjoy the full value of their property (i.e., the defaulted debt they had bought and now own). One law firm, Dechert LLP, said that limiting the amount of recoverable debt could be viewed as a “de facto expropriation of property.” It also cited a decision (*Litigew v. United Kingdom*) from the European Court of Human Rights (which adjudicates disputes concerning the ECHR), stating that “compensation for deprivation must be ‘reasonably related’ to the value of the property taken,” and that “where the calculation of compensation is manifestly without reasonable foundation, this will amount to a break of Article 1.” So by reducing significantly the amount of defaulted debt which a debt owner may recover, the Act could violate Article 1 of the *First Protocol*.

The UK government responded that, while Article 1 does, indeed, say that everyone is entitled to the use of their property, it also says that “no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law . . . .” During parliamentary debate, the UK government said that the Act does serve the public interest because it reduces the debt loads of HIPCs, which, in turn, aids their economic and social development. In addition, the Act prevents a minority of creditors from taking advantage of the debt relief provided voluntarily by the majority (which include UK creditors).

The UK government also argued that the Act does not deprive the debt owner of a significant value of its debt. It pointed out that the market value of defaulted HIPC debt is usually much lower than its face value, and that “evidence indicates that HIPC debts currently trade at or slightly below their levels to which they would be reduced under the provisions of this [Act].”

**Passing domestic legislation in the United States:** Members of the U.S. Congress are also trying to limit the amount of debt which commercial creditors can collect from HIPCs. In June 2009, Congresswoman Maxine Waters (D-CA) introduced H.R. 2932, the “Stop Very Unscrupulous Loan Transfers from Underprivileged Countries to Rich, Exploitive Funds Act” (otherwise known as the “Stop VULTURE Funds Act”).

Like the act passed by the UK Parliament, this proposed bill neither calls on poor nations to repudiate their defaulted debts nor does it completely prohibit commercial creditors from litigating their legitimate debt claims in a U.S. court. Instead, the bill prohibits U.S. nationals, companies, groups, and others in the United States from engaging in “sovereign debt profiteering.” This activity is defined as any act where a party acquires (at a significant discount) defaulted debt owed by qualified poor countries, and then tries to collect – through litigation and the threat of litigation – an amount exceeding the purchase price plus six percent interest a year since the purchase date. The government may impose fines on violators which are equal to the amount sought by the creditor.

The proposed bill also prohibits a U.S. court from taking any action (such as issuing a summons or judgment) which would aid in sovereign debt profiteering, and requires it to dismiss claims which constitute sovereign debt profiteering. Furthermore, if a court is adjudicating a case concerning the collection of defaulted sovereign debt which is not considered debt profiteering, then each creditor must file a written claim with the Department of
Treasury, provide the names and addresses of all people having any interest in the sovereign debt collection, and give a copy of the legislation and complaint to the debtor nation, among other requirements. Also, under the bill, the debtor nation may request information, documents, and evidence from creditors to verify the legitimacy of the debt claims.

The bill does not apply to qualified poor countries which are involved in gross human rights violations, have excessive levels of military spending, support international terrorism, and are not cooperating with efforts to stop illegal narcotics. It also does not apply to sovereign and multilateral creditors.

Currently, 33 member of Congress have co-sponsored the proposed bill, which is being considered by the Subcommittee on Courts and the Judiciary. But no other action has been taken. So, in the meantime, private creditors may still pursue their full debt claims (plus interest and fees exceeding six percent of the debt’s purchase price) against HIPCs in U.S. courts.

Making agreements among sovereign lenders: For sovereign lenders participating in debt reduction programs, various groups have called on them not to sell their uncollected debts to hold-out creditors. For example, in May 2007, the Paris Club – which is a group of some of the world’s largest sovereign lenders – released a statement saying that its members were “committed to avoiding selling their claims on HIPC countries to other creditors who do not intend to provide debt relief under the HIPC Initiative.”

In May 2008, the Council of the European Union said that its member nations “will deter aggressive litigation by distressed debt funds,” and also agree “not to sell claims on HIPCs to creditors unwilling to provide debt relief.” Analysts point out that these agreements do not include sovereign lenders outside of the Paris Club and the EU.

Providing legal assistance: Some groups have offered to provide legal assistance to help HIPCs defend themselves against creditor lawsuits. They hope that such assistance will make it more difficult for hold-out litigants to collect the full amount of unpaid loans, and could even encourage them to collect only a portion of them. For example, the AfDB created a new international organization called the African Legal Support Facility (or ALSF), which, in part, offers legal and technical advice to African governments facing creditor litigation for unpaid debt. The Board of Directors of AfDB said that “the Facility shall provide services similar to legal aid societies that work to remove asymmetric technical capabilities and level the field of expertise among parties.”

Among other services, the ALSF (which became operational at the end of June 2009) will help member nations identify and select law firms to represent their interests in creditor litigation, and also help to negotiate and finance reasonable fees for such services. According to the U.S. Government Accountability Office, the United States had voted against the creation of the ALSF because it believed that debtor nations already had access to sound legal representation. It also said AfDB funds should not be used for other ALSF activities such as giving expert advice to member nations negotiating complex commercial transactions involving natural resource extraction in their territories.

The Commonwealth of Nations, which is an intergovernmental organization composed mostly of nations which were once part of the British Empire, also created a Legal Debt Clinic in October 2006 to provide legal advice to countries facing creditor litigation for sovereign debt.

Buying back debt at a discount: The World Bank administers a program called the Debt Reduction Facility (or DRF) which provides grants to the poorest nations so that they can buy back their debts from external commercial lenders at a significant discount. According to the World Bank, “the DRF has supported 25 buyback operations in 22 low income countries, resulting in the extinguishing of over $10 billion of external commercial debt.” But many note that creditors don’t have to participate in the DRF.

Creating an international treaty? Some have proposed the creation of a treaty to limit the defaulted debt which lenders and creditors may collect from nations participating in the HIPC Initiative and other debt relief programs. “Debt relief is an international issue, and the problem of creditor non-cooperation also crosses borders,” said the UK Treasury. “A complete solution would require international agreement.” But no country has yet initiated negotiations for such a treaty.

Many have also called on the IMF to create a formal debt restructuring process for sovereign nations which would, among other provisions, force a minority of creditors to accept debt restructuring agreements reached by a majority. Such a process would even bind so-called vulture funds, and prevent them from pursuing the full amount of their claims.

In November 2001, IMF officials presented a proposal for a sovereign debt restructuring mechanism (or SDRM) which would “provide a framework [of rules and procedures] for the orderly, predictable, and rapid restructuring of debt problems” for sovereign countries. Under some proposals (which were drawn from various domestic bankruptcy laws and practices from around the world), the SDRM would allow a sovereign and a yet unspecified supermajority of creditors to approve a restructuring agreement that would be legally binding on all creditors.

To turn the SDRM process into a formal procedure, three-fifths of IMF member nations representing at least 85 percent of total voting power must agree to amend that organization’s rules, say officials. The legislatures of these countries must then vote to approve the amendment. But top IMF officials conceded in April 2003 that there wasn’t enough political support to implement an SDRM process. Also, such support does not seem to exist even today.
Human rights groups say that migrants – those individuals numbering in hundreds of millions who cross international borders every year to find work in other nations – continue facing abuse, exploitation, and other dangers. In August 2010, the media reported that a drug gang had kidnapped and executed 72 migrants from Central and South America traveling through Mexico after they had probably refused to work as drug couriers and assassins. In July 2010, human rights groups reported that many companies in Japan continued to exploit migrant workers who came to that country under a government training program, but, instead, forced them to work in dangerous conditions for long hours and substandard pay.

In September 2010, Human Rights Watch said that Italy and Libya carried out joint sea patrols where Libyan personnel would shoot at boats carrying what they believed to be illegal migrants traveling from sub-Saharan Africa to Italy. A report issued in July 2010 by the UN Assistant Secretary-General for Human Rights said that migrants continued to face debt bondage, illegal confinement, rape, and physical assault, said UN News Centre.

Where do all of these migrants come from and where do they travel to find work? What other problems do they face? Are there any international treaties which address how nations must treat migrants? Have they been effective? What are some of their shortcomings? And what more must be done to protect migrants from abuse and exploitation from private employers, criminal gangs, and even government officials?

A growing migration population

Migration refers to the movement of people across international borders – generally from poor, developing nations to wealthier and industrialized countries – mainly for the purpose of finding work. (Movement within nations is not considered migration, say experts.) According to the International Organization for Migration (or IOM), the 214 million international migrants in the world today – nearly half of whom are women – comprise over three percent of the global population. Currently, the top origin countries of migrants are China (with 35 million migrants working abroad), followed by India (at 20 million) and the Philippines (with 7 million). Top destination countries include the United States (home to 42.8 million migrants), Russia (12.3), Germany (10.8), Saudi Arabia (7.3), Canada (7.2), France (6.7), the United Kingdom (6.5), Spain (6.4), India (5.4), and Ukraine (5.3), according to IOM estimates.

While migrants are spread out across various regions of the world, Europe hosts the largest concentration of migrants (69.8 million people representing 9.5 percent of that continent’s population), followed by Asia (with 61.3 million migrants representing 1.5 percent of the population), North America (home to 50 million migrants representing 14.2 percent of the population), and then Africa, which has 19.3 million migrants. In countries and principalities such as Andorra, Guam, The Holy See, Monaco, Qatar, and the United Arab Emirates, migrants make up more than 60 percent of the total population.

While some regions have experienced an increase in their migrant population in recent years, others saw moderate declines. The migrant population in North America, for instance, rose from 15.9 percent in 1970 to 23.3 percent in 2000, says the Migration Information Source. The former USSR saw a larger increase as its migrant population rose from 3.8 percent in 1970 to 16.8 percent in 2000 while Asia’s migrant population expanded to 40 million in 2000, up from 28.1 million in 1970. In contrast, from 1970 to 2000, said the IOM, Africa’s migrant population dropped from 12 percent to 9 percent while Latin America saw a decline from 7.1 percent to 3.4 percent.

Migrants are mostly involved in manual labor in their countries of employment, ranging from construction, agriculture, food production, and plumbing for male workers to domestic work, childcare, cleaning, and home health care for female workers, according to Human Rights Watch and the Migration Information Source. However, a small percentage of migrants (for instance, 3.2 percent in the United States and
1.7 percent in the European Union or EU) work as highly skilled professionals such as consultants, managers, academics, corporate transferees, health/education professionals, scientists, engineers, and journalists in their host countries. According to a 2003 study from the International Labor Organization, the top origin countries for highly skilled migrants include China, India, Japan, and the Philippines.

Migration helps origin countries substantially. For example, the World Bank points out that remittances sent home by migrants – totaling $414 billion in 2009 compared to $2 billion in 1970 – have helped individual families at home rise out of poverty. These remittances have also contributed to an origin nation’s overall economic development. In 2001, say migration experts, remittances were “double the amount of foreign aid [given by other nations] and ten times higher than net private capital transfers [from investors].”

Many experts also say that destination countries reap many benefits from migration. Many employers, for instance, keep their business costs down by paying migrants a lower wage than native workers, though this practice has come under heavy criticism. In addition, migrant workforces ensure a nation’s continued economic growth, according to the Global Commission on International Migration. As the native populations in destination countries begin to retire and as birthrates decline (particularly in Italy and Japan), the collection of tax revenues will decrease, which could – in turn – endanger the solvency of social security systems. However, a growing migrant workforce which pays taxes could reverse this trend, said the commission. Still, others argue that a growing migration population has taken jobs away from native populations and has led to social unrest.

Problems facing migrants: Exploitation, abuse, discrimination, and violence

While some migrants do find work which pays adequate wages and provides decent working conditions, many others don’t. In fact, migrant workers usually face serious problems in their countries of employment, according to various human rights groups such as Amnesty International and Human Rights Watch. For example, many destination countries exclude migrant workers from their labor laws or don’t enforce them in their cases. As a result, many employers exploit migrant workers by forcing them to work up to 18 hours a day without overtime (many times in unsafe and dangerous conditions), reducing their salaries drastically or simply not paying them at all, and firing them collectively without any reason, among other practices.

In addition, employers try to prevent migrants from finding better work or complaining to officials by destroying or confiscating travel documents. Some countries operate visa-sponsorship systems where migrant workers cannot leave their destination countries unless they get approval from their employers. In many cases, employers refuse to let a migrant worker return home unless he gives up any disputed pay owed to him. They may even prevent migrants from transferring their earnings to their home states.

Furthermore, many destination countries treat migrant workers differently from native workers. For instance, although they require migrant workers to pay domestic taxes, these same nations prevent them from receiving certain benefits, including unemployment benefits, social services, and retraining assistance. Other nations prohibit the children of migrants from attending the same schools as native children. Some have even prevented migrants from receiving urgent medical care. Many host countries have also passed legislation prohibiting migrant workers from joining trade unions or restricting the benefits of having such membership, including standardized wages, limits on work hours, and working in safe conditions.

Moreover, migrant workers face what experts say are pervasive human rights abuses in their host countries. Many employers physically abuse and sometimes torture migrants for making mistakes on the job. Others sexually assault female domestic workers in their private homes. Many countries also bar migrants from moving freely after certain hours or keep them confined in their places of employment. Many are also attacked without provocation by xenophobic natives. Migrant workers not only face abuse from employers, but also from officials. In many cases around the world, the police carry out “document checks” where they threaten to detain migrants unless they give up several months’ pay, according to Human Rights Watch.

While some workers complain about such abuse, most do not because they fear that doing so will jeopardize their employment. Even in cases where migrants report abuses, law enforcement officials will simply ignore their complaints, say human rights groups.

Experts also point out that in many countries of origin, recruitment agencies (which are responsible for placing migrant...
workers in host countries) deceive migrants by changing the terms of their job contracts and also by putting them in job assignments different from their initial placements. Many of these recruitment agencies also charge migrants excessive fees, but assign them jobs where they have little chance to recoup those fees.

The world community expresses concern

The abuses faced by migrant workers are not a recent phenomenon. In fact, observers believe that, since times of antiquity, destination countries have mistreated migrant workers. But decades ago, the world community began to express concern regarding their plight. For example, during the 1970s, the United Nations passed two resolutions calling on its member nations to address the exploitation faced by international migrants.

In 1972, after revelations that employers in Europe had abused undocumented African workers, the UN Economic and Social Council (or ECOSOC) passed Resolution 1706 (LIII), which stated that the conditions faced by these migrants were “akin to slavery and forced labor which constitute an extreme outrage to the human person,” and that UN member nations should adopt legislation to prevent the labor exploitation of migrant workers within their respective jurisdictions. Later that year, the General Assembly passed Resolution 2920 (XXVII), which called on its nations to end illicit and clandestine trafficking of migrants and also discriminatory treatment against them.

But legal experts did not consider these resolutions as binding international law requiring specific action on the part of UN member states. As a result, employers and other people in host nations continued to exploit migrants.

In 1999, the UN Commission on Human Rights created the position of Special Rapporteur on the human rights of migrants to investigate human rights abuses faced by migrants and their families and also to recommend policies to correct them. The Rapporteur also issues an annual report concerning the state of human rights of international migrant workers.

The international framework for protecting migrants

Over the past several decades, different international and regional organizations have undertaken their own initiatives to address problems faced by migrant workers. For example:

The ILO and international labor law: The International Labor Organization (or ILO) – a United Nations agency founded in 1919 and comprising of governments, workers, and employers – promotes human and labor rights by creating and overseeing international labor standards embodied in over 100 conventions.

In 1947, when the demand for labor was at an all-time high to reconstruct Europe after World War II, the ILO passed the Migration for Employment Convention (No. 97), which experts describe as one of the first initiatives explicitly protecting the rights of international migrant workers. Among its many provisions, a nation must treat migrants in the same way it would treat its nationals in terms of remuneration, hours of work, overtime pay, trade union membership, accommodations, and social security benefits.

In 1975, the ILO passed the Migrant Workers Convention (No.143), which calls on nations to end illegal migration and employment while recognizing that irregular status migrants (i.e., those without authorization to work in a destination country) still have inviolable human rights. It also calls on nations to impose penalties on employers who use irregular migrants.

Although these ILO conventions represented landmark steps in establishing an international legal framework to protect the rights of migrants, legal experts point out several shortcomings. For instance, Convention No. 97 applies only to migrants who have legal authorization to work in a destination country, thereby excluding millions of other migrants who enter illegally. (On the other hand, Convention No. 143 applies to both regular and irregular migrant workers.) Also, both conventions have low ratification rates. As of September 2010, only 49 nations have ratified Convention No.97 while 23 states have ratified Convention No. 143. (And in the case of both conventions, much of the world’s largest destination states – including the United States and a majority of EU member states – have not ratified them.)

In trying to explain these low ratification rates, a General Survey carried out in 1999 by the ILO Committee of Experts on the Application of Conventions and Recommendations said that many nations may lack the financial resources to implement the conventions. It also cited what could be the “incompatibility of national legislation with the instruments’ provisions.”

Legal experts say several other ILO conventions should apply to migrants – including the 1948 Freedom of Association and Protection of the Rights to Organize Convention (No.87), the 1951 Equal Remuneration Convention (No.100), and the 1958 Discrimination (Employment and Occupation) Convention (No.111) – but notes that none of them explicitly contains the term “migrant.”

Even in modern times, the ILO continues to pass agreements which are supposed to protect migrant workers. For example, in 1997, it adopted the Private Employment Agencies Convention (No. 181), which requires signatory nations to protect the rights of migrant workers by imposing penalties on and even abolishing private recruitment agencies carrying out fraudulent practices. But only 23 nations (not including the world’s largest destination countries) have ratified it.

Various UN human rights treaties: In addition to the work of the ILO, several UN declarations and treaties call on countries to recognize and enforce certain rights for individuals in their jurisdiction. Although these treaties do not explicitly mention whether they apply to international migrants, legal experts claim that their provisions should cover everyone.

The Universal Declaration of Human Rights, adopted by the General Assembly in 1948, calls on nations to recognize and respect a wide variety of human rights for “all peoples” such as the right to life and liberty, equal protection of the laws, and freedom from slavery, discrimination, arbitrary arrest, and detention, among many others. Although the declaration does not explicitly mention migrant workers, many legal analysts say that its provisions should apply to them, especially provisions from Article 23 and Article 24 which say that everyone has a right to free choice of employment, favorable work conditions, the right to equal pay for equal work, limits on work hours, and the right to join trade unions, among others.

The 1966 International Covenant on Civil and Political Rights (or ICCPR) calls on nations to recognize and protect fundamental civil and political rights, including the right to equality before the
law, freedom of association, and the right to a fair trial, among many others. While the ICCPR does not specifically mention the term “migrant,” the UN Human Rights Committee – the body in charge of monitoring the convention's implementation – issued an official interpretation in 1986 (called General Comment No. 15) on whether the ICCPR applies to aliens, including migrants. It specifically stated that “the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”

The International Covenant on Economic, Social and Cultural Rights (or ICESCR), also adopted by the General Assembly in 1966, calls on nations to ensure basic economic, social, and cultural rights of individuals in their jurisdiction, although it doesn’t specifically mention migrants. These rights, among others, include the right to work, the right to free primary education, the right to favorable and safe work conditions, an adequate standard of living, limitation on work hours, and social security.

The UN Committee on Economic, Social, and Cultural Rights – the independent body overseeing this convention – issued an interpretation (called General Comment No. 20) in 2009 where it declared that the rights set forth in the ICESCR “apply to everyone including non-nationals such as refugees, asylum seekers . . . migrant workers, and victims of international trafficking, regardless of legal status and documentation.”

In 1965, the General Assembly passed the International Convention on the Elimination of All Forms of Racial Discrimination (or ICERD), which requires signatory nations to take measures to prevent discrimination based on “race, color, descent, national or ethnic origin.” While the term “migrant” does not appear in this convention, the Committee on the Elimination of Racial Discrimination (the independent body overseeing ICERD) noted in General Comment No. 24 issued in 1999 that “among non-citizens, State

Migrant workers usually face serious problems in their countries of employment, including labor exploitation, unsafe and dangerous work conditions, withholding of pay, confiscation of travel documents, physical abuse and torture, sexual assault, kidnappings, and xenophobia, say human rights groups.

In addition, the Committee issued an interpretation in 2005 called General Comment No. 18 where it stated that “the principle of non-discrimination should apply in relation to employment opportunities for migrant workers and their families. State parties are under the obligation to respect the right of work by . . . prohibiting forced or compulsory labor and refraining from denying or limiting equal access to decent work for all persons . . . including migrant workers.”

In 1979, the General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (or CEDAW), which calls on nations to end discrimination against women in all aspects of society, but does not mention migrants specifically. In particular, Article 11 calls for an end to discrimination in the workplace, and also to ensure the right to work, equal remuneration for equal work, and worker health and safety. The body overseeing the implementation of CEDAW (called the Committee on the Elimination of All Forms of Discrimination Against Women) issued two interpretations on whether CEDAW applied to migrant women.

In General Comment No. 21 issued in 1994, for instance, the committee said that “migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them.” Moreover, it said that “special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women . . .” in General Comment No. 24 issued in 1999.

The Convention on the Rights of the Child, issued by the General Assembly in 1989, calls on its signatory nations to recognize and protect the basic human rights of children including the right to life, health, education, and development, among many others. (It also does not explicitly mention migrants.) In 2005, the Committee on the Rights of the Child – which oversees this convention's implementation – expressed its concern regarding migrant children's access to education and health services. In General Comment No. 6, it stated that “the rights stipulated in the Convention [are] not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – including asylum seeking, refugee, migrant children – irrespective of their nationality, immigration status, or statelessness.”

In 1966, the European Social Charter (or CETS), which calls on signatory nations to respect fundamental freedoms and social, economic, and cultural rights of individuals in their jurisdiction, although it doesn’t specifically mention migrants. These rights, among others, apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.

Even certain regions of the world have expressed their concern about the abuses faced by migrant workers in countries of employment. For example, in 1961, the Council of Europe – an organization which sets human rights and democratic principles across Europe – passed the European Social Charter (later revised in 1996), which calls
on European nations to guarantee various social and economic rights to individuals. Article 19 explicitly addresses the rights of migrant workers and their families, calling on European nations to treat migrants no less favorably than their own nationals in terms of remuneration, working conditions, and membership in unions, among other requirements. In 1977, the Council passed

Given previous shortcomings, the UN in 1990 adopted the Migration Convention, the most comprehensive treaty calling on nations to recognize and protect a wide variety of rights for all migrant workers throughout the entire migration process—beginning with their recruitment in origin nations to their stays in destination states.

the European Convention on the Legal Status of Migrant Workers which is similar to the European Social Charter, but provides more details on how European nations must treat migrants.

But analysts point out that both treaties apply only to migrant workers who are nationals of the member nations of the Council of Europe. So they don't apply to the millions of migrant workers from other parts of the world who are working in Europe.

Similar to the treaties passed by the UN, the Organization of American States (or OAS) – which promotes cooperation among nations in the Western Hemisphere—adopted two regional treaties which legal experts believe are indirectly applicable to migrant workers. (They do not specifically mention them.) Both treaties—the 1949 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights—mirror the rights listed in the Universal Declaration of Human Rights, including the right to life, work, fair remuneration, education, social security, and equality before the law. But in the same fashion as the regional European treaties, the OAS treaties apply only to OAS member states.

The Migration Convention: Filling in the shortcomings?

Given these various shortcomings, the world community began work on a treaty specifically for the protection of all migrants. After years of negotiations, the UN General Assembly in 1990 adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (or simply the Migration Convention), which came into force in July 2003 and is legally binding on the states which have ratified it.

Legal analysts describe the Migration Convention as the most comprehensive international treaty calling on nations to recognize and protect a wide variety of rights for all migrants (and their families) throughout the entire migration process—beginning with their recruitment in origin nations to their stays in destination states. It defines a migrant worker as “a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national.” (Its provisions do not apply to employees of international organizations, government officials, investors, refugees, stateless persons, students, trainees, and seafarers.)

Some of the rights for migrants and their families (regardless of their legal status in the host country or even their national origin) include the right to leave any state subject only to restrictions provided by law (Article 8), the right to life (Article 9), the right to property (Article 15), the right to protection against “violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups, or institutions” (Article 16), the right to protection against the destruction of IDs and other travel documentation (Article 21), the right to protection from collective expulsion (Article 22), the right to “enjoy treatment
In addition, if a migrant believes that his host country is not fulfilling its obligations under the Migration Convention, he can (under Article 77) submit a complaint to the CMW, but only after exhausting all other domestic remedies. After reviewing the complaint, the CMW will try to resolve the matter with the state party in question. However, for the CMW even to begin receiving and resolving complaints on behalf of individual migrants, at least 10 states must formally recognize the CMW’s authority to do so. Currently, only two states have made such declarations.

The CMW also has yet to issue any interpretations (in the form of general comments) of any provision in the Migration Convention.

Despite the breadth of its protections, many have questioned the effectiveness of the Migration Convention. For example, as of October 2010, only 43 of the UN’s 192 member states have ratified the Convention. While many origin, transit, and destination countries have signed and ratified the convention (such as Argentina, Egypt, Mauritania, Mexico, Morocco, Senegal, Syria and Turkey), critics point out that most major destination countries have not done so, including Canada, China, India, Japan, Russia, Saudi Arabia, and the United States. Also, none of the 27 EU member states have signed that convention.

Why are major destination countries reluctant to sign the Migration Convention? One political analyst said that some of these nations may fear that doing so will set off political opposition. As more and more nations face economic competition from other countries (both industrialized and developing), the public in individual nations will be unlikely to support a treaty which requires their government to give rights to non-nationals for vocational training, unemployment benefits, job placement, and social security, they say.

Several misunderstandings also inhibit support for the Migration Convention. Many nations believe that the Convention requires them, for example, to cede control of their borders and immigration policies to the UN. But, according to Article 79, “nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families,” say supporters. The Convention, they point out, does not give migrants an absolute right to enter the nation of their choice. They must still receive permission from a destination country to enter its borders.

In addition, many nations fear that the Convention could encourage more irregular migrants to enter their borders. But others say that empirical evidence from destination countries which have ratified the Convention has not supported such a claim.

Continuing problems for migrants around the world

Because major destination countries still refuse to sign and ratify the Migration Convention, many groups point out that migrants all around the world continue to face extensive and pervasive abuses. In fact, human rights organizations have publicized their plight in the past few years and even the last few months. Even in countries which have ratified that agreement, experts say that governments have not been enforcing the rights of migrants. For example:

**Saudi Arabia:** In the last six years, Human Rights Watch (or HRW) had issued two reports concerning human rights abuses and labor exploitation faced by migrants working in Saudi Arabia, which has not signed the Migration Convention. According to the International Federation of Human Rights, nearly six million migrants make up 50 percent of the Saudi workforce.

The first report – *Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia* – released in 2004 provides...
firsthand accounts from Bangladeshi, Filipino, and Indian migrant workers who reported long work days, no overtime pay, unpaid salaries, and forced expulsions. Many employers also confined female domestic workers to locked dwellings, and some have sexually assaulted them. HRW also alleged that Saudi authorities beheaded them and did not contact their families after their executions. A 2008 report – As If I Am Not Human: Abuses Against Asian Domestic Workers in Saudi Arabia – described the human rights violations faced by many of the 1.5 million Filipina, Indonesian, and Sri Lankan domestic workers in Saudi Arabia. Employers physically abused and sexually assaulted them, forced them to live in inadequate living quarters, and confiscated their passports, claimed the report.

**Thailand:** In February 2010, HRW released a report – From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand – where interviews with migrant workers from Cambodia, Burma, and Laos uncovered cases of labor exploitation, human rights abuses, and police extortion. They alleged that employers regularly confiscated identification and travel documents, and also reduced salaries without explanation. In addition, certain provinces in Thailand – which is not a party to the Migration Convention – have issued decrees prohibiting migrants from owning cell phones, registering cars, or being outside of their places of employment or residence after certain hours. Furthermore, the Thai Labor Relations Act of 1975 prohibits migrants from establishing trade unions. Thailand has claimed that some of its measures protect national security.

**Mexico:** In a 2010 report (Invisible Victims: Migrants on the Move in Mexico), Amnesty International said that migrants traveling through Mexico – over 10,000 Central American migrant workers cross that nation to reach the United States each year – faced human rights abuses, violence, and kidnappings from drug gangs and even government officials, describing their trip as “one of the most dangerous in the world.” The National Human Rights Commission in Mexico reported in a 2009 study that around 20,000 migrants are kidnapped in Mexico every year, according to the Wall Street Journal, and that many of these kidnappings were “carried out by local police or in collusion with police forces.”

Although Mexico had ratified the Migration Convention in 1999 and also prohibited the imprisonment of undocumented workers, Amnesty International claims that its government has failed to uphold the rights of migrants.

**Japan:** Following his visit to Japan in March 2010, the UN Special Rapporteur on the human rights of migrants, Jorge A. Bustamante, concluded that Japan (a major destination country for migrants which had not signed the Migration Convention) was blatantly violating the human rights of its migrant workers. He said that “racism and discrimination based on nationality are still too common in Japan, including in the workplace, in schools, in healthcare establishments and housing.” Groups such as Solidarity Network with Migrants Japan (or SNMJ) said that many public establishments allowed only the entry of Japanese nationals, for instance.

Bustamante also noted that its government continued to place irregular migrants, including children and asylum seekers, in detention for prolonged periods of time, some as long as three years. He added that Japan denied equal access to education to the children of migrant workers. Others groups said that female migrant workers in Japan faced domestic and sexual violence.

**Kazakhstan:** In a report – Hellish Work: Exploitation of Migrant Tobacco Workers in Kazakhstan – released in July 2010, HRW documented what it said were labor and human rights abuses of migrant workers (including children) employed in tobacco farms under contract with Philip Morris International, one of the world’s largest tobacco companies. Interviews with over 60 workers (primarily from the neighboring country of Kyrgyzstan) claimed that the employers had confiscated their passports, withheld and reduced pay, forced them to perform additional jobs for no compensation, and encouraged child labor.

The report further added that, in a single day, workers who simply pick tobacco can absorb nicotine equivalent to smoking 36 cigarettes. In a statement, a spokesperson for Philip Morris said that the company was “firmly opposed to child labor,” and, in an interview with the New York Times, noted that it had a policy of not buying tobacco from farms employing child labor.

Although Kazakhstan is not a party to the Migration Convention, it had ratified 17 conventions passed by the ILO, including the Worst Forms of Child Labour Convention, which prohibits child and forced labor. Its constitution and labor codes also have provisions guaranteeing freedom of labor and freedom from forced labor. But HRW believes that the government has not been doing enough to carry out its obligations under these and other agreements.

**Little progress in ratifying the Migration Convention**

As of 2010, two decades have passed since the UN had adopted the Migration Convention, but the number of nations which have ratified that agreement remains low. An organization called the International Steering Committee for the Campaign for Ratification of the Migrants Rights Convention launched a worldwide campaign to mark the 20th anniversary of the adoption of the Migration Convention. The steering committee – which is composed of human rights and faith-based organizations as well as civil society and intergovernmental organizations – are trying to raise awareness of the Migration Convention with government officials and also the public.

Carla Edelenbos, the coordinator of Steering Committee, highlighted the importance of ratifying the Convention, saying that “migrant workers all over the world suffer abuse, discrimination, and exploitation by traffickers, smugglers, and employers,” and that the “failure by States to effectively protect migrants against abusive practices demonstrates the urgent need for ratification.” But many political analysts say that global economic uncertainty, especially in the United States which had just come out of its longest recession since the Great Depression, makes it unlikely that large destination countries will ratify the Migration Convention.
Can the United States bar the entry of a foreigner simply because his viewpoints and ideas clash with those held by the federal government or society at large? Since the early days of its founding, the United States had passed a wide range of laws which allowed officials to prevent the entry of individuals and even whole groups of people (including anarchists and Communists) for ideological reasons, according to historians.

This practice began to wane towards the end of the twentieth century in the face of U.S. Supreme Court decisions which ruled that excluding a foreigner in certain cases would violate freedom of speech. Critics claim that the United States had recently revived the use of ideological exclusion to prevent the entry of foreigners who had criticized American anti-terrorism policies and also those who sympathized with terrorist causes. The federal government has denied such charges, arguing that U.S. immigration law bars the entry of people for many different reasons.

What laws currently allow the United States to prevent the entry of certain individuals? Can the United States legally keep out a foreigner whose political viewpoints run counter to those of the federal government? Have there been recent cases where critics believe that the United States had barred the entry of a foreigner for ideological reasons? What happened in these cases? And where does the debate stand today?

National gateway: Getting permission to enter a country

Every nation around the world, including the United States, has the sovereign right to determine which foreigners may enter and stay within its borders. Individuals do not have a fundamental right to enter any country of their choosing, and there are no international treaties which regulate how states address this specific matter. “Aliens abroad do not enter as a right, but as a matter of grace,” said assistant United States attorney David Jones. (On the other hand, the Universal Declaration of Human Rights, under Article 13, says that “everyone has the right to leave any country.”)

In general, an alien must receive prior permission to enter a country by applying for a visa or other form of legal authorization. Immigrant visas, for instance, authorize people to live and work permanently in the United States. Nonimmigrant visas such as a B-1 visa authorize people to enter the United States temporarily for a specific purpose (including business and medical reasons) while B-2 visas authorize short, personal visits. Nonimmigrant visas also restrict their holders to the activities stated on their visas during their visits. Under visa waiver programs, eligible citizens of certain countries may enter the United States for up to 90 days without having to obtain a visa.

The Executive branch has primary authority in deciding who may enter the United States. Within the U.S. Department of State, the Bureau of Consular Affairs issues visas for foreigners who want to travel to the United States. In the Department of Homeland Security, the U.S. Bureau of Citizenship and Immigration Services oversees the immigration and naturalization process for aliens while U.S. Customs and Border Protection inspects people and merchandise entering the United States to ensure that they are doing so legally.

How do I exclude thee? Let me count the ways . . .

While tens of millions of foreigners enter the United States every year for a variety of reasons, the U.S. government bars the entry of certain people.
Exclusions for practical reasons: The government may exclude aliens for certain practical reasons. For example, under 8 U.S.C. §1182(a), it may bar the entry of foreigners who have committed crimes such as illicit drug trafficking or money laundering, have serious communicable diseases or mental disorders which threaten public safety, or who simply want to receive social security and other public benefits.

Exclusions for ideological reasons: In the past, the United States had also barred the entry of foreigners for ideological reasons (i.e., largely for their political viewpoints, ideas, and associations with other people rather than their actions), a practice generally described as “ideological exclusion.”

In the past, the United States had barred the entry of foreigners for ideological reasons (i.e., largely for their political viewpoints, ideas, and associations with other people rather than their actions), a practice generally described as “ideological exclusion.”

with other people rather than their actions). Groups such as the American Civil Liberties Union (or ACLU) have described this practice as “ideological exclusion,” though the phrase does not appear in any statute. Since its founding, the United States had passed many laws specifically to keep out or deport those aliens whom it considered political opponents, according to historians and political analysts. For example:

- The Alien Enemies Act of 1798 authorized the President to apprehend and remove alien enemies from the United States during times of hostility with their respective home nations.
- The Immigration Act of 1917 (popularly known as the “Anarchist Act”) barred aliens with “subversive ideas” from entering the United States. Some say that the act defined the term “anarchism” so broadly that it allowed the U.S government to deport aliens for what they say were vague offenses.
- In 1952, at the height of McCarthyism, Congress enacted the Immigration and Nationality Act (or INA), which some argued allowed the United States to prevent Communists from entering the country. But the act primarily organized existing immigration regulations into a single body of law.

Over the years, critics such as the ACLU claimed that the United States continued to bar people from entering the country because of their political viewpoints. For example, from 1962 to 1996, it refused to grant a visa to Colombian novelist and Nobel laureate Gabriel Garcia Marquez, and, instead, required him to apply for special permission each time he entered the country. The ACLU says that the United States had barred Garcia Marquez for his support of leftist causes in Latin America and also his friendship with Cuban president Fidel Castro. The U.S. government, however, never explained its policy concerning Garcia Marquez.

Until 2003, former South African president and Nobel laureate Nelson Mandela needed special permission to enter the United States, which had listed him as an “undesirable alien.” (He had once served as head of the African National Congress, which the United States had designated as a “terrorist organization” until 1994, noted the ACLU.) In 2006, the U.S. government denied entry to British hip-hop singer M.I.A. (whose real name is Mathangi Arulpragasam) even though she had toured in the country in previous years. According to the ACLU, the United States banned M.I.A. because her lyrics were “overly sympathetic” to the Liberation Tigers of Tamil, an insurgent group once active in Sri Lanka, and which the State Department had listed as a foreign terrorist organization. The United States never publicly explained its policy concerning M.I.A.

Over the past several decades, the United States amended its “ideological exclusion” laws, believing that they undermined the nation’s moral position in the world as a leading defender of free speech and the exchange of ideas, even controversial ones. For instance, in 1977, Congress passed the McGovern Amendment, which prohibited the State Department from excluding foreigners on ideological grounds unless they posed a national security risk, said the ACLU. A decade later, it passed the Moynihan-Frank Amendment, which prohibited the State Department from denying visas to foreigners “because of any past, current or expected beliefs, statements or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution.” The 1990 Immigration Act further reduced the grounds for deportation and focused on aliens’ actual conduct rather than their beliefs, said various observers.

While it has many opponents, ideological exclusion also has its supporters. For example, advocates such as the Center for Immigration Studies argue that all countries, including the United States, have the right to bar the entry of foreigners who reveal violent or hostile attitudes toward them. They also claim that excluding foreigners on the basis of their ideological views is constitutional because the U.S. government had carried out such a practice in many different forms since colonial times.

Exclusions on security and related grounds: The government may also exclude foreigners under a broad category called “security-related grounds” in 8 U.S.C. § 1182(a)(3). For example, it allows consular officers or the Attorney General to bar the entry of aliens for general reasons such as those whom they believe intend to spy, steal government or trade secrets, or carry out any other unlawful activities, including the violent overthrow of the government.

Also under the category of security-related grounds, the government may bar a foreigner for foreign policy reasons. Specifically, it says that an alien “whose entry or proposed activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is inadmissible.”
Furthermore, the government may bar an alien who “endorses or espouses terrorist activity or persuades others” to do so. While the U.S. Code does not define the phrase “endorse or espouse,” the U.S. Department of State Foreign Affairs Manual (2005) – which provides policy and legal guidance to American consular officers – said that voicing “irresponsible expressions of opinions” could qualify as one example of endorsing or espousing terrorist activity. But even the manual does not define that term “irresponsible expressions of opinions.”

Moreover, under the category of security-related grounds, officials may bar foreigners whom they believe had once engaged in a terrorist activity or are likely to engage in such activity after entering the United States, including assassination, sabotage, hijacking, preparing or planning a terrorist activity, inciting others to commit terrorism, and gathering information on potential targets.

Terrorist activity also includes providing “material support” to terrorists such as safe houses, transportation, or monetary funds, or any act which a person knows or should reasonably know affords material support to terrorists such as giving funds to a charitable group which, in turn, funnels them to terrorists. (Federal law prohibits people in the United States from providing material support to groups which the State Department designates and publicly lists as “foreign terrorist organizations.” In addition, the Treasury Department publishes a separate list of charities and individuals – called “Specially Designated Global Terrorists” – whose assets it had frozen because of ties to terrorist activities.)

In 2005, Congress passed the REAL ID Act, which, in part, made it a crime to give material support to an organization designated as a foreign terrorist group even before it had received such a designation.

A foreigner who provided material support to terrorists may not enter the United States unless the Attorney General and Secretary of State issue a special waiver for temporary admission under 8 U.S.C. § 1182(d)(3)(B)(i). Otherwise, he must “demonstrate by clear and convincing evidence that [he] did not know, and should not have reasonably known, that the organization [he had supported] was a terrorist organization.” The 2005 U.S. Department of State Foreign Affairs Manual outlines several factors which consular officers may consider in determining whether a foreigner could not have known that he supported a terrorist organization, including his residence, profession, and education, and also whether a particular organization is widely known to support terrorists.

Ideological exclusion and the First Amendment

After a consulate makes a decision to deny a visa to a foreigner, that person does not have any legal right – under a doctrine called “consular nonreviewability” – to ask an American court to review that decision. A court also does not have jurisdiction to review a consular decision. One judge noted that the judiciary had long respected this doctrine even though it is not mentioned in the U.S. Constitution. Some say that it maintains the separation of powers between the judicial and executive branches of government, and that consulates – and not the courts – are best suited to administer the visa process which involves political and policymaking considerations. Critics such as the ACLU argue that consular nonreviewability gives low-level administrative officials too much authority without sufficient judicial oversight.

But the doctrine of consular nonreviewability does not completely shield a consular decision from court review. In the 1972 landmark decision called Kleindienst v. Mandel (which legal observers simply call Mandel), the United States Supreme Court spelled out an exception to this doctrine. In 1969, a U.S. consulate denied a visa to Ernest Mandel – a Belgian journalist and self-described “revolutionary Marxist” – to speak at several conferences in the United States. It said that, during earlier visits to the United States, Mandel had engaged in activities beyond those stated on his visa. The Court upheld the government’s decision to deny a visa to Mandel.

But it also ruled that U.S. citizens may challenge the government’s decision to deny a visa to an alien if such a denial possibly violated their First Amendment right to freedom of speech, which (according to previous court decisions) includes the freedom to receive information and ideas. Mandel added that this right to receive information also included a right to have “an alien enter and to hear him explain and seek to defend his views.” So excluding an alien from the United States solely on the basis of his political views would violate the First Amendment rights of U.S. citizens, said that Court.

How would a court determine whether denying a visa to an alien violated the First Amendment rights of U.S. citizens? In such cases, the government must show that it had denied a visa to an alien for a “facially legitimate and bona fide reason,” and not on the basis of his political views, said the Court.

If the government fails to provide such a reason, it could lend more credibility to a plaintiff’s accusations that the government had excluded the alien because of his political views. In such a situation, a court can issue an order prohibiting the government from excluding the alien on that basis. But the court itself will not approve and issue a visa (simply because doing so is not a function of a court). Instead, it can order the government to process a visa application without taking an alien’s political views into consideration.

But if the government does provide a facially legitimate and bona fide reason (such as a genuine security concern), a court itself cannot delve into and begin to assess the adequacy of that reason. It must stop its inquiry and let the government’s decision stand, even if such a decision continues to affect the constitutional rights of U.S. citizens. (Just as the doctrine of consular nonreviewability is not absolute, neither is a U.S. citizen’s First Amendment right to have an alien enter the United States to share his views.) “The courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the [visa] applicant,” said the Mandel decision.

But legal analysts point out that Mandel neither defined the terms “facially legitimate” or “bona fide” nor did it instruct lower courts how to determine whether a visa denial satisfied those terms.
The revival of ideological exclusion?

Since the terrorist attacks on September 11, 2001, the United States has and continues to carry out an aggressive economic, military, and political campaign against international terrorism, especially against groups such as Al Qaeda and the Taliban. But during the course of its campaign, critics point out that the United States had abused the human rights of terrorist suspects. Agents for the Central Intelligence Agency had, for instance, tortured suspected terrorists during interrogations in sites around the world, acknowledged American officials. They also point out that the U.S. military had prevented suspected terrorists held in Guantanamo Bay, Cuba, from challenging their detention.

These practices have led to protests and sharp condemnations from around the world. In the face of growing criticism, many believe that the U.S. government had revived the practice of ideological exclusion where it allegedly tried to keep out critics solely on the basis of their views, especially those who attacked U.S. foreign policy and the war on terror.

But by doing so, protestors said that the government had, in many instances, violated the First Amendment rights of those Americans and organizations who wanted to meet, hear, and speak with people from other countries. On the other hand, the government insisted that it has valid reasons for barring the entry of certain individuals. Two recent cases have stood out in particular.

The case of Tariq Ramadan

The first case concerned Tariq Ramadan, a prolific scholar who currently teaches Contemporary Islamic Studies at Oxford University, and has written about Muslim identity and the role of Islam in democratic societies. Born and raised in Switzerland, Ramadan is the grandson of Hassan al-Banna, the founder of a political and religious movement called the Muslim Brotherhood.

His supporters have described Ramadan as a moderate figure who promotes a tolerant version of Islam, and notes that he disapproves of terrorism. But critics point out that six Muslim countries have banned his entry. France temporarily banned him during a series of terrorist attacks in 1995 carried out by Muslim extremists. In 2004, the French newspaper Le Parisien reported that European intelligence agencies believed Ramadan had been in touch with leaders of Al Qaeda, a charge he has denied. Others note that Ramadan is a frequent critic of American foreign policy, especially in the Middle East.

In 2005, several academic groups had invited Ramadan to speak at several conferences in the United States. The New York Times reported that Ramadan had previously visited the United States 24 times, speaking at universities such as Dartmouth, Harvard, Princeton, and also at the U.S. State Department.

But the U.S. consulate in Switzerland rejected his visa application, stating that he had provided material support to a terrorist organization in violation of 8 U.S.C. § 1182(a)(3)(B). During his visa interview, Ramadan admitted donating over $1,300 between 1998 and 2002 to the Association de Secours Palestinien (or ASP), a charity in Switzerland which aids Palestinians. In 2003 (a year after Ramadan’s final donation), the Treasury Department listed ASP on its list of “Specially Designated Global Terrorists” because it had determined that the charity was the primary fundraiser in Switzerland for the terrorist group Hamas. Ramadan claimed not to know that ASP was supporting Hamas when he had made his donations. He also pointed out that he had made them before it was illegal to do so.

District court decision: In February 2007, the American Academy of Religion, the American Association of University Professors, and the PEN American Center (all of which had invited Ramadan to speak in the United States) sued the United States. In the case of American Academy of Religion v. Chertoff, the plaintiffs first argued that the U.S. government had violated their First Amendment rights by denying a visa to Ramadan solely based on his political views. Doing so, they argued, prevented them from meeting with Ramadan, hearing his views, and engaging him in debate. “The government [had barred] Professor Ramadan not because of his actions, but because of his ideas,” claimed Jameel Jaffer, an ACLU attorney who argued the case. They called on the government to issue a visa to Ramadan without taking his political views into consideration.

Second, they called on the court to strike down as unconstitutional that portion of the U.S. Code which barred the entry of an alien who “endorses or espouses terrorist activity.” The plaintiffs argued that the provision was vague and broad. (As mentioned before, the U.S. Code does not define these terms.)

In response, the government said that its consulate in Switzerland had denied a visa to Ramadan because he had provided material support to a terrorist organization, which is a violation of federal law, and that Ramadan’s critical views of American foreign policy had not been a factor.

In December 2007, the district court ruled in favor of the government. Because the plaintiffs sued on First Amendment grounds, the district court (using the Mandel decision) had to determine whether the government had given a facially legitimate and bona fide reason for barring Ramadan from entering the country. But because the Mandel decision did not provide any guidance on how courts should make this determination, the district court created a three-part test to do so.

• First, did the government provide a reason for denying the visa? The court held that the government did provide Ramadan with a reason – he had given material support to individuals or organizations (i.e., ASP) that support terrorists (i.e., Hamas).

• Second, did the law allow the government to deny the visa for this particular reason? The district court cited 8 U.S.C. § 1182(a)(3)(B), which specifically allows the government to exclude aliens who provide material support to individuals or organizations that support terrorists.

• Third, did the government properly apply the law to Ramadan? To answer this question, the court posed two further questions:
  – Should the material support provision of the REAL ID Act be applied retroactively? The plaintiffs argued that it would be unfair for the government to retroactively criminalize donations given to organizations before it was illegal to do so, and that Congress – when it passed the REAL ID Act – did not intend to do this. But the court determined that the plain words of the statute indicated Congress’ intent to apply the law retroactively.
  – Did Ramadan know or should he have known that he was providing material support to a group that supported...
terrorists? As mentioned before, the U.S. Code requires an alien to show by “clear and convincing evidence” that he did not know he provided material support to an organization which supported terrorism. The plaintiffs argued that, because the U.S. Government did not designate ASP as a group supporting terrorists until 2003, Ramadan (who ended his donations in 2002) could not have known that he was funding terrorists. But the court determined, on its own, that Ramadan’s evidence was not clear and convincing. In fact, in one instance, it described his evidence as “self-serving.”

After applying this three-part test, the district court concluded that the government did provide a facially legitimate and bona fide reason for excluding Ramadan from the United States even though doing so would violate the First Amendment rights of the plaintiffs. It also declined to determine the legality of the section of the U.S. Code which allows the government to exclude a foreigner who “endorses or espouses terrorist activity.” It noted that the government did not deny Ramadan’s visa under this particular provision, and that “a court should render judgments only on actual cases and controversies before it.”

**Appeals court decision:** But in July 2009, an appeals court reversed the district court’s decision, saying that there wasn’t enough information to determine whether the government had provided a facially legitimate and bona fide reason for excluding Professor Ramadan from the United States.

For Ramadan to defend himself against allegations that he had provided material support to a group which supported terrorism, the appeals court said that the consulate had to contact him about these allegations and then give him a chance to defend himself. The consular officer, said the ruling, was “required to confront Ramadan with the allegation against him and afford him the subsequent opportunity to demonstrate by clear and convincing evidence that he did not know, and reasonably should not have known, that the recipient of his contributions was a terrorist organization.” But it noted that “the record was unclear as to whether the consular officer had done so.”

The appeals court remanded the case to the district court where the government would have a chance to show whether the consular officer had actually confronted Ramadan with his allegations and had given him an opportunity to dispute them. The appeals court also ruled that the district court had exceeded its authority when it assessed (on its own) Ramadan’s evidence disputing that he had knowingly provided a terrorist group with material support. As mentioned previously, the Supreme Court said that the judiciary must stop its inquiry once the government provides a facially legitimate and bona fide reason for excluding an alien if doing so violates the First Amendment rights of an American citizen.

**A waiver for Ramadan:** In January 2010, Secretary of State Hillary Clinton issued a waiver to Ramadan, which stated that “for purposes of any application for non-immigrant visa or for admission as a non-immigrant,” the United States will not require him to provide clear and convincing evidence that he did not know that he was giving material support to a group supporting terrorism. As mentioned before, the U.S. Code allows the Secretary of State and the Attorney General to issue such waivers. Also, at this point, the district court had not yet determined whether Ramadan had provided clear and convincing evidence on whether he knew that ASP gave funds to Hamas.

Soon afterward, the United States approved his application and issued a visa to Ramadan who has since spoken at several conferences in the United States.

**The case of Adam Habib**

Another case which attracted publicity involved Adam Habib, a South African scholar and human rights activist who currently serves as the Deputy Vice-Chancellor of Research, Innovation, and Advancement at the University of Johannesburg in South Africa. He lived in the United States for three years and earned his Ph.D. from the City University of New York. An outspoken critic of United States foreign policy, Habib spoke at an anti-Iraq war rally in 2003.

Habib applied for a visa in 2007 to speak at several conferences in the United States. After long delays, the U.S. consulate in South Africa denied Habib’s visa application, citing 8 U.S.C. § 1182(a)(3)(B)(i)(I) which bars the entry of aliens who “engaged in terrorist activity.” But it refused to explain how Habib had engaged in such activity.

In September 2007, the American Sociological Association – along with other organizations which had invited Habib to speak in the United States – filed a lawsuit against the United States (in *American Sociological Association et al. v. Clinton*), arguing that it had violated their First Amendment rights by barring Habib from speaking in the United States.

Specifically, in a 2007 press release, the ACLU (which represented the plaintiffs in the lawsuit) stated: “The State Department refused Habib a visa after months of inaction, claiming that he is barred because he has ‘engaged in terrorist activities,’ but the government failed to explain the basis for its accusation, let alone provide any evidence to prove it.” By refusing to give any explanation, the government had failed to provide a facially legitimate and bona fide reason for barring Habib from entering the United States and engaging in debate with the plaintiffs, which, in turn, violated their First Amendment rights. (Unlike the Tariq Ramadan case,
the ACLU did not challenge the constitutionality of the “espouse or endorse” provision in the Habib case.)

Among other arguments, the government responded that the district court (under the Mandel decision) did not have the authority to review the U.S. consulate’s decision unless it first provided a reason for that denial.

The district court, in December 2008, decided that it did have legal authority under Mandel to review the U.S. consulate’s decision to deny a visa to Habib. The decision rejected the government’s argument, saying that it would give a “perverse”

U.S. citizens may challenge the government’s decision to deny a visa to a foreigner if such a denial possibly violated their First Amendment right to freedom of speech, which includes the freedom to receive information. The Supreme Court added that this right also included a right to have “an alien enter and to hear him explain and seek to defend his views.”

incentive to the government in rejecting a foreigner’s visa application – “better to give no reason for a [visa] denial so that it would be unreviewable than to give a reason and be second-guessed by a court.” But the district court did not determine whether the government provided a facially legitimate and bona fide reason for excluding Habib from the United States because it did not have enough information to do so. Instead, it called on the parties to “engage in discovery and develop a fuller factual record.”

In the midst of these legal proceedings, Secretary of State Clinton, in January 2010, signed a waiver indicating that the United States (when it reviews Habib’s visa application) will not consider that section of the U.S. Code which bars the entry of aliens who engaged in terrorist activity. Since then, Habib obtained a 10-year visa to the United States.

**Did the U.S. government engage in ideological exclusion?**

After Ramadan and Habib received their visas, they continued to maintain that the United States had kept them out solely for political reasons. “It was clear I was banned from this country because of [views on] the Israeli/Palestinian conflict and the war in Iraq,” said Ramadan in an interview with the Washington Times. To the Huffington Post, Ramadan stated that he was excluded because of “the fact that I was very critical about the US’s foreign policy.” At several American universities, Habib also said that the United States had excluded him solely on the basis of his political views. But in both cases, neither Ramadan nor Habib presented any incontrovertible evidence bolstering their claims.

Some groups had hoped that the Ramadan and Habib cases would clearly show that the government did not have facially legitimate and bona fide reasons for barring their entries into the United States, hence supporting their beliefs that the United States engaged in ideological exclusion. But the outcomes of exclusion was not limited to Professors Habib and Ramadan,” and that “between 2001 and 2008, dozens of prominent intellectuals” could not enter the United States because of that policy.

The ACLU noted, for instance, the exclusion of Greek professor Yoannis Milios, a Marxist active in Greek politics and who has written extensively about class and economic inequality. Milios said that he traveled to the United States in June 2006 to present a paper at the State University of New York at Stony Brook, but that American officials at John F. Kennedy International Airport interrogated him about his political beliefs and then sent him back to Greece. While a U.S. consulate official did not give an exact reason on why the United States had barred Milios from the United States, the ACLU said that the official implied that one factor could have been his advocacy for prisoners who had been convicted of terrorism-related crimes in Greece. The United States has also not commented on this case.

In another separate case, the United States in July 2010 denied a visa to a Colombian journalist, Hollman Morris, to attend Harvard University on a prestigious fellowship, according to the Washington Post. U.S. consular officials said that Morris had engaged in terrorist activities in violation of 8 U.S.C. § 1182(a) (3)(B), but did not provide further details, citing privacy laws. Analysts say that Morris is a critic of the Colombian government and its ties with right-wing militias in their long-running fight against the left-wing insurgent group FARC.

The February 2010 letter urged Secretary Clinton to issue “agency-wide guidance” which would discourage officials from taking an applicant’s political beliefs into consideration when processing a visa application, and also to give waivers to foreign scholars, writers, artists, and activists who were deemed inadmissible under current law except in cases “where articulable national security interests unrelated to the applicant’s political beliefs or associations make waiver inappropriate.”

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34 THE INTERNATIONAL REVIEW
Asylum in the United States for foreign homeschoolers?

In what some legal experts say is the first case of its kind, a U.S. immigration law judge recently granted asylum to a family who endured what they described as persecution in Germany for home-schooling their five children. While supporters of the family said that the ruling could provide a basis for other families facing similar circumstances to come to the United States as refugees or asylum seekers, others note that the U.S. federal government has appealed the judge’s ruling.

According to political analysts, German public education laws require children between the ages of 6 and 18 to attend a government-approved public or private school (including religious ones and those with alternative curricula) during regular school hours. The United Nations notes that Germany is one of the few industrialized countries in the world which requires mandatory school attendance up to 18 years of age. There are a few exceptions to mandatory school attendance, including cases where children are too ill to attend a formal school or where parents have jobs (in circuses or as musicians) requiring them to travel constantly. Also, parents cannot refuse to send their children to school based on academic, political, religious, or social objections, among others.

German officials say that a policy of mandatory school attendance ensures that all children receive a standard level of education. “For reasons deeply rooted in history and our belief that only schools properly can ensure the desired level of excellent education, we (Germany) go a little bit beyond that path which other countries have chosen,” explained German consular official Lutz Gorgens.

German laws also generally prohibit home-schooling where parents provide their children with most of their academic instruction. “In our increasingly multicultural society, school is the place for a peaceful dialogue between different opinions, values, religions, and ideologies,” according to Berlin’s education minister, Juergen Zoellner, in an interview with BBC News. “It is a training ground for social tolerance. Therefore, home-schooling is not an option for Germany.” Still, one official said that German laws don’t prohibit outright all forms of home-schooling. Parents may, for instance, provide instruction at home once their children return from school and also on weekends when schools are generally closed.

Around 400 to 1,000 children are home-schooled in Germany, according to varying estimates. Home-schooling is legal in the United States, say analysts, but point out that each state regulates that practice differently. Approximately 1.5 million children are home-schooled, said a 2008 federal report.

For parents in Germany who refuse to send their children to school, authorities may impose penalties, including fines and imprisonment. In 2007, a German appellate court affirmed that authorities may even take custody of children whose parents don’t enroll them in school. Because Germany discourages home-schooling, some have claimed that many German families who wanted to home-school their children had fled to other countries as refugees and asylum-seekers.

Commentators say that the popular view of refugees and asylum seekers includes political dissidents, racial minorities, and various religious groups – all of whom have endured or are threatened with persecution from their respective governments and other groups. On the other hand, people who are fleeing natural disasters or even domestic armed conflict are not considered refugees under international law and the immigration laws of individual nations.

A foreigner who says that he is fleeing persecution may enter the United States as a refugee. Under the Immigration and Nationality Act (or INA), refugees are individuals who are unwilling or unable to return to their home countries because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. A person who applies for refugee status usually does so while she is outside of the United States. After U.S. authorities verify claims of persecution, they give the applicant authorization to enter and resettle in the United States.

On the other hand, there are thousands of individuals who don’t have any prior authorization to enter the United States, but have still somehow managed to arrive at a U.S. port, airport, border station, and even beaches and other coastal areas – all in an effort to escape from alleged persecution. They can temporarily stay in the United States by applying for asylum, and must establish that they are refugees (as defined under the INA) who genuinely faced persecution in their home countries.

Persecution based on one’s political opinion is the most common basis for seeking asylum. But an asylum seeker must do more than say that he was swept up in political unrest in his home country, say experts. Instead, the asylum seeker must show, for example, that the government knew he specifically disagreed with it politically. Many people also file for asylum on claims of religious persecution. But, as in the case of political persecution, a person must show that persecutors had targeted him specifically. Others seek asylum on the basis of persecution based on race or nationality, though such claims are not common, say legal analysts.

People also seek asylum on the basis of being part of a particular social group which faces persecution (i.e., they faced persecution simply for being part or a member of a certain group). In the 1985 case Matter of Acosta, the Board of Immigration Appeals (or BIA) defined “social group” as people who share a “common, immutable characteristic.” It could include characteristics which are an innate part of their existence (such as gender, sex, and color), and which a group “either cannot change or should not be required to change because it is fundamental to their individual identities or consciences,” said the BIA. Members of a social group may also have common experiences, including military service or land ownership. Even with such criteria, determining what constitutes a social group can be very difficult. In fact, the BIA clarified that “the particular kind of group characteristic
that will qualify [for asylum] remains to be determined on a case-by-case basis.”

In recent years, U.S. immigration judges have been granting refugee and asylum status to individuals claiming persecution in cases which had not been considered before. For example, this past year alone, human rights advocates successfully overturned Judge Burman’s decision. According to various sources, including media articles and lawyers representing the Romeikes, Judge Burman agreed that “the States Parties to the present Covenant undertake to have the obligation to respect for the liberty of parents . . . to choose for their children the type of education they consider appropriate.”

Soon after, Immigration and Customs Enforcement (or ICE) – a federal agency which enforces the nation’s immigration laws – filed an appeal, arguing that “United States law has recognized the broad power of the state to compel school attendance and regulate curriculum and teacher certification.” Accordingly, the Romeikes did not face persecution under German public education laws. Rather, they faced legitimate prosecution for violating them. Ironically, the appeal noted, the “Immigration Judge did not address how, under various state laws of the United States, a person can be similarly prosecuted for not sending one’s children to school.”

The appeal also argued that designating homeschoolers as a “particular social group” facing persecution was done prematurely. Furthermore, ICE said that the Romeikes did not “make any effort to locate an acceptable alternative school” such as a school suited to their religious beliefs.

For the first time, a U.S. immigration law judge granted asylum to a foreign family who claimed that they faced persecution in their home country for wanting to home-school their children.

While some advocates of home-schooling believe that the judge’s ruling will allow other foreigners with similar circumstances to apply for asylum, legal experts point out that asylum cases are decided by courts on a case-by-case basis, and that the BIA may overturn Judge Burman’s decision.

Currently, no treaty or international agreement directly regulates, attempts to regulate, approves, or disapproves of home-schooling. Rather, legal experts note that Article 13 of the 1966 International Covenant on Economic, Social, and Cultural Rights (or ICESCR) say that people have a “right to education,” and that nations should undertake measures to ensure this right by requiring them to make primary education “compulsory and available free to all,” which could justify Germany’s policy of mandatory school attendance. (The ICESCR calls on nations to ensure basic economic, social, and cultural rights of individuals in their jurisdiction.) At the same time, though, Article 13 says that “the States Parties to the present Covenant undertake to have respect for the liberty of parents . . . to choose for their children schools, other than those established by the public authorities . . . and to ensure the religious and moral education of their children in conformity with their own convictions.”

A 2007 report submitted by Vernor Muñoz (a legal expert appointed by the United Nations specifically to determine whether Germany was ensuring a right to education) stated that “教育 may not be reduced to mere school attendance, and that educational processes should be strengthened to ensure that they always and primarily serve the best interests of the child.” To that end, the report said that “distance learning methods and home-schooling represent valid options which could be developed in certain circumstances, bearing in mind that parents have the right to choose the appropriate type of education for their children, as stipulated in Article 13° of ICESCR. Muñoz also noted that he had received several complaints from German nationals who said that their government threatened to “withdraw the parental rights of parents who chose home-
schooling methods for their children.” In response, he wrote: “The promotion and development of a system of public, government-funded education should not entail the suppression of forms of education that do not require attendance at school.” He then recommended that Germany adopt measures “to ensure that the home-schooling system is properly supervised by the State, thereby upholding the right of parents to employ this form of education when necessary and appropriate.”

But others note that, in September 2006, the European Court of Human Rights decided (in Konrad and Others v. Germany, Application no. 35504/03) that Germany’s compulsory school attendance policy did not violate the right of the plaintiffs under the Charter of Fundamental Rights of the European Union. (The Charter is comparable to a bill of rights.) The German plaintiffs in this case – the Konrads – wanted to home-school their children “in conformity with their own religious beliefs,” and argued that sending them to public school would conflict with those beliefs. They applied for an exemption from compulsory school attendance, which local authorities rejected. Officials argued, in part, that while parents did have a right to provide their children with religious instruction, parents were not “entitled under German laws to the exclusive education of their children,” citing societal needs of exposing children to different experiences in the classroom which would help in their development.

After several German courts ruled against the Konrads, they filed a case with the European Court of Human Rights. By denying them an exemption from mandatory school attendance, the Konrads argued that Germany had violated their rights under Protocol 1 (Article 2) of the Charter, which states: “No person shall be denied the right to education,” and that “the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

The court ultimately ruled that Germany’s compulsory education policy did not violate the rights of the plaintiffs, saying that “parents may not refuse the right to education of a child on the basis of their convictions,” and that Article 2 itself “[implied] the possibility for the State to establish compulsory schooling, be it in State schools or private [school] of a satisfactory standard.” But the decision did not directly address the extent to which Germany may restrict home-schooling. “The German courts have pointed to the fact that the applicant parents were free to educate their children after school and at weekends,” it simply stated. “Therefore, the parent’s right to education in conformity with their religious convictions is not restricted in a disproportionate manner.”

IMMIGRATION LAW

Does Arizona’s anti-illegal immigrant law violate international law?

In what has been described as a showdown from a classic western, the U.S. federal government and the state of Arizona are currently facing off in a federal court after that state had passed what analysts described as the nation’s toughest anti-illegal immigration law. While supporters say that the law prods the federal government to address illegal immigration and better enforce current immigration laws, opponents argue that the law violates not only the U.S. Constitution, but also American obligations under a major international treaty.

In April 2010, Arizona governor Jan Brewer signed the “Support Our Law Enforcement and Safe Neighborhoods Act” (otherwise known as SB 1070), which requires an Arizona law enforcement officer to determine the immigration status of an individual who had been lawfully stopped, but only if the officer has “reasonable suspicion” to believe that the individual may not be in the country legally.

While SB 1070 does not define the term “reasonable suspicion,” lawmakers amended that law to prohibit an officer from basing his reasonable suspicion on, for example, an individual’s race or national origin. (The amendment simply says that SB 1070 “shall be enforced without regard to race, color, religion, sex, age, disability, or national origin.”) If an officer cannot verify such status, he must detain that individual and verify his immigration status by notifying federal authorities. On the other hand, the law does not allow Arizona state authorities to deport detained individuals or enforce the nation’s immigration laws independent of the federal agencies responsible for them.

SB 1070 also contains many other provisions. For example, it prohibits an illegal alien to “apply for work, solicit work in a public place, or perform work as an employee or independent contractor,” and also makes it unlawful for drivers to hire anybody from their cars if they are blocking traffic. (Analysts note that many employers drive up to street corners to hire illegal immigrants.) It is also unlawful under SB 1070 for people to transport or bring illegal aliens into Arizona.

Furthermore, if a state resident believes that state and local authorities are not enforcing the nation’s immigration laws, he may file a lawsuit against those individuals. Moreover, SB 1070 allows a law enforcement officer to arrest a person without a warrant if he believes that person had committed a deportable offense.

Illegal immigration has become one of the most hotly debated topics in recent years. In the United States, the population of illegal immigrants – i.e., foreigners who have entered the country without legal authorization, overstayed their visas, or have violated the terms of their visas – has grown from 8.5 million in 2000 to around 11 million today, according to the Pew Hispanic Center and the Department of Homeland Security. They also estimate that one in every 20 workers is an illegal immigrant, and that they generally work in low-skilled jobs, occupying 25 percent of all agricultural jobs, 14 percent of construction jobs, and 17 percent of office and home cleaning positions.

Analysts say that illegal immigrants contribute to national revenues by paying income taxes, and point out that they help the economy by buying goods and services in the United States. Such economic activity “reverberates throughout the whole economy, creates more jobs, more spending, and more revenue,” according to Dr. Randy Caps, a senior researcher at the Urban Institute, a Washington, DC-based think tank. But opponents claim that the costs of illegal immigration outweigh any benefits since many state and local governments provide them with medical care and public education. Others argue that illegal immigrants drive down wages and take away jobs from native and legal residents.

In the United States, Congress passes immigration laws for the
entire nation while various Executive branch agencies (including Immigration and Customs Enforcement, an agency within the Department of Homeland Security) enforce them.

While the U.S. Constitution does not give explicit authority to Congress in setting immigration laws – in fact, it doesn’t even mention the term “immigration” – legal experts say that ability to do so is derived from the Commerce Clause (Article I, Section 8), which gives Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.” Because immigration has direct bearing on commerce with foreign nations, say analysts, Congress has the power to regulate that activity. In the event of a conflict between state and federal laws, the Supremacy Clause (Article VI, Section 1) says that federal law “shall be the supreme Law of the Land.”

Legal experts say that under this legal framework, states play a very limited role in immigration policy. For example, individual states cannot pass their own immigration laws. And while state officials may apprehend and detain illegal immigrants for various reasons, they cannot deport them on their own.

But as the illegal immigrant population continued to grow, it sparked an effort to reform the nation’s immigration laws. In 2005, the House of Representatives championed a bill which would address illegal immigration by better enforcing the nation’s immigration laws and by tightening security along the nation’s borders. On the other hand, the Senate supported legislation in 2006 which offered a path to citizenship for illegal immigrants and also created a guest worker program, among other provisions. But neither side was able to reconcile the differences between their bills, and efforts to reform the nation’s immigration laws collapsed.

In response, many state legislatures began adopting their own measures to curb illegal immigration. In 2008, state legislatures passed over 200 such laws. But analysts point out that these various laws did not give any legal authority to states to administer and enforce federal immigration laws. Some, for instance, simply denied driver’s licenses to illegal immigrants while others facilitated assimilation through English language classes.

But in the case of SB 1070, opponents have voiced strong concerns. For example, various human rights groups claim that the Arizona law will require law enforcement officials to engage in racial profiling, a widely-denounced practice where they target people for criminal investigation based primarily on their race, color, descent, or national or ethnic origin rather than relying on actual evidence of wrongdoing.

In the case of Arizona, say critics, the only way for police officers to form any reasonable suspicion of whether a person is in the United States illegally is by looking at their appearance. “Police will have little to go on other than an individual’s appearance when choosing whom to stop,” said Human Rights Watch in a statement. Another group, Amnesty International, added: “What other factors will the police have in front of them besides a person’s skin color, accent, or other ethnic or national feature when they decide to ask a person for his papers to prove his lawful immigration status?”

In addition to this concern, government officials say that the law could hurt the nation’s diplomatic and trade relations with Mexico. Mexican President Felipe Calderon and former Mexican President Vicente Fox have voiced their opposition to the Arizona law, saying that tourists and legal residents from Latin America could face police harassment. They called on Mexicans to reconsider their travel plans to Arizona.

Furthermore, U.S. officials fear that the law will divert resources from other areas of law enforcement. Secretary of Homeland Security Janet Napolitano (who once served as governor of Arizona) worried that federal immigration officers could spend much of their time verifying the immigration status of individuals detained by Arizona police officers. “We have some deep concerns with the law from a law enforcement perspective because we believe it will detract from and siphon resources that we need to focus on those in the country illegally who are . . . committing the most serious crimes,” she said.

Despite these arguments, a majority of Americans support SB 1070. According to a recent Rasmussen poll, 70 percent of Arizona residents supported the law. In a CBS news poll, 57 percent of all Americans in July 2010 said that SB 1070’s approach in addressing illegal immigration was “about right.” Also, as of June 2010, the state legislatures in five states – Michigan, Minnesota, Pennsylvania, Rhode Island, and South Carolina – had introduced similar bills.

The law was supposed to come into effect on July 29, 2010, but a federal district court temporarily blocked Arizona from enforcing it after the federal government had filed a lawsuit. In its complaint, federal officials said that federal immigration law pre-empted SB 1070, and that the Arizona law – if implemented – would violate the Supremacy Clause of the Constitution. “The Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country,” it stated. One Justice Department official, Edwin Kneedler, said that “the regulation of immigrants is unquestionably, exclusively, a federal power.” (Analysts point out that the government did not claim that SB 1070 would promote racial profiling or racial discrimination.)

A lawyer representing Arizona, John J. Bouma, claimed that SB 1070 simply mirrored federal law. He also argued that local law enforcement officials had a right to contact federal authorities to verify the immigration status of detained individuals even if doing so created more work for them. The state said that it would appeal the judge’s ruling.

Along with violating domestic law, many analysts have argued that the Arizona law violates the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (or ICERD), an international treaty prohibiting signatory nations from deliberately or unintentionally carrying out acts of racial discrimination, which it defines as denying certain rights to people (including non-citizens) within their borders because of their race, color, descent, or national or ethnic origin.

Specifically, under Article 2(1)(a), a nation must ensure that its officials and institutions do not practice racial discrimination, and also pass domestic laws which prohibit racial discrimination.
by any persons, groups, or organizations. Under Article 2(1)(c), they must amend or revoke existing national and local laws which create or perpetuate racial discrimination. Furthermore, under Article 5, a nation must equally protect certain rights for everyone within its borders – including political rights, civil rights, the right to marriage, the right to own property, and the right to housing and education, among many others – without taking into account their race, color, or national or ethnic origin.

An expert group called the U.N. Committee on the Elimination of Racial Discrimination (or Committee) oversees the implementation of this treaty and requires nations to send periodic reports describing how they are complying with its provisions. They also issue interpretations of particular treaty provisions called "General Recommendations." The United States ratified ICERD in 1994, and must comply with its obligations under that treaty, say experts.

Critics have claimed that SB 1070 promotes racial profiling, and that ICERD prohibits that practice because it discriminates against people mostly on the basis on their race, color, descent, or national or ethnic origin. To reverse this violation, various groups have argued that Article 2(1)(c) calls on Arizona to repeal those provisions in SB 1070 which will force its officials to engage in racial profiling.

Opponents also point out that, in 2005, the Committee had issued General Recommendation (XXXI) which seems to discourage the use or racial profiling. "States parties should take the necessary steps to prevent questioning, arrests, and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion," it said.

In 2001, then-President George W. Bush described racial profiling as "wrong." The then-Attorney General, John Ashcroft, added that "using race . . . as a proxy for potential criminal behavior is unconstitutional . . ." Despite these statements, the American Civil Liberties Union (or ACLU) said in a June 2009 report that "the practice of racial profiling by members of law enforcement at the federal, state, and local levels remains a widespread and pervasive problem throughout the United States . . ." There are currently no federal statutes which ban outright the use of race and similar factors during law enforcement activities. In a June 2009 report, the ACLU added that "only half of U.S. states have enacted legislation" which addresses the use of racial profiling.

On the other hand, other legal analysts have argued that the Arizona law does not, on its face, violate ICERD. They point out that the text of SB 1070 itself prohibits law enforcement officials from using race as a basis to form reasonable suspicion on whether an individual is legally in the country.

Others believe that ICERD may allow governments – in the administration of its immigration laws – to target people on the basis of, say, certain national groups. They note that Article 1.2 says: "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party . . . between citizens and non-citizens," meaning that a country cannot be accused of violating ICERD simply because it treats citizens and non-citizens differently. If a country had to treat citizens and non-citizens in the exact same manner, then it would never be unable to enforce its immigration laws. Why? Applying those laws only in the case of immigrants would open that country to accusations that it was making a distinction based on a person's national origin. But immigration laws, say analysts, logically apply only to non-citizens.

The next article (1.3) adds that ICERD’s provisions should not be interpreted in a way which will affect how a nation administers its immigration laws as long as those laws "do not discriminate against any particular nationality." During the administration of immigration laws, a government must logically make distinctions based on, say, a person's national origin, say some commentators. So just because law enforcement officials in Arizona detain many illegal aliens who are Mexican nationals does not necessarily prove that those officials had intended to target them specifically. It just so happens that a majority of illegal aliens in Arizona are Mexican nationals simply because that state shares a border with Mexico, said Prof. Julian Ku of Hofstra Law School. But as long as the Arizona law does not target a specific nationality, then people shouldn't interpret ICERD in a way which will prevent that state from implementing its law.

In response, other analysts such as Peter Spiro of Temple Law School point out that the Committee in 2004 had issued an interpretation of ICERD (called "General Recommendation XXX on Discrimination Against Non Citizens") which, they say, limits the extent to which nations may discriminate against non-citizens under Articles 1.2 and 1.3 in immigration cases. For example, Section II (7) of General Recommendation XXX says that nations must "ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status . . . ."

They also point out that Section II (9) of General Recommendation XXX says that nations must "ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin." So, goes the argument, even if Arizona officials do not intentionally target individuals on, say, the basis of national origin (such as detaining people who just all happen to be Mexican nationals), such a policy would still have the same effect of intentionally discriminating against people on the basis of national origin, which Section II (9) prohibits. And in a similar fashion, Article VI (25) of General Recommendation XXX adds that nations must "ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party do not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin . . . ."

In May 2010, a group of UN experts who address the human rights of migrants, indigenous people, and minorities issued a statement voicing their concern over the Arizona law, including its "vague standards and sweeping language," which they said raised "serious doubts about the law's compatibility with relevant international human rights treaties to which the United States is a party." They called on Arizona and federal officials to take all steps necessary to "ensure that the immigration law is in line with international human rights standards."

Even before Arizona had passed its law, observers note that other experts and forums had issued statements calling on the United States and other nations to discourage the use of racial profiling. For instance, an independent UN expert (called the Special Rapporteur on Contemporary Forms of Racism, Racial
Discrimination, Xenophobia, and Related Intolerance) issued a report in April 2009 where he specifically recommended that the U.S. government “clarify to law enforcement officials the obligation of equal treatment and, in particular, the prohibition of racial profiling.”

Others point out that a declaration issued in September 2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance called on nations “to design, implement and enforce effective measures to eliminate the phenomenon popularly known as ‘racial profiling’ . . . for determining whether an individual is engaged in criminal activity.”

The International Court of Justice (or ICJ) issued a highly-anticipated ruling on whether Kosovo’s declaration in 2008 proclaiming itself independent from Serbia conformed to international law. Kosovo’s controversial act provoked a heated debate on whether territories have a general right under international law to declare independence and then secede from a certain country, among other issues. But legal analysts say that the ICJ’s ruling created many more questions than it answered.

In 1990, Kosovo (a province in Serbia) began a guerrilla insurgency for greater independence. Serbia responded with a violent crackdown to protect what it called its “medieval heartland.” Political analysts said that while Kosovo was legally a part of Serbia, it had exercised some measure of autonomy. Kosovo had, for instance, its own assembly, which Serbia later dissolved to suppress any further moves toward independence. (Ethnic Albanians make up over 90 percent of Kosovo’s population. The remaining 10 percent are Serbian.)

NATO intervened militarily in 1999 to stop the fighting, which, by this time, had killed between 5,000 to 11,000 people while displacing 800,000 from their homes, according to various and conflicting media sources. The UN Security Council then passed Resolution 1244 (1999) which placed Kosovo under the control of the United Nations Interim Administration Mission in Kosovo (or UNMIK) – alongside tens of thousands of NATO troops – and also gave UNMIK the authority to create provisional institutions of self-governance in Kosovo. Adding that “the UN was never meant to stay in Kosovo forever,” officials pointed out that Resolution 1244 also required UNMIK to facilitate “a political process designed to determine Kosovo’s future status.”

Under the auspices of the UN, Serbia and Kosovo began negotiations in 2005 to determine the province’s political future. While Serbian authorities had offered Kosovo more autonomy, leaders in Kosovo insisted on full independence. A UN special envoy, Martti Ahtisaari, later submitted a comprehensive plan which recommended that “Kosovo become independent, subject to a period of international supervision,” but the UN Security Council failed to endorse it due to disagreement among its members.

After further negotiations failed to produce any progress, Kosovo unilaterally declared independence in February 2008. It passed a constitution in April 2008, and then held its first municipal elections in November 2009.

Britain, France, Germany, and the United States (among other nations) quickly recognized Kosovo as an independent state. In justifying their decision, supporters argued that Resolution 1244 did not set any limits on how Kosovo’s final legal status would be determined. They said that it called only for “a political solution to the Kosovo crisis,” and did not explicitly rule out independence. If the UN did want to prohibit Kosovo from declaring independence unilaterally, then Resolution 1244 would have used clearer and more unambiguous language, added supporters.

But many other nations, including Brazil, China, India, Spain, and Russia, had contested Kosovo’s declaration of independence. Resolution 1244, they said, called only for “substantial autonomy and meaningful self-administration for Kosovo,” and did not explicitly mention independence. So any such move would violate international law (as embodied in Resolution 1244). In addition, they argued that a permanent settlement of Kosovo’s final political status required the agreement of all the parties involved, especially Serbia. Accordingly, this would prohibit any unilateral declarations of independence. “The term ‘settlement’ by definition excludes solutions imposed unilaterally,” said legal expert Marko Milanovic in summarizing arguments made by Serbia, for instance.

High-ranking Serbian officials also argued that Article 2.4 of the UN Charter calls on member states to respect the territorial integrity of other members, and that the “international recognition of Kosovo’s independence risked undermining the sovereignty and territorial integrity of UN members.” Added the Serbian foreign minister: “The first and foremost consideration for any democratic government in the world is the preservation of its own sovereignty and territorial integrity.” Moreover, these officials claimed that Kosovo’s declaration would fan secessionist movements in other parts of the world. (Many of the nations opposing Kosovo’s independence, analysts pointed out, have active secessionist movements.)

In October 2008, the UN General Assembly passed a resolution (A/RES/63/3) which called on the ICJ to examine Kosovo’s declaration of independence. (As the main judicial body of the UN, the ICJ – popularly known as the World Court – settles disputes only among UN member states on most matters concerning international law by issuing non-binding advisory opinions. The ICJ is separate and different from other international judicial bodies such as the International Criminal Court and the European Court of Human Rights.) Specifically, the General Assembly asked the ICJ to answer the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

In July 2010, the ICJ issued a 10-4 decision (along with one abstention) in favor of Kosovo. How did it determine whether the declaration of independence was “in accordance with international law”? In its ruling, the ICJ explained that, in order to answer this question, it had to determine only whether the declaration violated any general rules of international law such as those embodied by practices carried out by nations, and also those found in the UN Charter and resolutions issued by the Security Council.
For instance, under its analysis, the ICJ pointed out that many territories in the eighteenth, nineteenth, and twentieth centuries had declared independence, and that in none of these cases did “the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law.” It added that, during the second half of the twentieth century, many territories had declared independence by citing a right to self-determination, and that the practice of states in these particular cases also did not lead to “the emergence in international law of a new rule prohibiting the making of a declaration of independence . . .”

In addition, the ruling said that the obligation of one nation to respect the territorial integrity of another nation (as embodied in Article 2.4 of the UN Charter) applied only to relations between actual states and not territories within these states.

Furthermore, the ICJ determined that past Security Council resolutions did not generally prohibit unilateral declarations of independence. In fact, in those instances where the Security Council did pass resolutions addressing certain declarations of independence issued by various territories, it did so because such declarations were “connected with the unlawful use of force or other egregious violations of norms of general international law.”

Taken as a whole, because these general rules of international law did not seem to prohibitions of declarations of independence, the ICJ concluded that Kosovo’s declaration was “in accordance with international law.” (The decision itself did not use the terms “legal” or “illegal” to describe Kosovo’s declaration.)

But neither did the ruling say that the general rules of international law had given Kosovo, for example, an actual right to declare independence. The ICJ had anticipated that governments around the world – after reading its decision – would ask on what basis Kosovo can issue such a declaration in the first place. But the ICJ refused to address this issue. Although it determined that the general rules of international law did not prohibit a territory from issuing declarations of independence, the ruling also stated that the ICJ did not (in turn) have to determine whether such rules gave Kosovo an actual right to declare independence or on what basis it can issue a declaration. Addressing such issues, said the ICJ, was beyond the scope of the General Assembly’s original question, adding that “it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred to it.”

The ICJ also refused to address other issues (such as deciding whether Kosovo was now an official state, whether other nations may now validly recognize Kosovo as an independent state, and the extent of the right to self-determination), saying that they, too, were beyond the scope of the General Assembly’s original question. Legal experts say that there is currently no formal international agreement regulating when a territory may secede and declare independence from another sovereign entity. They also note that there is no international treaty or even a broad agreement on when countries may recognize the government (or even statehood) of another territory. (In recognizing Kosovo in 2008, the president of the United States had simply sent a letter to that territory, stating: “On behalf of the American people, I hereby recognize Kosovo as an independent and sovereign state.”)

After determining that Kosovo’s declaration did not violate general rules of international law, the ICJ also examined whether Resolution 1244 itself prohibited Kosovo from issuing a declaration of independence. The ICJ’s decision stated that the main purpose of Resolution 1244 and its various provisions was to establish a temporary legal regime which would supersede Serbian authority in an effort to bring stability and public order to an area which was beset by a grave humanitarian crisis.

On the other hand, the ICJ said that the resolution did not contain or even imply any language which prohibited Kosovo from declaring independence. For instance, the resolution did not make “any definitive determination on final status issues,” said the ruling, which also determined that the “Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.” Given these findings, the ICJ concluded that Kosovo’s declaration of independence did not violate Resolution 1244. But, at the same time, the ICJ did not say that Resolution 1244 gave Kosovo an actual right or provided a basis to declare independence. In fact, it did not address these issues at all.

In his dissent, Judge Bruno Simma criticized the majority decision, arguing that its interpretation of the General Assembly’s original question – where it decided only to determine whether the general rules of international law prohibited Kosovo’s declaration – continued “an outdated view of international law” where global tribunals generally concluded that “everything which is not expressly prohibited carries with it the same colour of legality.” Instead, he said that “the General Assembly’s request [deserved] a more comprehensive answer, assessing both permissive and prohibitive rules of international law.”

After the ICJ’s ruling, Serbian president Boris Tadic declared, “Serbia will never recognize the unilaterally proclaimed independence of Kosovo.” Both China and Russia continued to oppose Kosovo’s declaration of independence. “China firmly believes that the respect of national sovereignty and territorial integrity is the basic principle of international law,” stated a spokesperson for China’s ministry of foreign affairs while Russia said: “We believe that the solution to the Kosovo issue lies only in the continuation of negotiations between interested parties . . .”

Several officials believe that the ICJ’s decision will not spur secessionist movements around the world to declare independence or use the decision as a precedent in furthering their causes. They note, for example, that the ruling applied only to Kosovo and its unique factual circumstances. “Every declaration of independence has its own character,” said Harold Koh, the top legal advisor of the U.S. Department of State. “Every declaration has to win on its own political legitimacy.”

But many others believe otherwise, arguing that secessionist groups will use the ICJ decision to bolster their causes even though it concerns only Kosovo. In an interview, Professor James

While Kosovo did not violate international law by declaring independence from Serbia in 2008, the International Court of Justice also said that international law did not give Kosovo the explicit right to do so.
The crime of aggression on the slow road to becoming a crime

In a major development, the member nations of the International Criminal Court (or ICC) recently announced that they had reached an agreement where that tribunal would have the ability to prosecute high-level government officials and even world leaders for committing what it calls the “crime of aggression.” But analysts note that several procedural hurdles will delay the implementation of the agreement for what could be many, many years. Also, some nations worry that prosecuting the crime of aggression could become so politicized that doing so will threaten the legitimacy of the ICC itself.

As the world’s only permanent criminal tribunal, the International Criminal Court (or ICC) – based in The Hague – is responsible for prosecuting individuals (even state leaders) for acts of genocide, war crimes, and crimes against humanity. Currently, 114 nations are States Parties to the 1998 Rome Statute of the International Criminal Court (or Rome Statute), which is the international treaty creating the ICC. It came into force on July 1, 2002, and covers criminal acts occurring after that date. Nations which did not sign the Rome Statute include China, India, Russia, and the United States.

Legal experts describe the ICC as a “court of last resort” because it will prosecute individuals only when a particular member state is unable or unwilling to do so. For example, after a major civil conflict, a nation’s legal system may lack the ability to carry out an effective prosecution. In other cases, a country may – for political reasons – refuse to prosecute an individual or simply carry out a half-hearted investigation, arguing that he had committed no wrongdoing. In these cases, the ICC may exercise its jurisdiction to prosecute individuals. (In past conflicts, many governments had refused to prosecute wrongdoing, which perpetuated the belief among some national leaders that they may carry out alleged atrocities with impunity, say analysts.)

The ICC does not have the authority to prosecute individuals from non-signatory states. But, under the Rome Statute, the UN Security Council may refer a specific case to the ICC for prosecution, even if a nation where the atrocities occurred had not signed the Rome Statute.

The ICC is not related to the International Court of Justice, a separate tribunal – also based in The Hague – which adjudicates non-criminal cases between governments. It is also distinct from the Strasbourg-based European Court of Human Rights. Analysts further point out that the ICC is separate from ad hoc tribunals established by the United Nations to prosecute criminal offenses carried out in specific conflicts such as those in Rwanda and the former Yugoslavia. (The UN will dissolve these temporary tribunals once they complete their work.)

In addition to the previously mentioned crimes, the ICC has jurisdiction to prosecute the crime of aggression. But at the time of its adoption, the Rome Statute neither defined that term nor did it say under what circumstances the ICC may begin a prosecution of that crime. Instead, it stated that the ICC would have jurisdiction over the crime of aggression once the States Parties adopted a definition.

Even before the ICC addressed crimes of aggression, the UN General Assembly in 1974 adopted Resolution 3314(XXIX), which defined aggression as “the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.” It also listed several acts which would be considered aggression, including the invasion or military occupation by the armed forces of one State upon another, the bombardment or use of weapons by one state against another, and the blockade of the ports of one state by the armed forces of another, among others.

Legal analysts and critics have long criticized the resolution. For example, they point out that the resolution is not legally binding, meaning that nations don’t have any legal obligation to adhere to its provisions. In addition, while the resolution defines “aggression,” it does not criminalize such acts. Furthermore, critics say that the resolution does not provide any criteria to determine whether a nation had actually carried out aggression against another country or specify who would make such a determination. Moreover, the resolution implies that only a “state” (i.e., a government as a whole) rather than individuals may be viewed as an aggressor.

Recently, the States Parties gathered in Kampala, Uganda (in May and June 2010) for a first-ever conference to review the effectiveness of the Rome Statute and also to consider amendments to the agreement itself. (Article 123 of the Rome Statute requires them to hold a review conference every seven years.) The conference included non-parties to the Rome Statute, such as the United States and Russia, as well as representatives.
from civil society organizations.

The States Parties concluded the review conference by unanimously adopting several resolutions amending the Rome Statute (not all of which come into effect automatically). For instance, Resolution RC/Res. 1 reaffirms the principal that the ICC is a “court of last resort” which places primary responsibility on the States Parties themselves to prosecute “the most serious crimes of international concern.”

Resolution RC/Res. 2 calls on States to implement the provisions of the Rome Statute requiring them to ensure the security of victims who testify at the ICC and also to provide counseling services. It further calls on nations to ensure that victims know of their right to participate in trials and to seek reparations. (Under Article 97, experts will assess reparations according to the extent of damages, loss, or injury suffered by victims, which will then be payable through the ICC’s Trust Fund for Victims.)

To exercise its power to prosecute officials and national leaders for carrying out crimes of aggression, the International Criminal Court must wait several more years and clear many procedural hurdles.

A third resolution, RC/Res. 3, asks for broader participation by states to imprison convicted individuals in their domestic prison facilities. Analysts say that many countries are reluctant to hold such prisoners, worrying that they might apply for asylum once they complete their sentences.

A fourth resolution, RC/Res. 4, left intact Article 124, which allows a States Party to opt-out from the ICC’s jurisdiction in prosecuting war crimes for a period of seven years after it ratifies the Rome Statute. Analysts note that Article 120 prohibits any reservations to the Rome Statute – that is to say, a nation must immediately accept the ICC’s jurisdiction for all of the crimes listed in the Rome Statute once it ratifies that agreement – but that Article 124 provides the only exception. Human rights groups such as Amnesty International have called on the States Parties to delete Article 124, arguing that it gives nations a “license to kill” in the area of war crimes.

But supporters of the provision claim it serves as a practical compromise to convince more and more nations to ratify the Rome Statute, especially nations which have large numbers of troops overseas, and, as a result, whose troops are more vulnerable to charges of committing war crimes. Analysts point out that France and Colombia had both invoked Article 124 immediately after ratifying the Rome Statute.

RC/Res. 6 (concerning crimes of aggression) was the most controversial amendment adopted by the review conference. Rather than creating a new and free-standing article dedicated solely to the “crime of aggression,” this resolution attached a new provision called “Article 8 bis (Crime of Aggression)” onto Article 8, which deals with war crimes. (Article 6 addresses genocide, and Article 7 concerns crimes against humanity.)

Article 8 bis defines acts of aggression in the same exact way as UN Resolution 3314 (XXIX) and also lists the same examples of aggression. But, unlike the UN resolution, Article 8 bis addresses crimes of aggression, which it defines as “the planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations.” Analysts note that the definition allows the ICC to hold accountable specific individuals within a state for carrying out acts of aggression.

The Security Council, under RC/Res. 6, has primary responsibility to determine whether an act of aggression had occurred, though (as in the case of the UN resolution) it does not provide any criteria to make such a determination. Still, if the Security Council determines that a specific action constitutes aggression, it may refer the case to the ICC.

To convict a person for the crime of aggression under Article 8 bis, the ICC prosecutor must satisfy many factors. First, he must prove that the person who allegedly committed the crime of aggression had “planned, prepared, initiated, or executed” that act. Second, he must show that the alleged individual had direct control over the political or military action of his nation when it had committed aggression against another state. Third, the prosecutor must establish that the person knew that the use of armed force by his state against another state was inconsistent with the Charter of the UN. Fourth, the prosecutor must show that the “character, gravity, and scale” of the act of aggression constituted a “manifest violation of the UN Charter,” and fifth, that the alleged perpetrator knew that the act violated the UN Charter.

Many have noted that RC/Res. 6 will not come into effect for at least for another seven years. Under the terms of that resolution, the ICC may prosecute only those crimes of aggression committed one year after at least 30 States Parties have ratified RC/Res. 6. In addition, at least two-thirds of States Parties must once again vote to approve the resolution beginning after January 1, 2017. Others also point out that RC/Res. 6 allows States Parties to opt out of the Court’s jurisdiction in prosecuting crimes of aggression.

Although many have applauded the passage of RC/Res. 6, others believe that the ICC should not even have the ability to prosecute crimes of aggression. Critics fear that some nations will call for an ICC investigation of an alleged act of aggression for political reasons (for example, against an adversarial nation), which they say will undermine more support for the ICC, which began to prosecute its first case (not related to the crime of aggression) only a few years ago.

For example, Richard Goldstone – the former prosecutor for the International Criminal Tribunal for the former Yugoslavia – argued that it would have been in the best interest of the ICC to put off this issue until the “ICC is more established institutionally and a broader consensus emerges on the relevant issue.” Also, Human Rights Watch stated that allowing the ICC to prosecute crimes of aggression could damage its role as an “impartial judicial arbiter of international criminal law.” Also, other analysts noted that delegates from non-signatory parties to the Rome Statute (including China, Russia, and the United States) voiced their unease during the review conference, saying that the issue of prosecuting crimes of aggression weakened their support for the ICC.
The Gulf of Mexico oil leak: Any role for international law?

In April 2010, a large explosion on the Deepwater Horizon – an oil rig in the Gulf of Mexico located 52 miles off the coast of Louisiana – killed 11 crew members. As the rig sank into the gulf, it broke a pipe (located nearly a mile below the water’s surface), which then began to spew 40,000 to 60,000 barrels of crude oil into the gulf every day. While many policymakers have called for tighter domestic regulations to reduce the chances of such leaks, others argue that nations must now work collectively to create new international operating standards for offshore and deepwater oil rigs.

Calling it “one of the worst environmental disasters in U.S. history,” the Wall Street Journal, along with many other media outlets, estimated that the leak released a total of 4 to 5 million barrels of oil into the gulf. By July 2010, officials had found more than 4,000 dead or incapacitated birds, sea turtles, and dolphins in the gulf area. The oil leak also caused substantial economic losses. To protect public health, the federal government banned fishing in 36 percent of the gulf area open to exploration and fishing. As a result, the fishing industry – a major employer in the gulf region – lost around $205 million in revenues, said analysts. Fishing in 36 percent of the gulf area open to exploration and fishing. As a result, the fishing industry – a major employer in the gulf region – lost around $205 million in revenues, said analysts.

To contain the oil leak, BP tried unsuccessfully to lower a containment dome over the broken oil pipe. Efforts to pump heavy drilling mud and even debris into the spewing leak also failed. In mid-July (nearly three months after the explosion), BP finally stopped the leak by lowering a cap over the broken pipe. By September 2010, the government declared the oil well “dead” after the company sealed it permanently with cement.

Various U.S. domestic laws call on responsible parties to pay for damages caused by oil leaks. For example, the 1990 Oil Pollution Act requires liable parties to pay cleanup costs. Specifically, 33 U.S.C. § 2702 states that “each responsible party for a vessel or facility from which oil is discharged . . . into or upon navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs . . . .” Analysts reported that BP had already spent $450 million in containing and cleaning up oil in the gulf and along the shoreline one month after the leak began. Clean-up costs could eventually cost billions of dollars, according to some estimates.

The Oil Pollution Act also requires liable parties to provide compensation to those affected by the leak, but currently sets a collective limit of $75 million in damage claims. A group of senators proposed to raise the limit to $10 billion dollars. In the face of intense government and public pressure, BP later created a $20 billion fund to pay damage claims.

Other domestic laws may hold responsible parties liable for other damages caused by the oil leak. The 1918 Migratory Bird Act, for instance, imposes fines up to $500,000 and/or imprisonment for injuries and deaths caused by pollution. The 1973 Endangered Species Act carries penalties up to $50,000 and imprisonment for one year. And the 1972 Clean Water Act imposes a civil fine of $1,100 for every barrel of leaked oil. But if the government determines that gross negligence had caused the spill, the act raises the fine to $4,300 per barrel.

In June 2010, the U.S. Department of Justice announced both civil and criminal investigations to determine the extent of liability in the oil leak, and also to determine if the parties involved committed any wrongdoing. While the explosion occurred on a single oil rig, many companies were involved in its operation. Transocean, which describes itself as “the world’s largest offshore drilling contractor,” owned and operated the rig, but leased it to London-based BP, currently the largest producer of oil and gas in the United States. Another company, Halliburton – which provides products and services to energy companies – carried out other components of the drilling operation.

Analysts say that the explosion of the Deepwater Horizon revealed many shortcomings in offshore and deepwater drilling operations. For example, they now generally agree that BP (and the oil industry in general) did not have a workable plan to contain deepwater oil leaks. During Congressional hearings, lawmakers chided oil company executives for having what they called “cookie cutter” plans in responding to deepwater oil leaks. A spokesman for BP, Scott Dean, acknowledged that the lessons from the spill would “change how the industry operates offshore and responds to oil spills.”

In addition, the oil leak raised questions concerning safety operations on deepwater oil rigs. Prior to the leak, the Minerals Management Service (or MMS) – which was part of the U.S. Department of the Interior – oversaw and regulated the safety of offshore oil drilling activities (covering exploration to drilling to storage of oil) under guidelines developed by the American Petroleum Institute, the national trade association representing all aspects of America’s oil and gas industry.

But critics believe that the oil industry largely self-policing its offshore drilling operations, and that such self-regulation had led to what some believe was a greater emphasis on oil production over safety. In July 2010, the New York Times obtained a confidential
report commissioned by Transocean which said that workers on the Deepwater Horizon expressed concerns about safety practices on the rig in the weeks prior to the explosion. For example, some stated that key safety equipment had not been fully inspected for 10 years. Others said that drilling priorities and profits took precedence over maintenance, and that they did not express these concerns for fear of losing their jobs.

Furthermore, critics cited potential conflicts-of-interest where government officials responsible for safety inspections could be swayed by their concurrent role of collecting oil royalties. (MMS also leased federally-owned lands – such as the seabed floor within U.S. jurisdiction – to private companies, and then collected royalties when they extracted oil and other natural resources.) Senator Barbara Boxer, chairwoman of the Environmental and Public Works Committee, said: “Clearly, stronger, more independent oversight of oil company activities is needed.”

In the wake of the explosion, the Secretary of the Interior, Ken Salazar, issued Order No. 3299, which reorganized MMS into three separate offices – the Bureau of Ocean Energy Management, the Bureau of Safety and Environmental Enforcement, and the Office of Natural Resources Revenue – to avoid conflicts-of-interest and also to improve safety standards on offshore oil rig operations.

While the United States sorted through these problems and issues, many observers asked what role international law would play in addressing oil leaks not only in the Gulf of Mexico, but around the world. Many experts have cited the 1982 United Nations Convention on the Law of the Sea (or LOSC), which is the most comprehensive international agreement governing various aspects of the world’s oceans. Part 5, for instance, allows countries to establish a 200-mile “exclusive economic zone” from its shoreline where it has exclusive rights to exploit, develop, manage, and conserve all natural resources including fish, oil, natural gas, and minerals found on the ocean floor.

Part XII (“Protection and Preservation of the Marine Environment”) addresses environmental protection, but the negotiators of the LOSC left the terms broad and vague, say legal experts. Article 192, for example, says that “states have the obligation to protect and preserve the marine environment.” But it does not say exactly how nations must address, for instance, an oil spill or any other specific type of pollution occurring in coastal areas. Rather, under Article 194, it broadly calls on nations to “take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce, and control pollution of the marine environment from any source.”

The LOSC also calls on states, under Article 197, to address environmental pollution in the seas, though it does not provide specific responsibilities. It simply says that “states shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards, and recommended practices and procedures.”

As a result, experts note that the global community had not started any collective plans to respond aggressively to deepwater oil leaks. Rather, individual nations and companies have taken their own initiatives. For example, in July 2010, oil companies such as ConocoPhillips, ExxonMobil, Royal Dutch Shell, and Chevron announced the formation of a “rapid response system” of vessels which they claim will reach underwater oil leaks within 24 hours, contain such leaks occurring up to 10,000 feet below the ocean surface, and recapture up to 100,000 barrels of oil a day. (This plan is not considered an international agreement between sovereign nations.) The companies stated that they would need at least six months to set up this system, and also claimed it would be adaptable to different conditions.

In October 2010, the European Union announced that it would propose “a single new piece of specific legislation for offshore oil and gas activities” for all of its member nations after a review revealed a “patchwork of different safety regimes.” Earlier that month, the European Parliament had adopted a non-binding resolution calling on European nations to “tighten up rules governing the safety of oil exploration and compensation in the event of an [oil] spill.”

Experts such as Caitlyn Antrim (who is the Executive Director of the Rule of Law Committee for the Oceans) also point out that current international treaties don’t address offshore oil rig operations. There is no “set of guidelines for behavior and operation of offshore activities,” she said. But Antrim believes that the world community will need to develop such standards because the oil industry has increased offshore and deepwater oil drilling, which are now the main sources of global oil production, according to PennEnergy, a news source for the oil and gas industry. During the 1960s, offshore rigs extracted one million barrels of oil per day. Today, they are pumping out 24 million barrels per day.

Experts believe that as the number of offshore drilling rigs increase, so do the chances of deepwater oil leaks. (There are currently 1,234 exploration rigs in the world – Deepwater Horizon was one of those exploration rigs – located in areas such as the North Sea, Gulf of Mexico, and off the coasts of Brazil, Venezuela, and West Africa, and also in the Persian Gulf.) The Deepwater Horizon represented a single leak, but with thousands of more rigs and platforms running worldwide, observers say that the international community will need to establish international standards to govern this specific activity.

Antrim also believes that, as the polar ice caps melt in the Arctic region (which experts view as the next potential area for growth in world oil production), safely issues concerning deepwater drilling will come to the forefront as nations compete with one another to claim and then extract oil in that particular area of the world. And containing oil leaks in the Arctic, said Antrim, poses special problems. “In the cold waters of the Arctic, it’s very hard to predict what a spill would do,” she said. “Working in waters that are near the freezing point, at[1] great depth, and having possible surface temperatures far below freezing makes a challenge for cleanup that would be much more difficult than in the warm waters of the Gulf, and would be one that we are currently ill prepared to deal with.”

Some hope that the Gulf of Mexico oil leak will push nations to develop a specific body of international law regulating offshore oil rig activities. James Harrison of the University of Edinburgh School of Law commented that “it often takes a disaster to prompt international regulation.”
More protection for salamanders, but not for coral, polar bears, sharks, tunas

A recent conference, the world community voted to prohibit the international commercial trade of several animal and plant species threatened with extinction, including salamanders, but rejected similar protection for bluefin tuna, corals, polar bears, and certain shark species. While conservation groups and others welcomed these developments, they criticized participating nations for basing their votes on what they believed were political and economic rather than scientific reasons.

Under a global treaty called the Convention on International Trade in Endangered Species of Wild Fauna and Flora (better known by its acronym CITES, which is pronounced cite-ees), signatory nations must gather in a conference at least once every two years where they regulate the global commerce in certain plant and animal species, and also review measures to preserve their survival and prevent their over-exploitation. These conferences have led to ground-breaking decisions protecting many species from extinction such as African elephants which people hunt for their ivory tusks. CITES held its most recent conference in March 2010 in Doha, Qatar.

International commerce involves a wide variety of goods. While much of the public is familiar with trade in popular goods such as cars, electronics, furniture, publications, toys, and steel (among countless others), observers point out that nations also trade heavily in live plants and animals, and also products derived from those species, including alligator shoes and purses, elephant ivory jewelry, turtle and shark fin soup, various kinds of precious timbers such as mahogany, and ornamental plants (including orchids), according to various groups. Every year, nations trade over 350 million plant and animal specimens worth billions of dollars, said administrators for CITES.

But as the international trade of plant and animals species increased, many nations worried that the lack of formal regulations could threaten certain species with extinction. These concerns led to negotiations which created CITES. This agreement does not completely ban all international commercial trade in plant and animal species. In fact, CITES officials say that the agreement recognizes that such trade “may be beneficial both to conservation and to the livelihoods of local people.”

Instead, using a set of criteria, participating nations decide how to protect only those plant and animal species whose continued trade could threaten or already threatens their survival. Then they vote to place these particular species – “whether they are traded as live specimens, fur coats, or dried herbs” – in one of three appendices:

- Species threatened with extinction are placed on Appendix I, and nations are prohibited from trading them commercially (although there are certain exceptions, including use in scientific research). Appendix I currently lists a total of 892 species, including all of the great apes, certain species of crocodiles, all sea turtles, tigers, specific orchids, pitcher plants, and certain whales.
- On the other hand, Appendix II is reserved for those species whose continued international commercial trade could affect their long-term viability, but whose survival is not yet endangered. CITES allows nations to continue the commercial trade in these species, but calls on them to implement strict controls (such as export quotas) so that this trade is carried out in a sustainable manner. Appendix II currently contains a total of 33,033 species, including certain black bears, iguanas, all species of sturgeon (the source of caviar), and also Pacific Coast mahogany. Restricting trade of species listed in Appendices I and II will allow their numbers to recover, say experts.
- An individual country may decide, on its own, to protect certain species, and ask other CITES nations to help in that effort. Such species are placed in Appendix III, which contains a total of 161 species, including certain sloths, civets, and bigleaf mahogany.

CITES requires the approval of at least two-thirds of all member nations to add or remove certain species from a particular appendix. Nations may also vote to move species from one appendix to another. (They make these various changes by adopting amendments.) Unlike Appendices I and II, nations may unilaterally add or remove species from Appendix III at any time.

To implement their obligations under CITES, each participating nation must create a domestic licensing system which will grant or deny permission to people or groups who wish to import or export those plant and animal species (and products derived from them) listed in the appendices. But given the large magnitude of trade in and demand for wildlife products, experts say that a black market skirts these controls. In October 2009, the president of the World Bank, Robert Zoellick, said that “the illegal trade in wildlife is estimated at over 10 billion dollars (annually) across Asia – second only to weapons and drug smuggling.”

CITES – which came into force in 1975, and whose provisions are legally binding on its 175 participating nations – is just one of many international environmental agreements, each of which has a different purpose and, in most cases, are not related to each other. There are, for instance, separate agreements regulating the emission of greenhouse gases, deforestation, and the use of oceans, among many other areas of concern.

During the most recent CITES conference held in Doha in March 2010, member states submitted and voted on a wide variety of proposals. Some of the more controversial ones involved:

**Bluefin tuna:** With the support of the United States, Monaco had proposed the complete ban in the international trade of bluefin tuna by placing that species in Appendix I until its stocks have had time to recover. It cited, for instance, a study showing that bluefin tuna stocks have declined nearly 75 percent in the eastern Atlantic over the last 50 years, and over 80 percent in the western Atlantic over a 38-year period.

On the other hand, nations such as Japan, and several countries in Africa, Europe, and Latin America – many of which have large tuna-fishing fleets – had opposed any restrictions. (Market analysts note that a single bluefin tuna can command prices of
environmental group, Oceana, to say that “vanity has once again in favor, 59 against, and 10 abstained, which prompted an livelihood, according to the could affect coastal communities which depend on them for their harvesting of pink and red corals said. But opponents said that the evidence did not sway them, red corals on Appendix II would help their colonies recover, they “coral harvests have declined 60 to 80 percent.” Placing pink and harvesting practices, Sweden and the United States claimed that to place these particular species of corals on Appendix II, which would have required governments to monitor their harvests in a way to promote their survival. Analysts note that fishing boats capture up to 73 million sharks every year and cut off only their fins and discard the rest of the shark, which dies afterwards. Unless CITES calls on nations to manage more strictly their catches of hammerhead sharks, this species is “likely to become threatened with extinction,” said the two nations. But the proposal failed to garner a two-thirds majority – 75 voted in favor, 45 against, and 14 abstained. Pink and red corals: Sweden and the United States proposed to place these particular species of corals on Appendix II, which would have required governments to monitor their harvests more strictly. Both countries argued that these corals have been “intensively harvested to supply international demand for jewelry and other products,” and that “new stocks have been rapidly exhausted shortly after their discovery.” The proposal also cited evidence showing that many nations indiscriminately dredged and trawled large coral colonies, including corals which have not reached maturity. Given the slow growth of coral colonies combined with recent harvesting practices, Sweden and the United States claimed that “coral harvests have declined 60 to 80 percent.” Placing pink and red corals on Appendix II would help their colonies recover, they said. But opponents said that the evidence did not sway them, and noted that curbing the harvesting of pink and red corals could affect coastal communities which depend on them for their livelihood, according to the UN News Service. The proposal failed to garner a two-thirds majority – 64 voted in favor, 59 against, and 10 abstained, which prompted an environmental group, Oceana, to say that “vanity has once again trumped conservation.”

Hammerhead sharks: The United States and Palau proposed to place several species of hammerhead sharks on Appendix II because they have been “over-exploited for [their] fins,” noting their numbers have declined by around 20 percent, and also by 98 percent in some regions. Placing them in Appendix II would have required governments to manage catches of hammerhead sharks in a way to promote their survival. Analysts note that fishing boats capture up to 73 million sharks every year and cut off only their fins and discard the rest of the shark, which dies afterwards. Unless CITES calls on nations to manage more strictly their catches of hammerhead sharks, this species is “likely to become threatened with extinction,” said the two nations. But the proposal failed to garner a two-thirds majority – 75 voted in favor, 45 against, and 14 abstained. Pink and red corals: Sweden and the United States proposed to place these particular species of corals on Appendix II, which would have required governments to monitor their harvests more strictly. Both countries argued that these corals have been “intensively harvested to supply international demand for jewelry and other products,” and that “new stocks have been rapidly exhausted shortly after their discovery.” The proposal also cited evidence showing that many nations indiscriminately dredged and trawled large coral colonies, including corals which have not reached maturity. Given the slow growth of coral colonies combined with recent harvesting practices, Sweden and the United States claimed that “coral harvests have declined 60 to 80 percent.” Placing pink and red corals on Appendix II would help their colonies recover, they said. But opponents said that the evidence did not sway them, and noted that curbing the harvesting of pink and red corals could affect coastal communities which depend on them for their livelihood, according to the UN News Service. The proposal failed to garner a two-thirds majority – 64 voted in favor, 59 against, and 10 abstained, which prompted an environmental group, Oceana, to say that “vanity has once again trumped conservation.”

Ivory trade: Tanzania and Zambia proposed to move the African elephant from Appendix I to Appendix II, arguing that their populations had recovered enough (for example, from 55,000 in 1989 to 137,000 today in Tanzania, according to the media reports) where governments can begin to sell their ivory stocks again, which come from elephant tusks. CITES had completely banned the commercial ivory trade in 1989 so that elephants populations would have time to recover. (But, in later years, it did allow limited “one-time” ivory sales.) But many other African nations – such as Kenya, Congo, and Sierra Leone – warned against such a move, saying that it could encourage poachers to kill more elephants for their tusks. Conservationists claimed that poaching had increased recently, and also noted that the elephant population had declined to around 500,000 today from 1.3 million in 1980. In what the media had described as a victory for elephant conservation efforts, the proposal failed to garner a two-thirds majority – 57 voted in favor, 45 against, and 32 abstained.

Polar bears: Arguing that the polar bear was threatened with extinction, the United States proposed that CITES move that animal from Appendix II to Appendix I, which would have completely banned all international commercial trade in polar bears and products made from them such as pelts. The United States said that the number of goods derived from polar bears had increased in recent years, and that these products eventually made their way to markets in 73 countries. It also said that polar bears would decrease in number further because its primary habitat – sea ice, where they mate and hunt for prey – has declined substantially. But opponents, including Canada, said that “they were not convinced about the conservation benefits” of banning the polar bear trade, and also noted that indigenous populations relied on such trade for their livelihood. Delegates rejected the proposal by a vote of 62 against, 48 in favor, and 11 abstaining.

Salamanders: Iran proposed that CITES place a certain species of salamander (commonly known as the Kaiser’s spotted newt, and which is found only in that nation) on Appendix I, arguing that its population had declined over 80 percent during the last 10 years (mainly due to its trade in international pet markets), and that fewer than 1,000 remain. Iran noted that while it strictly regulated the trade of this species of salamander, other nations did not. Participating nations approved the proposal. (CITES did not provide a vote count.)

While conservationists say that nations should base their support of or opposition to a particular proposal using scientific data and related criteria, political analysts say that nations engage in what has been described as “horse-trading” where one nation provides support for a particular proposal in exchange for support in its areas of interest. Many nations also vote for or against proposals mainly to protect their economic interests. According to the Washington Post, the votes in Doha taken against more protections for marine wildlife “underscored nations’ unwillingness to forgo immediate economic gains from exploiting natural resources, even when these activities are putting pressure and animals under intense pressure.” The next CITES conference will be held in Thailand in 2013.
International Intellectual Property

Will a new agreement finally stop counterfeiting and piracy?

In the ongoing fight against counterfeiting and piracy, a group of nations recently completed negotiations for a global agreement which creates a uniform and much stronger set of standards in enforcing intellectual property (or IP) rights. While many businesses – including those in the fashion, music, movie, and software industries – hope that the new agreement will finally discourage what analysts describe as massive IP infringement occurring across the world, others say that its provisions need further examination to determine their legal consequences.

The U.S. Chamber of Commerce claims that IP infringement drained about $287 billion in revenues (in terms of lost sales, and licensing and royalty fees) from the U.S. economy alone and also led to the loss of 750,000 American jobs. For European nations, a study carried out by TERA Consultants said that IP infringement in 2008 led to losses of $13 billion in revenue and 185,000 jobs. At the global level, a study by the Organization for Economic Cooperation and Development estimated that counterfeiting and piracy operations – which are being dominated by criminal organizations – had deprived businesses of $250 billion in 2007. Consumer advocates also say that counterfeit and pirated goods are often poorly made and may pose health and safety threats to consumers.

Counterfeiting and piracy revolve around the concept of intellectual property, which is often defined as the creation of a person’s mind or the product of his invention. Governments around the world protect such property by giving the creator the exclusive rights to use the product and control its use by others.

Some of these rights include a trademark, which is defined as “a word, phrase, symbol or design that identifies and distinguishes the source of the goods of one party from those of another.” Examples include clothing manufactured by Nike with its trademark swoosh arrow. Another right is a copyright, which “reserves to authors the exclusive control of their ‘writings’ [or original expressions] such as literary, musical, pictorial, and audiovisual works, including computer programs, for a fixed period of time.” If another individual wants to use such a work (such as drawings of Mickey Mouse whose copyright is held by the Walt Disney Company), that person must usually obtain permission from the copyright holder, and – in many instances – pay licensing and royalty fees.

Although the terms piracy and counterfeiting are sometimes used interchangeably, each term has a distinct legal definition. The World Trade Organization (WTO), which is responsible for administering the world trade system, defines pirated goods as “any goods which are copies made without the consent of the copyright holder.” Examples include pirated music CDs, video movies, digital publications, and computer software programs. Those involved in such activities are engaged in what is called “copyright piracy.”

In contrast, the WTO defines counterfeit goods as “any goods bearing, without authorization, a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark.” Examples include counterfeit cigarettes, cosmetics, home electrical appliances, medicines, toys, and even automobile and aircraft parts – all of which use the brand name of the original manufacturer without its permission. Those involved in such activities are engaged in “trademark infringement.”

Currently, an international treaty called the Trade-Related Aspects of Intellectual Property Rights Agreement (or TRIPS), which is administered by the WTO, requires nations to implement minimum standards of protection for and enforcement of a wide range of IP rights, including copyrights, trademarks, patents, and geographical indications, which are names that identify the geographical origin of a product such as Swiss chocolate and Parma ham. It also broadly calls on nations to create domestic procedures to enforce IP rights, give authority to their courts to stop IP infringement, set damages at levels which will deter such activities, and make it a crime for people to carry out IP infringement on a commercial scale.

Despite these provisions, observers note that many countries have still not adopted laws which will punish people involved in copyright piracy and trademark infringement. In other nations, IP infringement leads only to fines which some violators consider a cost to doing business. Also, many courts around the world don’t even have the legal authority to stop IP violations or order the confiscation and destruction of pirated and counterfeit goods. Furthermore, many nations don’t openly publish their IP laws and court decisions concerning the administration on these laws, which analysts say only allows IP infringers to continue their activities. Moreover, many countries will not investigate IP infringement unless a rights holder files a complaint.

In one effort to stop IP infringement, many governments are trying to pass what are popularly known as “three-strikes” laws where either the government or a business will track an individual who is engaging in IP infringement using a computer (such as selling pirated songs on the Internet), and then request that the Internet service provider (or ISP) send a warning to that person each time he engages in illegal activities. After a third warning, the ISP must disconnect that person’s access to the Internet for a specified amount of time. Earlier this year, France implemented its three-strikes law. Other nations are trying to hold ISPs responsible for the illegal activities of their subscribers unless these companies proactively take measures to stop IP infringement.

Given these varying standards and initiatives, piracy and counterfeiting operations move to countries where IP protection and enforcement are lax. Analysts also believe that many nations turn a blind eye on these activities because the revenues earned from the sale of fake goods help to keep their economies afloat. Many nations also lack the resources and political will to protect and enforce IP rights. A 2010 report issued by the Office of the U.S. Trade Representative said, for instance, that China’s IP enforcement regime “remains largely ineffective and non-deterrent.” It described Russia’s delays in implementing stronger IP laws as “particularly troubling,” and also noted that India’s IP enforcement regimes “remains ineffective” at stopping counterfeiting and piracy.
To better enforce IP rights, those nations which dominate IP commerce (including Australia, Canada, members of the European Union, Japan, and the United States) – along with several developing nations such as Jordan and Mexico – began negotiations in 2008 on an Anti-Counterfeiting Trade Agreement (or ACTA), which calls on nations to create much stronger and more detailed domestic standards for enforcing IP rights within their respective jurisdictions.

A new global agreement will require nations to take much stronger measures to protect intellectual property rights, but will not force them to search laptop computers and audio devices at border stations for illegally downloaded goods.

They conducted these talks apart from any international organization, and also excluded those countries which business analysts describe as the world’s most egregious violators of IP rights, including Brazil, China, India, and Russia. (China produced 80 percent of all counterfeit and pirated goods seized in Europe and the United States, according to a 2010 report issued by the Office of the U.S. Trade Representative.) Officials say that these nations had dragged their feet in stopping IP infringement, and argued that including them in the ACTA talks would have given them another chance to do so. “We have tried to raise this issue for several years in [other] multilateral organizations . . . but these attempts were systematically blocked by other countries,” said the EU Commissioner for Trade Karel De Gucht.

After 10 rounds of negotiations, officials released in October 2010 a final draft ACTA text, which would require nations to give courts, law enforcement officials, and even IP rights holders more robust authority and procedures to enforce all of the IP rights listed in the TRIPS agreement. Business associations have generally praised the ACTA, saying that its provisions will harmonize legal and enforcement standards across different jurisdictions which, in turn, will prevent pirates and counterfeiters from moving their operations to nations with weaker standards. The EU Commissioner for Trade described it as a “new global gold standard on [IP] enforcement.”

What exactly do nations have to do under the ACTA? Many provisions mirror sections found in the TRIPS agreement, but include more details. For example:

**Civil enforcement:** One section requires nations to create civil procedures where private groups can ask courts and agencies to protect their rights in IP infringement cases not considered criminal acts. For example, under Chapter Two (Section 2, Article 2.X), courts must have the power to issue orders calling on IP violators to stop their activities, and also to prevent illegal goods from entering the market. In cases where IP infringement activities are “likely to cause irreparable harm to the right holder,” courts may – under Article 2.5 – issue orders to stop the alleged infringer without holding a hearing first. But to prevent IP rights holders from abusing this process, Article 2.5 says that a complaining party must “provide a security or equivalent assurance” (i.e., they must deposit some money).
During civil proceedings, Article 2.2 calls on nations to give their judicial authorities the power to order the infringer to pay damages to the rights holder, including lost profits, but only in cases where an infringer “knowingly or with reasonable grounds to know, engaged in infringing activity.” (Civil penalties don’t include imprisonment.)

The judiciary will also have the authority under Article 2.4 to order IP infringers (“upon a justified request of the right holder”) to provide information concerning other people involved in making pirated and counterfeit goods, and also information regarding “the means of production or distribution channel of such goods . . .”

At the end of these proceedings, civil authorities will have the power under Article 2.3 not only to order the destruction of pirated and counterfeit goods, but also the means predominantly used to make those goods such as factory machinery and computer technology. But critics, such as the Public Knowledge, a public interest group in Washington, DC, fear that this provision could allow IP rights holders to sue the manufacturers of devices used to carry out copyright infringement even if the primary purpose of such devices was not meant to carry out IP infringement.

**Criminal enforcement:** In contrast to civil enforcement, nations must – at a minimum – make it a crime (under Chapter Two, Section 4, Article 2.14) for people to carry out either trademark counterfeiting or copyright piracy on a “commercial scale,” which it defines as those infringing activities willfully carried out for “direct or indirect economic or commercial advantage.” The agreement does not require countries to criminalize infringements regarding other IP rights such as patents and geographical indications, though they have the option to do so.

In addition to targeting individuals directly involved in IP infringement, Article 2.14(4) calls on nations to prosecute those who aid and abet such activities. Furthermore, law enforcement officials will have authority, under Article 2.16, to seize and confiscate suspected counterfeit and pirated goods, and, later, order their destruction. They may also act on their own initiative (known as *ex officio* authority under Article 2.17) in starting criminal investigations rather than waiting for the rights holder to file a complaint.

At the end of criminal proceedings, nations must, under Article 2.15(3)(a), give legal authority to their courts to impose monetary fines and prison terms “sufficiently high to provide a deterrent to future acts of infringement.”

**Border measures:** The ACTA calls on nations to take certain measures to prevent the actual import and export of counterfeit and pirated goods. For instance, under Chapter Two (Section 3, Article 2.X (“Border Measures”)), nations must establish procedures which will allow IP rights holders to request that customs authorities stop the import and export of suspected counterfeit and pirated goods if the rights holders provide “adequate evidence” that these goods infringe on their rights. But nations such as India (which was not involved in the negotiations) said that such a provision “shows [what it believes is] a general shift in the locus of enforcement which enhances the power of IP [rights] holders beyond reasonable measure.”

Nations will also have the option to exclude “small quantities of goods of a non-commercial nature contained in travelers’ personal luggage” from border inspections. Critics had worried that the ACTA agreement would require customs officials to search individual laptop computers and digital audio players for evidence of illegally obtained IP goods, including digital songs, computer programs, and movies.

But groups such as the International Chamber of Commerce and the International Trademark Association wanted negotiators to strike this provision from the final agreement, according to *International Trade Reporter*, a publication specializing in international trade issues. “We believe making an explicit exception that permits travelers to bring in goods for personal use sends a wrong message to consumers that buying counterfeits is accepted by the government,” said the two groups in a statement.

**Technological enforcement:** Under Chapter Two (Section 5, Article 2.18), nations have the option of requiring ISPs to reveal the identity of subscribers allegedly involved in IP infringement directly to the rights holders, but only in cases where the rights holder had first “filed a legally sufficient claim of infringement” with a court, which must then process the complaint in a way which “preserves fundamental principles such as freedom of expression, fair process, and privacy” under Article 2.18(4).

Unlike previous drafts, the final text does not include any provisions addressing whether IP rights holders may hold third parties (such as ISPs) responsible for infringement carried out by others (such as an ISP’s subscribers). The final draft also dropped all provisions concerning three-strikes laws to stop IP infringement carried out through the Internet. “There’s no provision that would oblige a three-strikes rule to be implemented across ACTA parties,” said an EU official in an interview with the *International Trade Reporter*. “Similarly, there’s no provision that would prohibit it.” Previous drafts said that nations must not impede efforts to adopt three-strikes laws.

**Enforcement practices:** The ACTA (under Chapter Three) requires nations to undertake certain practices which will allow the public and other governments to understand their administration of IP laws and enforcement measures. Specifically, Article 3.3 says that a Party must publish and make publicly available “relevant laws, regulations, final judicial decisions and administrative rulings of general application pertaining to enforcement of intellectual property rights.” In addition, they must make publicly available procedures “regarding the enforcement of intellectual property rights” and include contact information of government officials.

**International cooperation:** To ensure that nations effectively enforce these various measures, the ACTA (under Chapter Four) requires nations to share and exchange statistical data on IP infringement and also information on practices which discourage IP infringement. In addition, the agreement says that nations should promote greater cooperation among their law enforcement authorities to stop IP infringement. Furthermore, it calls on developed nations to provide technical assistance (such as specialized training) to help developing countries enforce their IP laws.

Observers say that negotiators will open the agreement for signature and ratification by individual nations by the end of
the year. The ACTA will come into force 30 days after a sixth country ratifies the agreement. Some groups, such as IP Justice, an international civil liberties group, say that countries which do not agree with the aims of the agreement could be forced to join anyway because participating nations could refuse to trade with them.

But even if these new enforcement standards come into force, analysts are already questioning their effectiveness, saying that hundreds of millions of people around the world will still want to buy fake goods rather than pay the full cost of authentic merchandise. Also, while the laws in many countries prohibit the manufacture and sale of pirated and counterfeit goods, they don’t always forbid people from buying them. The New York Times noted, for instance, that “the law in the United States does not prohibit consumers from buying counterfeit products.”

**SUPREME COURT DECISION**

**Teaching international law to terrorists can be a federal crime**

The U.S. Supreme Court upheld a law which makes it a crime to give certain training and advice (including those involving specialized knowledge of international law) to terrorist groups – even if those activities are intended for legal and peaceful purposes. While the federal government applauded the Court’s decision and said that it will help to prevent terrorism, critics say that it erodes the right to freedom of speech in the United States.

Since the 1990s, the Humanitarian Law Project (a non-profit group based in Los Angeles) and several Tamil-American groups have tried to assist, respectively, the Kurdistan Workers’ Party (or PKK), which is currently leading a guerilla movement to create a separate state for the Kurdish population in Turkey, and the Liberation Tigers of Tamil Eelam (or LTTE), which had fought a decades-long civil war to create a separate state for ethnic Tamils until its defeat by government forces in May 2009. The State Department had officially designated these two groups as terrorist organizations, noting that their struggles have led to the deaths of tens of thousands of people. “The two groups . . . have violent histories, and their presence on the State Department’s official list of terrorist groups is not in dispute,” said one analyst.

The Humanitarian Law Project and the Tamil-American groups wanted to provide both groups with “nonviolent dispute resolution and human rights training” so that they would be able to advance their causes through peaceful means rather than violence. Such training and teaching would have included “how to use humanitarian and international law to peacefully resolve disputes,” and also “how to petition various representative bodies such as the United Nations” to protect their rights. These activities, claimed plaintiffs, wouldn’t have contributed to terrorist activities, but, instead, were “intended solely to promote the lawful and non-violent activities” of these groups. (The Center for Constitutional Rights, which helped to represent the plaintiffs, claimed that “both the PKK and the LTTE [engaged] in a wide variety of lawful, nonviolent activities.”)

In the views of the plaintiffs, the First Amendment’s right to freedom of speech allowed them to provide training and instruction intended for lawful activities, even to groups designated as terrorist organizations by the State Department. Civil libertarians say that freedom of speech includes more than just the freedom to express one’s thoughts – either in writing or verbally – on various issues. It also includes meeting with foreigners to engage them in discussion and debate, among many other activities. In this particular case, the plaintiffs believed that the First Amendment gave them a right to provide training and advice (both of which are forms of speech) to the PKK and the LTTE for lawful activities.

But the federal government argued that providing such training would have violated a statute which prohibits “material support” to terrorist groups. Specifically, 18 U.S.C. §2339B (popularly known as the material support statute) prohibits people from knowingly providing or conspiring to provide material support to and under the direction and control of foreign terrorist organizations – even if such support contributed to peaceful ends. Penalties for violating this law include fines and/or imprisonment for up to 15 years. But to protect First Amendment rights, the law also states that “individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.”

Under the statute, material support includes not only money, false documents, and weapons, but also a wide range of services such as financial services, lodging, and transportation. Other services include “training” (which the statute defines as “instruction or teaching designed to impart a specific skill”) and “expert advice or assistance” (defined as “advice or assistance derived from scientific, technical, or other specialized knowledge”).

Because they risked possible prosecution for providing such training and expert advice, both the Humanitarian Law Project and several Tamil-American groups filed several lawsuits against these specific provisions of the material support statute (and not the entire statute itself). These lawsuits snaked their way through the court system for over a decade until they finally reached the Supreme Court, which heard oral arguments in February 2010 in the case of Holder v. Humanitarian Law Project.

First, the plaintiffs argued that, by prohibiting services such as training and advice for lawful activities, the law violated their right to freedom of speech. They said that its provisions should instead apply only to those activities intended to support actual terrorism. The Center for Constitutional Rights, the non-profit advocacy group which represented the plaintiffs, argued: “In our view, the First Amendment does not permit the government to make advocating human rights or other lawful, peaceable activity a crime simply because it is done for the benefit for, or in conjunction with, a group [which the State Department] has blacklisted.” Added Ralph Fertig, president of the Humanitarian Law Project: “I am opposed to violence of all sorts. It seems crazy to me that I could go to jail for trying to persuade people to use nonviolent means to achieve their goals.”
But then-Solicitor General Elena Kagan (now Supreme Court justice) argued in a brief that the material support statute was not targeting their speech per se. (She said that, under the law, plaintiffs may freely express their views concerning these groups – in newspaper opinion pieces, speeches, and other forums – and even meet with them to discuss general ideas, as long as they did so independently from these groups.) Rather, the law targeted conduct (or certain actions). Specifically, “the discussion must stop when you go over the line into giving valuable advice, training, support to these organizations,” she said. Examples include filing an amicus brief on behalf of terrorists and instructing them on how to petition international bodies, all of which require direct contact and coordination with those groups. Such support, claimed the Solicitor General, could free up resources which groups can then use to carry out terrorist activities. She used another well-known terrorist group, Hezbollah, to illustrate her point. “Hezbollah builds bombs . . . Hezbollah also builds homes,” she said. “When you help Hezbollah build homes, you are also helping Hezbollah build bombs.”

Second, the plaintiffs said that those sections of the law which prohibited people from providing training and advice intended for peaceful purposes to terrorist organizations were “unconstitutionally vague,” arguing that they did not offer sufficiently clear standards which would allow a person to determine whether he was committing a crime. Because the government had (in the views of the plaintiffs) written these provisions very broadly, it could criminalize a whole range of activities at its own discretion. The government argued otherwise, saying that its goal in prohibiting all training and advice to terrorist groups (even for peaceful purposes) was to isolate these groups completely and, ultimately, to prevent terrorism. According to one government lawyer: “We do not want U.S. persons to be assisting terrorist organizations in making presentations to the UN, to television, to a newspaper.”

Added a Justice Department lawyer: “Congress wants these organizations to be radioactive.”

In June 2010, the Supreme Court, in a 6-3 decision, upheld the provisions in the material support statute which made it a crime to provide certain training and advice to terrorist organizations even for peaceful purposes.

First, the Court said that the law did not violate freedom of speech. It began its analysis by saying both the plaintiffs and the government had taken “extreme positions” on that issue. It was wrong for the government to argue that the law primarily regulated the plaintiff’s conduct when, in fact, it did affect their free speech rights, said the Court. And it disagreed with the plaintiffs’ claim that the law had completely banned all speech concerning the PKK and the LTTE. The ruling pointed out, for instance, that the material support statute “[did] not prohibit independent advocacy” of the goals and objectives of these groups.

Rather, the law prohibited what it described as a “narrow category of speech” (i.e., training and advice which imparts “specific skill” or “specialized knowledge”) only in instances where such activities were carried out “under the direction of or in coordination with foreign groups that the speaker [knew] to be terrorist organizations.” (The statute itself does not use the term “coordination” to describe the direction and control provided by a terrorist organization. One analyst said that the Court had probably used the term “coordination” to encompass both “direction” and “control.”) But the Court also added that “plaintiffs’ speech [was] not barred if it [imparted] only general or unspecialized knowledge.”

Although this prohibition, on its face, violated freedom of speech, the Court concluded that the government had, in this instance, “adequately substantiated” its justification for doing so, which is to protect the public by preventing terrorism. The majority decision noted that, even in cases where a designated terrorist organization carried out both peaceful and terrorist activities, Congress and the Executive branch – using their expertise in foreign affairs, national security, and intelligence gathering – had concluded that such groups “do not maintain organizational firewalls between social, political, and terrorist operations.”

As a result, they had the ability to divert material support “meant to promote peacable, lawful conduct” to “advance terrorism in multiple ways,” said the ruling. (Various forms of material support are “fungible,” said the Court. So if the plaintiffs provide one form of support, it could free up other resources which could be used for terrorist activities.) For instance, the majority claimed that “directly training the PKK on how to use international law to resolve disputes would provide that group with information and techniques that it could use as part of a broader strategy to promote terrorism.”

How? Using its own examples, the majority said that the PKK could “pursue peaceful negotiation as a means of buying time to recover from short-term setbacks . . . and ultimately preparing for renewed attacks.” The ruling further claimed that “teaching the PKK to petition international bodies . . . could help the PKK obtain funding it would redirect to its violent activities.”

Second, the Court ruled that those sections of the material support statute which prohibited training and advice to designated terrorist groups were not “constitutionally vague.” It noted that Congress had narrowed the definitions for terms such as “training” and “expert advice or assistance,” and that the plaintiffs’ proposed activities “readily [fell] into the scope of the terms.” The ruling said, for instance, that “a person of ordinary intelligence would understand that instruction on resolving disputes through international law falls within the statute’s definition of ‘training’ because it imparts a ‘specific skill,’ not ‘general knowledge.’”

The dissenting opinion – written by Justice Stephen Breyer – said that providing training and advice for lawful purposes is “the kind of activity to which the First Amendment ordinarily
offers its strongest protection.” It noted that in *Brandenburg v. Ohio*, the high court ruled that “the First Amendment protects advocacy even of unlawful action so long as that advocacy is not directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.” In its view, the government had failed to provide a strong justification to prohibit these activities in the face of First Amendment protections. “Not even the ‘serious and deadly problem’ of international terrorism can require automatic forfeiture of First Amendment rights,” said Justice Breyer, adding that the majority had “failed to insist upon specific evidence, rather than general assertion.”

For example, the dissent said that it didn’t understand how teaching the PKK and LTTE “to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends . . . .” Not only did the dissent say that “the Government [had] provided us with no empirical information that might convincingly support this claim,” it also described the majority’s own example where the PKK can use international law to buy time for renewed terror attacks as “[stretching] the concept of ‘fungibility’ beyond constitutional limits.” Justice Breyer added: “I am not aware of any case . . . in which the Court accepted anything like a claim that speech or teaching might be criminalized lest it, e.g., buy negotiating time for an opponent who would put that time to bad use.”

To prevent unconstitutional restrictions on freedom of speech while trying to prevent terrorism, the dissent suggested that the government should criminalize “First-Amendment-protected pure speech . . . only when the defendant knows or intends that those activities will assist the organization’s unlawful terrorist actions.”

Critics of the majority decision worry about the implications of the decision. For example, Professor David Cole of Georgetown University Law Center said that the government could prosecute editors at publications such as the *New York Times* and the *Washington Post* for working with terrorist groups in, say, publishing opinion pieces. Prosecutors could be able to argue, for instance, that providing expert editorial advice is a form of training which is carried out in coordination with a person that the editors know belongs to a terrorist organization.

**United Nations**

**Right to water and sanitation officially recognized as human rights**

For the first time, the UN General Assembly passed a resolution which declared access to safe and clean drinking water and also access to sanitation as fundamental human rights, putting them on par with many other existing human rights, including the right to life, equal protection of the law, freedom of thought, and freedom of speech. But a large percentage of UN member nations did not vote for the resolution and have even questioned whether such rights have a legitimate basis under international law.

The resolution (A/64/L.63Rev.1) does not require nations to provide, for example, free bottled water to their citizens or force them to install toilets or latrines in every household. Rather, it calls on them to help increase people’s access to clean drinking water and sanitation by providing developing countries with financial resources and technology. But the resolution neither provides details on the exact form of financial assistance or technology nor does it call on nations to establish benchmarks (or even a timetable) in carrying out its goals. It also did not state whether these rights are legally binding (i.e., whether people can call on governments to enforce these rights).

The UN notes that 884 million people around the world do not have access to safe drinking water, and that more than 3 million die every year from water-borne illnesses. Of the 1.9 billion children who live in the developing world, 400 million have no access to safe drinking water, according to the 2006 United Nations Human Development Report. Concerning sanitation, experts say that 2.6 billion people (or 39 percent of the world’s population) don’t have any access to sanitation systems such as toilets and latrines, and that many countries can’t or don’t provide a basic infrastructure to collect and dispose of raw human sewage whose accumulation in cities and rural areas contaminates animals, food supplies, and drinking water, and also attracts insects and vermin. Such contamination then leads to problems such as diarrhea, which claims the lives of 1.8 million people every year.

A recent UN resolution officially recognizing the right to water and sanitation as fundamental human rights does not require nations to provide free bottled water or force them to install toilets in every household.

The General Assembly, which seats 192 member nations, passed the resolution in July 2010 with a vote of 122-0. While some analysts had expected the vote count to be divided along north-south and rich-poor lines, the final tally upended these expectations, according Thalif Deen, the UN bureau chief for *Inter Press Service*.

Countries voting in favor included Brazil, China, France, Germany, Mexico, Iran, Russia, and South Africa. While no nation had voted against the resolution, 41 had abstained, including Australia, Canada, Ireland, Israel, Japan, Kenya, Lesotho, South Korea, Tanzania, Turkey, the United Kingdom, the United States, and Zambia. And delegates from close to 30 developing nations did not even attend the vote. (Around 40 percent of all UN member nations either abstained or did not show up.) Some political analysts speculated that these nations worried that voting to recognize a right to water and sanitation as human rights would obligate them to take away attention and resources from what they consider more urgent domestic priorities.

In a statement, a U.S. official, John Sammis, explained that while the United States supported the principle of recognizing access to water and sanitation as human rights, he worried that the resolution would undermine existing and ongoing efforts by other UN organizations on establishing a right to water and
sanitation. “This resolution,” he claimed, “attempts to take a short-cut around serious work of formulating, articulating, and upholding [various] universal rights.”

Sammis also said that the drafting process for the resolution lacked transparency, and also did not give the United States “sufficient time to really consider [its legal] implications.” Furthermore, he questioned whether the resolution’s supporters had any basis to declare the existence of a right to water and sanitation.

Analysts generally agree that existing international treaties do not explicitly give people a fundamental right, for instance, to safe and clean drinking water. But many legal scholars believe that several treaties imply such a right, arguing that nations would be unable to implement other officially recognized human rights unless they also recognized the right to safe drinking water.

For example, the 1966 International Covenant on Economic, Social, and Cultural Rights (or ICESCR) under Article 11(1) says that “States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family . . .” Article 12 (1) says that “the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” Yet without access to safe and clean water, nations would be unable to implement these and other rights mentioned in ICESCR, say some experts.

In a similar fashion, they argue, to comply with Article 24 of the 1989 Convention on the Rights of the Child – which “[recognizes] the right of the child to the enjoyment of the highest attainable standard of health” – nations must first recognize the right of access to clean and safe water. Some point out that the 1979 Convention on the Elimination of all Forms of Discrimination against Women mentions a right to a “supply” of water, but does not provide more details. Specifically, under Article 14(2)(h), nations must ensure that women have a right “to enjoy adequate living conditions particularly in relation to housing, sanitation, electricity and water supply, transport, and communications.”

Concerning a right to sanitation, many human rights groups also argue that this right is implicit in several treaties. For instance, in ICESCR, Article 11(1) says that “States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family . . .” Even though this article does not explicitly mention a right to sanitation, advocates say that it would be difficult for people to benefit from a right to an adequate standard of living unless governments also enforced a right to sanitation.

In September 2010, the Human Rights Council – which is the main UN body overseeing the status of human rights around the world – seemed to end the debate on whether the right to water and sanitation had a basis under international law when it unanimously passed a resolution (A/HRC/15/L.14) stating that “the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health . . .”

As a result, said the resolution, states now have a responsibility to ensure the right to water and sanitation by passing legislation and also creating “comprehensive plans and strategies.” A UN expert in this area added that “the right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable [i.e., the right can be evaluated by a court] and enforceable.”

**United Nations**

**Fewer tour boats, but cleaner sailing around Antarctica**

A United Nations maritime agency recently amended an international treaty to prohibit vessels from using heavy fuels while sailing around the region of Antarctica. While private boat operators and others complain that the ban will hurt their business, experts say that it will protect the environment and the teeming wildlife in a region considered one of the coldest, driest, and most uninhabitable in the world.

An international treaty will help to preserve the environment in Antarctica by prohibiting tour boats which burn or carry heavy fuels from sailing into the region.

Based in the United Kingdom, the International Maritime Organization (or IMO) is a 169-member nation UN agency which sets safety, environmental, security, and shipping regulations for maritime vessels through three global treaties. The 1974 International Convention for the Safety of Life at Sea established global safety rules for the construction, equipment maintenance, and operation of merchant vessels. The 1978 International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers created (as its name indicates) a uniform set of standards for the training, certification, and watchkeeping of officers of sea vessels.

The third treaty – called the 1973 International Convention for the Prevention of Pollution from Ships (or MARPOL, an abbreviation for “marine pollution”) – set international rules to prohibit ships from polluting the marine environment with oil, chemicals, garbage, and sewage (through either deliberate or accidental discharge). In response to an increase in shipping accidents, the IMO attached additional provisions to MARPOL in 1978. Collectively referred to as MARPOL 73/78, they both entered into force in 1983.

State parties to MARPOL 73/78 must pass their own domestic laws to comply with and enforce the treaty. (IMO does not have its own separate enforcement mechanism.) For example, U.S. federal law includes provisions addressing violations of MARPOL. Under 33 U.S.C. § 1908, violations of MARPOL are considered Class D felonies punishable by 10 years of jail time and a maximum fine of $250,000 for an individual and $500,000 for a corporation. Legal analysts also say that the government may seize and sell a ship which polluted ocean waters to pay fines and other penalties.

MARPOL 73/78 currently has six annexes. Annex I (called “Regulations for the Prevention of Pollution by Oil”) prohibits ships from discharging any oil whatsoever in designated regions of the world called “special areas” which are extremely vulnerable to
pollution. They include the Baltic Sea, Black Sea, Mediterranean Sea, Red Sea, and certain areas of the Persian Gulf near Kuwait. In 1990, IMO member nations added the Antarctic region (an area larger than the United States) to this list.

In March 2010, the IMO amended Annex I by adopting Resolution MEPC.189(60), which bans all ships from sailing into the Antarctic region if they use heavy fuel to power their engines or carry it as cargo. While the new regulation – which will take effect on August 1, 2011 – applies to all ships using or carrying heavy fuel, it exempts naval vessels as well as search and rescue ships.

Analysts say that the IMO adopted the new regulation in response to the growing number of accidents in the Antarctic region involving ships using or carrying heavy fuel. In 2007, for example, the *MS Explorer*, a Canadian cruise ship carrying 154 passengers, collided with an iceberg. While rescuers retrieved every passenger, observers said that the ship sank with an estimated 50,000 gallons of diesel fuel, 6,300 gallons of lubricant, and 260 gallons of gasoline. Scientists believe that the fuel could sicken over 2,500 penguins in the area. In 2008, the *M.V. Ushuaia* (a cruise ship carrying 82 passengers) grounded near Cape Anna, Antarctica, causing fuel oil to spill from two punctured tanks into Antarctic waters.

Citing the 1989 *Exxon Valdez* oil spill in Prince William Sound in Alaska, conservation groups worry about the long-term environmental and economic impacts caused by oil spills in the Antarctic region. (The Antarctic region, they note, is home to blue whales, colossal squid, fur seals, penguins, and plankton – all of which rely on the surrounding waters for their food supply.) Spills of heavy fuel are difficult to locate and clean up because they float below the surface and eventually sink. Also, because these oils do not break up naturally, they remain toxic to marine life. Moreover, the burning of heavy fuels (compared to lighter ones) emits high levels of greenhouse gases such as sulfur oxides, which, in turn, poses a danger to the surrounding environment, say scientists.

The new ban, argue supporters, will ensure that the environmentally hazardous effects from the burning and discharge of heavy oils will no longer affect the Antarctic region.

Given the limited commercial activities in and around Antarctica, analysts say that the ban will primarily affect tour operators – such as America, Celebrity, Holland, and Princess Cruise Lines – whose vessels carry more than 500 passengers each and typically burn heavy fuel.

In criticizing the new regulation, the International Association of Antarctica Tour Operators (an industry group) claimed that, once the ban takes effect, “the number of cruise-only passengers that will visit Antarctic waters is expected to fall from 15,531 this past Antarctica season to 6,400.” While cruise vessels typically burn heavy fuel (which is significantly cheaper than lighter fuels), many have the capability to switch to lighter fuels when nearing Antarctic shores. But because the new regulation prohibits ships from even carrying heavy fuel on board, tour operators will have to use light fuels only, which is more expensive. To offset these increased costs, tour operators will most likely increase their ticket prices, which could, in turn, discourage people from visiting Antarctica.
UPCOMING EVENTS

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