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| **Kutafin Moscow State Law University (MSAL)** | | **Russian Academy of Justice** | |
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| **Hebrew University of Jerusalem**  **Faculty of Law** | **ART DE LEX**  **Law Firm** | | **University of Cambridge**  **Centre for Public Law** |

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**International Association of Judicial Independence and World Peace International Project on Judicial independence**

International Conference on

Judicial Independence as Essential Foundation of Justice and Peace

Moscow, 30 May - 1 June 2014

**Conference Materials**

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**Announcement: The Conference of the International Association of Judicial Independence and World Peace**

From 29 May to 1 June 2014, the International Association of Judicial Independence and World Peace will hold the Conference in Moscow. As organizers of the Conference are Moscow State University of Law by the name O.E. Kutafin (MSAL), Russian Academy of Justice (RAJ), University of Cambridge Centre of Public Law (UK), Hebrew University of Jerusalem Faculty of law ,Sacher institute (Israel) and Russian law firm ART DE LEX.

The theme of the Conference is “The Judicial Independence as Essential Foundation of Justice and Peace”.

Such recognized world-class scholars as Prof. Shimon Shetreet (Hebrew University of Jerusalem), Dr. Sophie Turenne (University of Cambridge), Prof. Christopher Forsyth (Director of the Centre for public law, University of Cambridge), Sir Louis Blom cooper QC , Prof. Marcel Storme (University of Ghent), Prof. Irina Reshetnikova (professor of Ural State Law Academy, Chair of the Federal Arbitrazh Court of the Ural District), Prof. Vladimir Yarkov (Ural State Law Academy), Prof. Viktor Blazheev (Rector of MSAL), Prof. Valentin Ershov (Rector of RAJ), Prof. Sergey Nikitin (Deputy Rector of RAJ), Prof. Dmitry Maleshin (Lomonosov Moscow State University) will participate in the Conference as speakers. The Conference will also be attended by representatives of leading universities in the USA, Europe, Asia, the UK, Australia and many other countries.

The official program and debate section within the Conference will be provided by Moscow State University of Law by the name of O.E. Kutafin (MSAL). Also, the hosting organizers of the Conference scheduled a visit to the Constitutional Court of the Russian Federation in St.Petersburg for its participants.

The Organizing Committee for the Conference is headed by Dmitry Magonya, Managing Partner for ART DE LEX Law Firm.

The International Association of Judicial Independence and World Peace was founded in 1982 and is one of the most reputed international organizations, which unites practising lawyers, competent experts in law and incumbent judges around the world. The work of the Association is focused on drafting international standards of judicial independence, supporting culture of peace in all states, promoting the ideals of peace, democracy, freedom and liberty by strengthening and maintaining judicial independence in all its aspects. The Association participated in drafting a number of international documents which are now recognized and applicable in many jurisdictions of the world (Minimum Code of Judicial Independence (in cooperation with the International Bar Association, New Delhi, 1982), Montreal Declaration on the Independence of Justice (Montreal, 1983). The Association‘s outstanding contribution to the advancement of law was evidenced by the Candidacy of the Association for Nobel peace prize in 2013. The Association was honored with the right to claim such prize for conducting the International Project on Judicial Independence, which is the result of its 30 years of effort.

About the organizers:

The University of Cambridge is one of the world's oldest universities and leading academic centres, and a self-governed community of scholars. Its reputation for outstanding academic achievement is known world-wide and reflects the intellectual achievement of its students, as well as the world-class original research carried out by the staff of the University and the Colleges.

The Hebrew University of Jerusalem, founded in 1918 and opened officially in 1925, is Israel’s premier university as well as its leading research institution. The Hebrew University is ranked internationally among the 100 leading universities in the world and first among Israeli universities.

The MSAL has been specified as a model of an institution of higher education in the region and wider. Since its foundation the Academy has grown to become the University it is today, educating around 17,000 students; delivering courses that provide deep knowledge of the subject matters and relevant practical skills; making efforts to improve the law and legal institutions through teaching, research, and other forms of public service.

The RAJ was established in 1998 pursuant to the Decree of the President of the Russian Federation and the Resolution of the Government of the Russian Federation specifically for the purpose of training and skill upgrade of judges and staff of the judicial system. The founder’s powers and authority were given to the Supreme Court of the Russian Federation and the Supreme Arbitrazh Court of the Russian Federation.

ART DE LEX Law Firm since its foundation in 2005 has been proactively involved in collaborating with professional law associations. Promotion of jurisprudence inevitably leads to the social development and enables to reach high occupational standards in law enforcement practice. These principles are also the Association’s fundamental for cooperation with practicing lawyers.

Pavel Krasheninnikov the chairman of the Committee on civil, criminal, arbitration and procedural legislation of the State Duma of the Russian Federation gave a welcome speech.

For news and current status regarding the conference, as well as more information about it, please visit the official website of the Conference:

<http://artdelex.ru/conference>

program

**Thursday 29 May 2014**

**Arrival**

Pre conference social event

**Friday 30 May 2014**

8:30am – 9:00am: Registration & Get together

9:00am – 10:30am: **Opening Session**

**Chair: Dmitry Magonya, Managing Partner for ART DE LEX Law Firm, Moscow**

**Opening Remarks and Greetings**

* Professor Irina Reshetnikova, Urals State Law Academy, President of the Federal Arbitrazh Court of Urals Region, Conference Co-Chair
* Professor Shimon Shetreet, Greenblatt Professor of Public and International Law, Hebrew University of Jerusalem, President, International Association of Judicial Independence and World Peace, Conference Co-Chair
* Professor Vladimir Sinyukov, Prorector, Kutafin Moscow State Law University (MSAL)
* Professor Valentin Ershov, Rector, Russian Academy of Justice, Moscow
* Professor Christopher Forsyth, Director, Centre for Public Law, University of Cambridge, UK, with video conference

**10:30am – 11:00am: Break**

**11:00am – 12:30pm: Session 2: Judicial Independence as a Central Foundation of Culture of Peace**

**Chair: Professor Dmitry Maleshin, Moscow State University**

* Introduction of the keynote speaker: Professor Vladimir Sinyukov, Prorector, Kutafin Moscow State Law University (MSAL)
* Keynote speaker: Professor Veniamin Yakovlev, Adviser to the President of the Russian Federation, Retired Chairman of the Supreme Arbitrazh Court of the Russian Federation
* Professor Valentin Ershov, Rector, Russian Academy of Justice – *Legal Clarity as One of the Main Guarantees of Judicial Independence*
* Professor Ekaterina Shugrina, Kutafin Moscow State Law University (MSAL) – *Judicial Independence as a Guarantee of Local Government in the Russian Federation*
* Dmitry Magonya, Managing Partner, ART DE LEX Law Firm – *Access to Justice for Socially Vulnerable Groups and Judicial Independence*
* Professor Marina Rozhkova, Kutafin Moscow State Law University (MSAL) – *Judicial Independence as a Guarantee of Unprejudiced Enforcement of Law*
* Professor Sergey Nikitin, Russian Academy of Justice – *Conflict of Interests as an Obstacle for Nomination of Judges*
* Vote of thanks:Dmitry Magonya, Managing Partner, ART DE LEX Law Firm, Moscow

**12:30pm – 2:00pm: Lunch**

**2:00pm – 3:30pm: Session 3: Strengthening Individual Independence of judges and Institutional Independence of the Judiciary**

**Chair: Professor David Casson, Former Honorary Secretary, Society of Public Teachers of Law, UK, Former Judge, Immigration Appeal Tribunal, UK.**

* Sir Louis Blom Cooper QC, Bencher of the Middle Temple; Deputy High Court Judge London, England –*Judges in public inquiries* redivivus *(translated, ‘renewed’) or Horses for Courses*
* Dato Dr. Cy Das, Past President Bar Association of Malaysia – *Retiring Judge and Judicial Independence*
* Professor H.P. Lee, Monash University, Faculty of Law – *Judicial Independence and Judicial Creativity: The Implied Rights Doctrine in Australia*
* Professor Giuseppe Franco Ferrari, University of Bocconi, Milan – *Judicial Independence: Italian Perspectives*
* Sergey Mikhailov, Candidate of Law Science, Kutafin Moscow State Law University (MSAL) – *The Special Knowledge as a Guarantee of Judicial Independence of the Judges of Intellectual Property Court*
* Professor Vladimir Yarkov, Urals State Law Academy – video conference – *Optimization of Civil Procedure and Independence of Judges*
* Comments:

Professor Chandra De Silva, Vice Provost, Old Dominion University, Virginia

**3:30pm – 4:30pm: Break**

**4:30pm – 5:30pm: Session 4: The Impact of Transnational Jurisprudence on Judicial Independence**

**Chair: Professor Daniel Thuerer, University of Zurich, Vice President, International Association of Judicial Independence and World Peace**

* Professor Wayne McCormack, University of Utah – *Judicial Gaps in International Criminal Law Enforcement*
* Professor Yitzhak Hadari, University of Tel Aviv and Natanya College of Law – *Resolving International Tax Conflicts*
* Mr. Gian Andrea Danuser, Senior Advocate, Zurich, General Secretary, International Association of Judicial Independence and World Peace

– *Historical Practice in Switzerland of Buying Judicial Office*

* Dr. Sophie Turenne, University of Cambridge, UK – *Judicial independence and accountability: two sides of the same coin?*
* Vladimir Zhbankov, Candidate of Law Science, Kutafin Moscow State Law University (MSAL) – *Role of Judicial System of the EU in the Establishment of the Supremacy of Law Doctrine*
* Comments:

Professor Amos Shapira, Dean, School of Law, Carmel Academic Center, Israel

**Evening: Official Conference Dinner**

**Saturday 31 May 2014**

**9:00am – 10:30am: Session 5: Judicial Independence, Rule of Law, Justice and Peace**

**Chair: Mr. Richard Barton, Partner, Procopio, Cory, Hargreaves & Savitch Law Firm, San Diego, USA**

* Professor Graham Zellick, CBE QC,President of the Valuation Tribunal for England, former Vice-Chancellor and President of the University of London and Dean of the Faculty of Laws of Queen Mary, University of London – *The Challenges of the independence of the Administrative Justice*
* Professor Liu Hao, China – *Analysis of Recent Development in Mainland China*
* Professor Sean McConville Queen Mary College – *The Legalisation of Illegality: Acts of Indemnity*
* Artur Zurabyan, Candidate of Law Science, Head Dispute resolution and Mediation practice, ART DE LEX Law Firm – *Correlation between the right to appeal decisions of the lower courts and the principle of judicial independence*

**10:30am – 11:30am: Break**

**11:00am – 12:30pm: Session 6: Continuing discussion of Mount Scopus International Standards of Judicial Independence**

Chair: TBD

* Professor Andrew Le Sueur, University of Essex UK – *The Legal Profession and Judicial Independence*
* Professor Jennifer Temkin, LLD, AcSS, Professor of Law at City University, London, a Bencher of the Middle Temple and an Academician of the Academy of Social Sciences – *The Role of the Bar and the Legal Profession in Maintaining the Independence and Accountability of the Judiciary*
* Professor Nikolay Petukhov, Russian Academy of Justice – *Role of Judicial Community in the Formation of An Independent Court System*
* Professor Artem Chetverikov, Kutafin Moscow State Law University (MSAL) – *Guarantees of Independence of Judicial Authorities of International Unit of Modern States: Comparative Aspects*
* Professor Shimon Shetreet, Greenblatt Professor of Public and International Law, Hebrew University of Jerusalem, President, International Association of Judicial Independence and World Peace – *Developing Universal Judicial Code of Ethics*
* Professor Shimon Shetreet, Greenblatt Professor of Public and International Law, Hebrew University of Jerusalem, President, International Association of Judicial Independence and World Peace – *Online Justice or Online Dispute Resolution (ODR)*

**Concluding remarks:**

* Professor Marcel Storme, University of Ghent, Honorary President, International Association of Procedural Law
* Professor Irina Reshetnikova, Urals State Law Academy, President of the Federal Arbitrazh Court of Urals Region
* Professor Shimon Shetreet, Greenblatt Professor of Public and International Law, Hebrew University of Jerusalem, President, International Association of Judicial Independence and World Peace

12:30pm – 2:00pm: Lunch

Afternoon: Moscow Tour

Evening: Social Event

**Sunday Evening 1 June 2014**

Departure to St Petersburg.

The Second Part of Conference convened in St. Petersburg, June 2-4, and included a visit of The Constitutional Court of the Russian Federation, along with historical tours and social events.

During the visit to The Constitutional Court of the Russian Federation conference participants had the opportunity to meet in St. Petersburg with three Justices of The Constitutional Court of the Russian Federation; Justice Olga S. Khakhryakova ,Vice-President of the Constitutional Court of the Russian Federation, Justice Larisa O. Krasavchikava and Justice Mikhail I. Kleandrov, Judges in the Court.

**Conference Venue: Moscow State University of Law**

**Address: 9 Sadovaya-Kudrinskaya Street, Moscow, Russia, 123995**

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Prof. Victor Blazheev, Rector, Kutafin Moscow State Law University (MSAL)

Professor Sergey V. Nikitin, Vice Rector, Russian Academy of Justice, Moscow,

Professor Dmitry Maleshin, Moscow State University

Professor Shimon Shetreet, Greenblatt Professor of Public and International Law, Hebrew University of Jerusalem, President, International Association of Judicial Independence and World Peace

**Informational Partners**

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| **E:\Profiles\ADL\E.Dovgonozhenko\Documents\Конференция\Информационные партнеры\pravo.jpg** | **PRAVO.RU**  **Legal information portal** |
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| **E:\Profiles\ADL\E.Dovgonozhenko\Documents\Конференция\Информационные партнеры\logo.png** | **«The Judge» journal** |

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***Judges in public inquiries* redivivus *(translated, ‘renewed’)***

***or, Horses for Courses***

***Sir Louis Blom-Cooper ,QC***

The ever-popular use of members of the higher judiciary to conduct (either alone, or with assessors) public inquiries into major social scandals or serious human disasters remains today at least modish, if no longer instinctively political. Governments are still inclined to seek judge-led inquiries, despite a professional debate about their utility following legislation in 2005 and the formidable lecture delivered in Jerusalem in 2006 by Lord Justice Beatson,[[1]](#footnote-1) alluding to the fact that appointments of a senior judge should be made sparingly and that judges should be hermetically sealed off from inquiries that were politically sensitive, or those which might be susceptible to hostile criticism over the independence of the judiciary. Ministers should heed the warning against an urge to respond too readily to the popular clamour for a ‘*judicial* inquiry’. The report of the Select Committee of the House of Lords on the Inquiries Act 2005,[[2]](#footnote-2) however hesitantly, endorsed the popularity, if not priority, of judge-led inquiries. The early effect of legislative action is a distinct move towards treating investigation under the Inquiries Act 2005 as an endorsement of the public inquiry as an emanation of ministerial power by a Commission of Inquiry rather than an outcrop of legal proceedings. Is the Inquiry an act of public administration, outwith the purpose of legal proceedings?

**Buying Judicial Office in medieval Switzerland**

**Gian Andrea Danuser**

In over 30 years of work and endeavour the group of academics around Prof. Shimon Shetreet

have refined and promoted the Standards of Judicial Independence known now as Mt Scopus International Standards of Judicial Independence 2008, amended in 2011 and 2012. This work aimes to improve not only the Standards themselves but also the implementation and practice of these Standards in the different countries all over the world. It is a prospective work. The work is based on the supposition of a more or less modern and democratic constitutional framework with the division and separation of powers and as a consequence a complete independence of the judiciary. During its work the Group has ascertained that even under these conditions there can be big differences between the countries in respect of judicial independence. So wisely it stated in the Preamble, that the Standards give due consideration particularly to the fact that each jurisdiction and legal tradition has its own caracteristics that must be recognised. [[3]](#footnote-3). So for instance under Section 9A the Standards were modified in 2011 by extending them to administrative adjudicatory officers exercising judicial functions in agencies who are not part of the regular court system, to integrate the great number of these officers in the administrative systems of the United States of America.[[4]](#footnote-4)

Last year, preparing my lecture for the San Diego Conference, I was studying the swiss federal charter, the founding document of the three original Cantons of Switzerland of 1291, in which these Cantons agreed not to accept foreign Judges. In the same clause of the treaty they agreed also not to accept judges who bought the judicial office for money or for value.[[5]](#footnote-5)

***A seven hundred years old document stating principles of jucicial independence***

Animated by this very old document stating principles of Judicial independence more than seven hundred years ago, I thought that it was worthwhile to have a retrospective look at issues of judicial independence and to consider the relativance of solutions for these questions under a historical perspective.

As we will see later the federal charter contains also very interesting statements about the rule of law and a culture of peace.

The literal translation of the clause from the original text in latin is: „ We have also vowed, decreed and ordained in common council and by unanimous consent, that we will accept or receive no judge in the aforesaid valleys, who shall have obtained his office for any price, or for money in anyway whatever, or one who shall not be a native or a resident with us.“

Considering, that once upon a time somebody could not only buy or corrupt a judge but somebody could buy a complete judicial office, I recalled the famous phrase of Mackeath in Bertolt Brechts „Three Penny Opera“ :

“ What is the breaking in a bank compared with the founding of a bank?“. [[6]](#footnote-6)

***A world of Kings and Nobles***

To understand how it was possible to buy a judicial office we must analyze some facts of the medieval social constitution.

The medieval world was a world of Kings an Nobles. In the medieval institution of Kingdom all functions of power layed in the hand of the king. He was the absolute Master. To exercise his power in practice he had to delegated some of it to his Counts and Dukes.

The different functions of power and their exercise were not embodied in a written constitutional framework but in the rule , the real and effecive exercise of power and its delegation to the nobles.

One of the most important mechanism for delegation of power was the system of fief or fee. The king promised protection to the vassall and the latter obliged himself with an oath to service and obedience . Then he received an area of land or other useful rights in which he could exercise in principle all the powers of the king, including judicial office, at least for non capital crimes. [[7]](#footnote-7) The fee began with the public oath of the vassall and ended with his death. It could be reactivated on request of the heirs. [[8]](#footnote-8)

In the later medieval era a commercialisation of the fee began, because the land could not be multiplied. So complete jurisdicitions could be transferred as fief against money or value. [[9]](#footnote-9)

***The dominion of Altenklingen***

Now I would like to describe a nice example from Canton Thurgau, Switzerland:

The county of Thurgau, today a Swiss Canton, was conquered by the Swiss confederates in

1460. A Governor was installed who exercised the Criminal Justice and delegated the lower juristdiction to Subgovernors in a smaller part of the county.

The bigger part of the county was divided in small jurisdictions in which judicial office laid in the hands of the bishop of Konstanz, the city of Zurich and the city of St. Gallen. The rest of 32 small jurisdictions were entrusted in the hands of small squires and private gentlemen of the cities of Zurich an Konstanz.

The biggest of the latter was the dominion of Altenklingen with courts in three small villages.[[10]](#footnote-10)

In february 1586 Squire Leonhard Zollikofer bought the dominion of Altenklingen together with his two brothers for 25'500.—fl. In his will he designed the dominion legally as „fideicommissum“, an organisation which preserves the entitlement to inheritence always to the eldest members of a stock of the family. In this way it was possible to organize the dominion as a profit center for a long perspective. In effect it lasted until the year 1798.[[11]](#footnote-11)

In effect it lasts until today as a property but without the judicial office.

Altenklingen was not only a Jurisdiction but also a Castle with a broad network of landed property, fiefs, and other permanent rights. It was a private enterprise in which a jurisdiction was included. The adminstrative center of the dominion was in the castle of Altenklingen. The entitled members of the family installed a Governor, usually of one of the family members, who acted as Judge together with a clerk.

***Jurisdiction an Administration***

The task of these two persons was not only jurisdiction in the courts of the three villages but also the administration of the dominion as a profit centre. They had the following duties:

1. Keeping of the minutes of the court sessions and rulings.
2. Controlling of the collecting of all the taxes and contributions as an income.
3. Collecting all the fines and charges imposed by the judge.
4. Accounting all income and expenses for the beneficiaries of the dominion.

The court sessions were held by the judge and the clerk together with lay assessors of the circumscription of the court.

The judge was the beneficiary of the fines and charges. The judicial activities of the Governors were not controlled by a supervising authority. [[12]](#footnote-12) In cases where the judicial office was a fief, the judge could only retain one third of the fine. Two thirds went to the original proprietor of the judicial office.

There were manuals indicating how to perform administration.

The accounting by the Governor was made yearly on the 2nd february (Lichtmess) to the family of the beneficiaries.[[13]](#footnote-13)

The governor as Judge was also charged with the ruling of inheritance litigation, confiscation and to start proceedings in bankrupcy. Often the orders, briefs and rulings of the Gorvernor were pronounced from the pulpit of the local church during the religious service.

If the fine was not paid within 10 days the person could be exposed to the villagers by drawing him through the streets cuffed on hands and neck or to be exposed in a cage which could be turned around.[[14]](#footnote-14)

This profit center of the Zollikofen family lasted until 1798 when Napoleon put an end to the feudalistic system in Switzerland.

We can perceive how much power and wealth could be united under such a regime and that the common people were looking with anger at this system.

We recollect the words of Charles Dickens in „Bleak House“, saying: “The one great principle of the (English) law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it.“[[15]](#footnote-15) This was the view of a former court reporter.

***Judicial Independence as element for preservation of political independence and culture of peace***

Might be that the people of the three original Cantons of Switzerland had seen in the surrounding territories examples like the dominion of Altenklingen and wanted to prevent themselves of Judges who considered their office as a business and investment of capital.

Reading principle sections of the Swiss Federal Charter of 1291 we find wise knowledge of

principles and guidelines for living together in community, for law, especially rule of law, peace keeping and mediation.

Abstract

Prof. Yitzhak Hadari – Compulsory Arbitration in Transfer Pricing and International Tax Conflicts

The notion that international tax conflicts must be resolved and the double taxation is avoided has been agreed upon by the countries for years, but it is only in recent years that it has been translated into real international consensus. The modus that has been agreed upon is the mutual agreement procedures in bi-national tax treaties, providing that if no agreement is reached within two years, the conflict must be resolved via compulsory arbitration. The big push forward was given by the fiscal committee of the OECD which added such provision to its model tax treaty of 2008.

Since then we can find such clause in many new bi-national tax treaties or protocols. In fact, in my opinion, there is no need to evidence many such arbitrations in practice, the mere addition of such provision is enough to encourage the two countries involved, to solve such conflicts through the mutual agreement procedure of the bi-national treaty.

International Conference on Judicial Independence as Essential Foundation of Justice and Peace, Moscow

Saturday 31 May 2014 11:00am – 12:30pm

Session 6: Continuing discussion of Mount Scopus International Standards of Judicial Independence

Lawyers’ contributions to securing judicial independence

Professor Andrew Le Sueur, University of Essex, United Kingdom

This note reports on work-in-progress for a study of the role of lawyers in securing judicial independence. It introduces the study, provides a draft outline of the research questions and methods, and reports on some preliminary findings. Suggestions for developing the study are sought from colleagues.

# A. Introduction — putting lawyers into the picture

Since the 1980s, there has been a flood of initiatives designed to articulate and achieve better implementation of the human rights and constitutional principle of judicial independence (JI). On the international level, the United Nations, the Council of Europe, and the Commonwealth of Nations (among other organisations) have sponsored work. Activities have taken place at national level in numerous countries, including constitutional redesign and more detailed operational measures. International bodies, governments, judges, academic researchers, and civil society organisations (national and international) have all contributed to the tasks. While legal scholars have been more concerned with the normative questions relating to JI, it has been left largely to political scientists to address the empirical question whether these activities can be demonstrated to improve *de facto* adherence to JI.[[16]](#footnote-16)

What almost everybody has neglected is the contribution of lawyers — as individual professionals and collectively through professional associations — in efforts to define, protect and improve compliance with principles of JI. The focus has instead been on state actors, typically the triangle of judicial, executive, and government branches of government. Yet lawyers in various ways exercise power in relation to JI. Individual lawyers are key players in trial processes: as advocates, they share courtrooms with judges and have day-to-day interactions with court administrations. Organised legal professions, though associations, may influence judicial appointments and appraisals; they may contribute to public discourse; and regulate behaviour of their members.

This study seeks fill the gaps in our understanding of the role of lawyers in relation to JI by providing an analytical description of their activities using four sources. First, the obligations of individual practising lawyers are assessed across a sample of legal systems to assess what formal provision is made in relation to duties related to JI; this includes professional ethics and conduct codes and undertakings or oaths made on entry to the legal profession (see Part B). Second, the study examines the JI-related activities of lawyers professional associations in several national systems (see Part C). Third (in Part D), attention is turned to the international level, examining the publications and activities of international lawyers organisations. Fourth, several of the official and non-official codes of principles about JI that have been developed internationally are analysed to see what is said about lawyers’ roles and responsibilities (see Part E).

# B. Individual lawyers in national legal systems

This section focuses on lawyers as individual professionals. What if any formal undertakings do lawyers make in relation to JI when admitted to the legal profession? What responsibilities are placed on lawyers by codes of conduct and professional ethics?

A sample of jurisdictions needs to be identified.

# C. National lawyers associations

This section moves on from individual professionals to explore the organised profession: what national lawyers associations — typically known (in English) as bar councils, bar associations, and law societies — say and do about JI.

This is done in two ways. First, the websites and online publications of national lawyers associations in a sample of countries (see Table 1) are surveyed for the presence or absence of a various possible observable outputs and activities that may relate to JI (see Table 2). Second, [three or four case studies] on how lawyers associations respond to national events are examined in more detail (see Table 3).

National lawyers associations are non-state actors that exercise power. Sometimes a national lawyers association may act as a corporate entity (e.g. in adopting rules of professional conduct); on other occasions power may be exercised by a nominated member or representative (e.g. when sitting on a judicial appointments commission). Through national lawyers associations, lawyers are able to mobilise the resources to enable them to act.

The concept of “power” is notoriously contested in political science; for present purposes, a framework of three dimensions of power will be used.[[17]](#footnote-17) National lawyers associations, in ways relevant to JI, may be seen as having: (a) “decisional power”, the capacity to influence decision-making; (b) “discursive power”, the capacity to frame and reframe pubic discourse; and (c) “regulatory power”, the capacity to make and remake rules.

Also of importance, but less easily observed, is the the idea that a form of power is keeping issues hidden, off the political agenda.[[18]](#footnote-18) A hypothetical example would be a bar council deciding (tacitly or after deliberation) not to press for constitutional change that might improve respect for JI in a legal system.

## Table 1: Sample of national lawyers associations

1. American Bar Association (ABA)
2. Canadian Bar Association
3. Jamaican Bar Association (JBA)
4. Hong Kong Bar Association
5. Pakistan Bar Association
6. Bar Council of England and Wales

## Table 2: Types of lawyer association power relating to JI

1. DECISIONAL POWER
   1. Judicial appointments: membership of judicial selection commissions
   2. Judicial appointments: consultees on nominees for appointment
   3. Judicial appraisal: organisation/participation in routine reporting systems
   4. Judicial appraisal: ad hoc complaints about individual judges
2. DISCURSIVE POWER
   1. Initiation/participation in national debates about judiciary/judicial reform
   2. Publications aimed at legal practitioners (e.g. newsletters, magazines)
   3. Public legal education and information activities
   4. Public statements censuring/supporting individual judges in time of crisis
3. REGULATORY POWER
   1. Publication and enforcement of lawyers professional ethics and conduct codes referring expressly to JI
   2. Publication and enforcement of lawyers professional ethics and conduct relating implicitly to aspects of JI
   3. Requiring and monitoring of continuing professional development (CPD)
   4. Involvement in approving law schools’ curricula.

## Table 3: Lawyers associations’ responses to national events

1. Response of lawyers to the suspension and reinstatement of Chief Justice of Pakistan in 2007.
2. Response of lawyers to proposals for reform of judicial appointments, abolition of office of Lord Chancellor, and creation of a supreme court in the United Kingdom in 2003-2005.
3. Response of lawyers to criticism of judiciary in Hong Kong by former justice minister Leung Oi-sie in 2012.
4. Response of lawyers to the impeachment of Shirani Bandaranayake, Chief Justice of Sri Lanka, in 2013.

# D. International lawyers associations

Since the 1980s many international organisations and groups have worked on project designed to improve JI. This part of the study seeks to build a picture of what international lawyers organisations have said and done in relation to JI by looking at a sample of six associations (see Tables 4 and 5).

## Table 4: International lawyers associations

1. International Bar Association (IBA)
2. Commonwealth Lawyers Association (CLA)
3. European Criminal Bar Association (ECBA)
4. International Association of Lawyers (UIA)
5. International Association of Democratic Lawyers (IADL)
6. International Criminal Defence Attorneys Association (ICDAA)

## Table 5: overview of international lawyers organisations

|  |  |  |  |
| --- | --- | --- | --- |
| Organisation | JI in short mission statement? | JI in constitution? | JI evident in other publications? |
| IBA | No | No | Yes (relating to rule of law work and implicitly in anti-corruption guidelines) |
| CLA | No | Not available. | Yes |
| ECBA | No | No | No |
| UIA | No | No | Yes |
| IADL | Yes | Yes | Yes |
| ICDAA |  |  |  |

# E. International codification of JI

A flurry of activity at international level — by official bodies and civil society organisations — over the past 30 years has led to publication of codified statements of the basic norms on judicial independence. This section will analyse the content of these codes to identify what is said about lawyers’ roles and responsibilities relating to JI.

## United Nations

In 1985, the United Nations adopted a resolution entitled Basic Principles on the Independence of the Judiciary.[[19]](#footnote-19) Article 1 provides “It is the duty of all governmental *and other institutions* to respect and observe the independence of the judiciary” (emphasis added, for reasons explained below).

UN Basic Principles on the Role of Lawyers — focus on protection of independence of lawyers.

## 2. Council of Europe

In 1994, the Council of Europe Committee of Ministers adopted Recommendation No. R(94)12 on the independence, efficiency and role of judges replaced in 2010 with Recommendation CM/Rec (2010)12.[[20]](#footnote-20)

Work of the Venice Commission on Democracy through the Rule of Law.

## 3. Commonwealth

The Commonwealth (“Latimer House”) Principles on the Three Branches of Government, applicable to the 53 states of the Commonwealth of Nations, was adopted in 1998.[[21]](#footnote-21) Under the heading “The role of non-judiciary and non-parliamentary institutions” provides that “An independent, organised legal profession is an essential com pendent of the protection of the the rule of law”.

## 4. Civil society organisations.

The New Delhi Code of Minimum Standards of Judicial Independence, adopted by the International Bar Association in 1982, which (typical of the codes) focuses on autonomy of the judiciary vis-a-vis the executive and legislature.[[22]](#footnote-22)

In Montreal in 1983, a meeting of scholars, judges and lawyers adopted a Declaration on The Independence of Justice at the First World Conference on the Independence of Justice in 1983.[[23]](#footnote-23)

Starting in 2000, the Judicial Group on Strengthening Judicial Integrity (later renamed the Judicial Integrity Group or JIG), an international group of senior judges,[[24]](#footnote-24) drafted the Bangalore Principles of Judicial Conduct. These focus on the ethical conduct expected of members of the judiciary. The Principles were adopted by the United Nations Economic and Social Council (ECOSOC) in 2006 and further work has included the publication of a 175-page “Commentary” on the principles, designed for use in judicial training programmes[[25]](#footnote-25) and a statement of implementation measures in 2010 (divided into two parts, one on “Responsibilities of the Judiciary”, the other “Responsibilities of the State”).[[26]](#footnote-26)

The Mount Scopus Revised International Standards of Judicial Independence, first approved in 2008 provides a synthesis of the many other statements of principle.[[27]](#footnote-27)

## 5. Preliminary findings

Read together the codifications provide a very thin account of norms governing lawyers and JI. We learn the following.

1. There is a responsibility for public education. Lawyers, individually and through professional associations, have a duty to “to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties, and the relevant and available remedies”.[[28]](#footnote-28)
2. “It is the duty of a lawyer to show proper respect towards the judiciary”.[[29]](#footnote-29)
3. A judge “must ordinarily avoid being transported by … lawyers”, from which can be inferred a responsibility on the part of lawyers not to offer lifts to judges.[[30]](#footnote-30) The *Commentary* goes on to provide detailed guidance on the boundaries of acceptable contact with lawyers in a variety of different social and professional contexts, all of which is essentially advice on avoiding reasonable perceptions of bias.
4. “A lawyers shall at all times maintain the highest standards of honesty, integrity and fairness towards … the court”.[[31]](#footnote-31)
5. Bar associations should adopt strategies, including education programmes, adjustment of discipline and ethics codes, on combatting corruption.

# F. Findings, discussion and next steps

This study seeks to “triangulate” information about the activities of lawyers relating to JI from a range of different sources, nationally and internationally. Early findings suggest that there is a significant quantity of activity, most of which has not been “captured” in the codifications of norms generated in recent years.

Part of the conclusions of the study will be to formulate a possible amendment to the the Mount Scopus Standards to include reference to lawyers and lawyers associations. What might the provision include? How detailed should it be?

LAWYERS AND THE JUDICIARY

1. Lawyers have an individual professional responsibility to uphold the independence of the judiciary.
2. Lawyers professional associations shall have a duty to defend the independence of the judiciary.

**DRAFT – NOT FOR CITATION WITHOUT THE AUTHOR’S PERMISSION**

**The Dark Side of Counter-Terrorism.**

**The argument for a more enlightened approach based on a constitutional law paradigm**

Arianna Vedaschi\*

1. Introduction. – 2. Historical Background and Definition: Targeted Killings. – 3. Historical Background and Definition: Extraordinary Renditions. – 4. International Terrorism as Serious Crime: Targeted Killings and Extraordinary Renditions within a Criminal Law Approach. – 5. Targeted Killings and Extraordinary Renditions under the “War Paradigm”: towards a Global War Model. – 6. Concluding Remarks: Criminal Law and International Cooperation, Steering Away from the dangerous “grey area”.

1. The wide effort in implementing effective counter-terrorism measures, made by the United States of America and its allies in the aftermath of 9/11, has raised a number of major critical issues, from a constitutional point of view, and with specific regard to human rights.[[32]](#footnote-32) Within the extensive set of policies and practices, adopted over more than a decade of struggle against militant Islamic extremism, so-called targeted killings (TKs) and extraordinary renditions (ERs) certainly represent the most controversial and criticised ones.[[33]](#footnote-33)

This paper will propose a brief theoretical and historical reconstruction of these two practices, in order to analyse them under different legal paradigms: the criminal law model – which includes international terrorism in the wider category of organised crime and aims at preventing terrorist attacks and punishing the perpetrators of terrorist attacks by means of law enforcement operations, criminal investigations and trials – and the war model, that considers terrorist attacks as acts of war and terrorists as enemies to be defeated by means of lethal force. From the latter perspective, this paper aims at showing how even the war model, adopted by the United States since 9/11, does not seem broad enough to justify the current scenario of the fight against international terrorism, dangerously drifting towards a “global war”, whose limits―if they do exist―appear very hard to define. In spite of the recent, minor, course corrections, US counter-terrorism policy still seems to be widely geared towards what some scholars have effectively termed “extra-legalism[[34]](#footnote-34)”: not only practices such as targeted killings and extraordinary renditions are carried out in overt violation of domestic legal systems and international principles, but they are also incompatible with international law and the laws of war. Crucial national security issues, and counter-terrorism in particular, seem dependent on the arbitrary choice of governments, far beyond the parameters of national and international legality, concealed beneath a cloak of State secrecy.[[35]](#footnote-35)

In light of these considerations, this paper will finally endorse taking a step back towards the criminal law model in the fight against international terrorism, either through a reinforced judicial and police cooperation between States and regional organisations such as the European Union (EU), solidly founded on respect for constitutional and legal principles, and by promoting a stronger role of international *fora* to challenge those countries which are unable or unwilling to offer effective cooperation. Such a change of paradigm, in the end, seems the only feasible way to preserve the very same rule of law, to help mature democracies avoid finding themselves in a legal grey area.

In paragraph 2 and 3 of this paper a brief historical background is developed, providing a definition of targeted killings and extraordinary renditions. Paragraph 4 presents the so-called criminal law model, with its rules and safeguards, showing how targeted killings and extraordinary renditions are incompatible with this legal paradigm. Paragraph 5 analyses the development of the war model from the classical approach, as codified by international law, to the new paradigm of the global war on terrorism. Paragraph 6 is devoted to concluding remarks, proposing a new criminal law model, focused on a much stronger dialogue between domestic and international *fora*.

2. In analysing the historical evolution of targeted killings and extraordinary renditions in the fight against jihadist terrorism, it is essential to sketch their key elements in order to be able to evaluate their compatibility with different legal frameworks.

The first “declared” appearance of a targeted killing – i.e. the planned and authorised selective assassination of dangerous subjects[[36]](#footnote-36) – occurred at the dawn of the twenty-first century, in the fight against jihadism.

The first country overtly resorting to targeted killing was not the United States: Israeli armed forces have publicly admitted the adoption of this practice, against Hamas militias in the Gaza Strip, since the second *intifada* in 2000.[[37]](#footnote-37) Among the numerous examples of targeting operations, “successfully” accomplished by the Israeli Defence Force (IDF), we may remember the air raid that killed Salah Shehadeh, one of the most prominent personalities in Hamas, his wife and three children on 22 July 2002, destroying his whole house in Gaza (one of the most densely populated areas in the world), killing ten other civilians and wounding more than 150. Less than two years before, on 9 November 2000, an Israeli missile blew up a car in a village near Bethlehem, killing Hussein Muhammed Salim Abayat, a member of the Tanzin militia, and two bystanders.

Throughout the last decade, Israeli armed forces have carried out hundreds of operations in the Gaza Strip and the West Bank, targeting not only suspected terrorists but also unarmed civilians. The Israeli Government has publicly justified almost every targeted killing on the basis of self-defence: a principle of international law, enshrined in the Charter of the United Nations, whose broad interpretation Israel has used to allow its armed forces to target anyone who represents a threat, even if only a potential one, to national security. In fact, as we will see further on, the Israeli Supreme Court actively supported this position[[38]](#footnote-38) and refused to declare the unlawfulness of targeted killings by adopting an interesting “case by case” approach, along with an evolutionary view of international law and of the principle of proportionality in the light of the struggle against jihadist terrorism. According to this interpretation, targeting operations (which may imply, *prima facie*, some sort of reprisal) are aimed at preventing future attacks against the people of Israel.

The Israeli experience, while significant, is inextricably linked to the specific historical and geopolitical evolution of the Middle East area. Therefore, whilst offering a very good prototype of this practice from an operational (and quantitative) point of view, it does not seem to be the best example to determine some general trends in terms of legal policy due to the complex historical and territorial issues involved. In this latter regard, the United States of America post-9/11 represents an internationally-recognised paradigm.[[39]](#footnote-39)

The idea of carrying out targeted operations, to “physically remove enemy leaders” beyond the borders of the US, dates back to the seventies. At that time the *Church Committee Report*[[40]](#footnote-40)brought to light several plans to kill Fidel Castro, the South Vietnamese President Ngo Dinh and the Chilean General René Schneider. Several years earlier, during the Vietnam war, a series of operations named the *Phoenix Program* involved the killing of many Viet Cong leaders and supporters. Likewise, in 1986, President Ronald Reagan authorised *Operation El Dorado Canyon*, aimed at killing Muammar Gaddafi with an air raid on his private residence. Such a controversial practice was, therefore, already established in US foreign and security policy but remained largely unknown despite its repeated use as part of covert intelligence operations overseas. To reverse this trend, President Ford was compelled to adopt *Executive Order* 11905, banning any kind of State assassination; a prohibition reinforced in *Executive Order* 12036 by President Carter and extended in the still effective *Executive Order* 12333, signed by President Reagan in 1981,[[41]](#footnote-41)several years before *El Dorado Canyon*.

Targeted killings remained (at least formally) prohibited until the late 1990s:terrorist attacks on US embassies in Kenya and Tanzania led President Clinton to authorise the resort to “lethal force” as a form of self-defence against terrorist groups and Al-Qaeda in particular.[[42]](#footnote-42) Though not explicitly mentioning targeted killings, President Clinton paved the way for further evolution of the policy and its public disclosure.

After the 9/11 attacks President George W. Bush declared to an American public still in shock from the recent terrorist acts his firm commitment to seek out and destroy the perpetrators and prevent further attacks. In November 2002―under the Authorisation for Use of Military Force Against Terrorists, approved by the Congress on 14 September 2001―US authorities publicly claimed a success as a result of a targeting operation, carried out on Yemeni soil, against Qaed Salim Sinan al-Harethi, suspected of being involved in the USS Cole bombing.[[43]](#footnote-43) This operation, which led to the death of four other suspected terrorists (including a US citizen), was the first example of targeted killing to be overtly carried out by the United States in the fight against international terrorism: targeting was no longer something to be concealed.

While in this case the Yemeni authorities were duly informed and authorised the target operation, thus avoiding any inconvenient diplomatic and political consequences, other attacks―as happened several times in Pakistan―were carried out by the United States without any prior consent by the sovereign State where they occurred and sometimes without any advance warning. This was the case of Ayman al-Zawahiri, whose failed targeting operation unintentionally killed 18 civilians, prompting a strong protest by then-President Pervez Musharraf.[[44]](#footnote-44)

The US decision to resort to targeting significantly increased under President Barack Obama, whose policy choices in this area were in line with those of his predecessor.[[45]](#footnote-45) President Obama not only confirmed the targeting program, but embraced the Bush doctrine in affirming the possibility to engage US citizens, suspected of involvement in terrorist activities overseas. Throughout the last few years, many targeting operations have been aimed at “removing” US citizens who represent a potential menace in Pakistan,[[46]](#footnote-46) Yemen, Somalia and other politically unstable areas, often without the US seeking any form of cooperation with national governments.[[47]](#footnote-47)

With respect to the judiciary, several lawsuits have been filed by a number of NGOs and civil rights organisations in US federal courts, to challenge the legitimacy of targeted killings on constitutional grounds; nevertheless, to date, US courts have repeatedly dismissed all these claims, without addressing the merits, on the basis of jurisdictional issues such as the “political question” doctrine.[[48]](#footnote-48) In spite of the concerns raised by prominent legal scholars and a significant part of public opinion demanding a thorough judicial review of such practice, the Supreme Court of the United States has remained silent, refusing to hear any claim related to targeted killings and refraining from interfering with national security policy.

With regard to the “operational side” of targeted killings, several different models have emerged: the first model, widely adopted by Israel, relies on the Air Force to launch missile attacks (either from helicopters or fighter jets) against designated targets. This model tends to include targeted killings within the wider scope of military operations, given the almost exclusive involvement of military personnel.

The United States, which we will focus on, has adopted elements of different models, with respect both to the agencies and departments involved and to operational procedures. In particular, US targeting operations can be characterised by the pre-eminent presence of the Central Intelligence Agency (CIA) often assisted by the Department of Defense, providing logistical and operational support. Covert actions on the ground and “conventional” air strikes, typical of the pre-9/11 scenario described above, have gradually been replaced by drone attacks, allowing greater precision and with virtually no risk to US personnel.[[49]](#footnote-49)

With the relevant exception of operation *Geronimo*, that led to the killing of Osama bin Laden, unmanned aerial vehicles operated by the Department of Defence and lent to the CIA have been the main protagonists of counter-terrorism targeting operations in the last decade.

Following concerns expressed by scholars, critics of US policy on the unwarranted leeway given to the CIA in carrying out targeting operations, President Obama has – in the last few months – signalled his intention to assign full responsibility for targeted killings to the military,[[50]](#footnote-50) thus excluding the direct involvement of the Agency, and his intention to implement a form of quasi-judicial review[[51]](#footnote-51)designed to make targeted killings more consistent with due process requirements.[[52]](#footnote-52) However, Congress has not particularly welcomed this idea and has effectively blocked it by means of funding cuts within the federal budget.

3. Having analysed some major features of targeting operations, we can now address the second controversial practice under discussion, namely, extraordinary renditions.[[53]](#footnote-53)

As we did with the issue of targeted killings, we will offer a brief overview of this subject in order to provide the basis for the analysis that follows.

In the United States, the expression “rendition to justice” has been used since the 1980s, with specific reference to the fight against terrorism. The phrase refers, in particular, to covert operations carried out by the CIA and aimed at capturing people suspected of committing terrorist offences overseas in order to bring them to trial in US Federal Courts. What is immediately clear is the extraterritorial dimension of such operations: in order to “render them to justice”, suspected terrorists have been placed “under arrest” by Government officials acting outside US jurisdiction, on foreign soil, and transferred to the United States to face criminal charges.

Over recent years, renditions have generally been used as a last resort, with the sole purpose to avoid problems, delays and the sort of resistance often encountered within ordinary extradition procedures. Many States, either due to their long-standing non-extradition policies or to their ideological sympathy with extremist organizations, have been unwilling to cooperate with US law enforcement agencies; others, as in the case of so-called “failed States” and those affected by ongoing political conflicts, are simply unable to provide effective support.

Considering the apprehending of a suspected terrorist as an overriding goal, National Security Directive 207, issued by President Reagan, included renditions in the wider set of counter-terrorism measures. To support this type of operation, US Administrations have repeatedly asserted their jurisdiction over those criminal offences committed overseas against US citizens or affecting American interests, claiming their right to arrest suspected criminals (virtually) anywhere in the world and to bring them to justice at home on American soil.

After their first appearance under the Reagan Administration in 1986,[[54]](#footnote-54) renditions continued throughout the 1990sunder Presidents George H.W. Bush[[55]](#footnote-55) and Bill Clinton.[[56]](#footnote-56) According to then-CIA Director George Tenet, from 1986 to 2001, the United States successfully accomplished more than 70 rendition operations, of which two dozen have taken place during the last four years.[[57]](#footnote-57)

Furthermore, under President Clinton, renditions to justice started to gradually transform into something different: a significant change in procedures and aims marked the transition from renditions to justice to what we are now used to calling extraordinary renditions. To understand the scope of this change we can refer to two relevant examples: the *Tal’at Fu’ad Qassim* and *Tirana Cell* renditions, ordered by President Clinton. In the first case, which happened in Bosnia, the CIA captured suspected terrorist Tal’at Fu’ad Qassim, an Egyptian citizen who was granted asylum in Denmark, and rendered him to Egyptian authorities; in the second case, US officials captured a group of suspected terrorists (the Tirana Cell) in Albania and also transferred them to Egypt. In both cases the operations did not aim to bring suspected terrorists to justice in the United States but rather to hand them over to a third country, where it was assumed they would be tried, with nothing but vague and bland assurances on the respect of their fundamental rights (e.g. the ban on mistreatment, violence and torture) from the US and on the part of the Egyptian government.

This new operational mode consisted in apprehending suspected terrorists within the territory of a foreign State, regardless of its consent or cooperation, and transferring them to a third State (other than the US) where they would be detained and possibly put on trial, with no credible guarantee for their psychological and physical safety.

Established as an exception under the Clinton Administration, this *modus operandi* has become a standardized operating procedure since September 2001: the momentous events of 9/11 caused a sudden change in the political and social climate. The clamour for greater security increased the pressure on the Executive Branch and drastically inhibited checks and balances aimed at preventing abuses. Both the Judiciary and the Legislative have proved reluctant to interfere with pro-active Executive power in this sense and, indeed, the latter have facilitated the process by passing legislation, which has granted the President ever greater powers within the arena of national security.

Within this altered context, renditions to justice became “extraordinary”, abandoning their original purpose (bringing terrorist suspects to justice) and have served to facilitate the requirements of intelligence agencies: gathering as much information as possible, without the strict constraints of US constitutional guarantees, and preventing future terrorist attacks. The prospect of prosecution in a court of law, either by the United States or by a third country, has taken second place to the main purpose of these operations, i.e. detaining suspected terrorists outside US boundaries, regardless of whether or not they will face trial.[[58]](#footnote-58)

Such a major deviation from the stated purpose of rendition activities offers an explanation for the development and operation of secret CIA detention facilities, or “black sites”, located far away from the United States itself and which are ideally suited to the secret imprisonment and interrogation of captured subjects.[[59]](#footnote-59)

Unlike the policy of targeted killings, US Administrations did not publicly acknowledge the use of extraordinary renditions as an integral part an effective counter-terrorism strategy.

While renditions to justice involved some kind of criminal charge and should (at least in theory) lead to a public trial, extraordinary renditions occur outside of the judicial system. People who have not been charged with an offence, either in the United States, or in any other legal system, but who are still suspected of either membership of a terrorist group or active involvement in terrorism according to intelligence sources can be targets for what is, in effect, abduction by the United States. These subjects could (and, in fact, have been)apprehended on the initiative of intelligence agencies, without recourse to the normal legal requirements (being charged with an offence, etc.) and transferred to any one of a number of secret prisons throughout the world without rights or guarantees and for an indefinite period of time. An aggravating effect of the procedure is that extraordinary renditions often interfere with (and frustrate) complex criminal investigations, aimed at prosecuting suspected terrorists(i.e. *Abu Omar* case),[[60]](#footnote-60) or can result in mistaken identity cases (i.e. *El-Masri* case[[61]](#footnote-61) and *Arar* case[[62]](#footnote-62)) which serve only to embarrass the authorities involved, in particular the United States itself.

Though being secret by their very nature, extraordinary renditions rapidly gained notoriety thanks to the detailed accounts of victims. As with targeted killings, however, a number of lawsuits brought against the United States (and its allies) in federal courts have failed to result in a final conviction; the Executive firmly asserted the State secrets privilege and claimed sovereign immunity for those involved, while the Judiciary (with a few exceptions, promptly appealed and overturned) did not take any steps to challenge the legal basis for such assertions. Rendition victims, as a consequence, were forced to seek redress outside of the United States and occasionally found it, as happened in Australia, Canada and the United Kingdom, by means of extrajudicial settlements where compensation was offered in exchange for waiving the right to further legal action.[[63]](#footnote-63) Official recognition and condemnation of this practice only came from the European Parliament,[[64]](#footnote-64) the Parliamentary Assembly of the European Council[[65]](#footnote-65) and – eventually – the European Court of Human Rights with the well-documented *El Masri* judgment in 2013.[[66]](#footnote-66)

It is worth pointing out that, to date, the only criminal conviction related to extraordinary renditions was delivered in Italy in 2010, by the Milan Court of Appeals, that found twenty-three CIA operatives guilty of kidnapping the Muslim cleric Abu Omar in 2003.[[67]](#footnote-67) Within the same case, however, a “confrontation” took place between the Supreme Court of Cassation and the Constitutional Court on the interpretation of the State secrets privilege.[[68]](#footnote-68) The Constitutional Court, upholding the position of the Italian Government in a much-debated judgment, adopted a strict and formalistic stance on the privilege, thus forcing the Supreme Court to acquit several officers of the Italian military intelligence (including the then-Director) who were accused of providing operational support to the CIA.[[69]](#footnote-69)

In spite of its unofficial nature, extraordinary rendition has represented – in terms of impact – one of the most significant counter-terrorism practices of the post-9/11 era. Together with targeted killings, they reflect the firm resolve of US Administrations against the jihadist threat and are commonly addressed, due to their controversial legal implications, as parts of the same strategy. While they raise many critical issues with regard to constitutional and international law (and, in this sense, are based on similar theoretical assumptions, emphasising the link and inviting the joint analysis here undertaken), they respond to, at least partially, very different needs: targeting operations are usually aimed at removing potential menaces, when apprehending the suspect seems unlikely based on evaluations of risk and feasibility. Targeted killings, therefore, have a substantially pre-emptive nature and focus on the most direct and safest way to eliminate a potential security threat. While an immediate pre-emptive goal can be achieved as well, the main purpose of extraordinary renditions is the (often forcible) collection of first-hand information on terrorist organisations and future attacks, in a long-term, intelligence and security-based perspective.

As we mentioned above, targeted killings and extraordinary renditions have raised much concern, with regard to violations of fundamental rights – such as the right to life, the right to personal freedom and the due process of law – and international law, in relation to national sovereignty. In the paragraphs that follow we will address these issues, analysing the two practices in the light of differing legal paradigms, starting from the so-called “criminal law model”, which considers international terrorism as a form of organised crime, and then passing to the “war model”, that tends to see terrorists as enemy combatants, rather than criminals.

4. According to many scholars,[[70]](#footnote-70) international terrorism should be considered as a form of serious organised crime and thus addressed through the usual criminal law practices, consisting in investigation, evidence collection, arrest, formal charge, trial and the possible conviction of the culprits. Within a criminal law model, resort to lethal force by public authorities should be limited to a small number of cases: law enforcement can legitimately “shoot to kill” when the suspect is acting in such a way that it is very likely he will endanger the safety of police officers or third parties, for instance by violently resisting arrest, taking hostages or trying to escape. Apart from these cases (if we exclude, in some legal systems, the lawful practice of imposing a death sentence) the use of lethal force by public authorities might therefore be considered as homicide and treated accordingly.

This fundamental assumption derives from general protection duties, imposed on State authorities by well-established western constitutional traditions, that include those people suspected of having committed, being about to commit or having conspired to commit a crime. Since the presumption of innocence is universal, suspects enjoy the same rights as all other people, including the right to exert an effective defence in a court of law and any other right, granted by the Constitution and the laws, to those charged with a crime.

That said, if we assume the rule of law as a fundamental prerequisite, we cannot rely on remedies other than those provided by national criminal laws, properly informed by constitutional principles, which precludes the illegitimate use of lethal force, regardless of the crime. Following this approach, any suspected terrorist within a State’s jurisdiction should be arrested, charged with any appropriate offence, and eventually tried in a way consistent with the Constitution and applicable laws. He may only be killed legitimately, before the imposition and execution of any death sentence, in those cases that we briefly enumerated above. In any other case a targeted killing should be considered and punished as an act of homicide.

The conclusion of our legal analysis cannot be substantially different from that in respect of extraordinary renditions. This practice, as described above, consists in the abduction of suspected terrorists by Government officials, within the territory of a foreign State (with or without its consent), and their transfer to a detention facility, usually in a third State.

Criminal law paradigms generally prescribe a number of procedural safeguards with regard to the arrest of suspects, which include the right to be informed of the reasons for such arrest, the right to be assisted by a lawyer and the right to appear in court within a reasonable lapse of time (*habeas corpus*); very significantly, law officers cannot arbitrarily exert their power of arrest: any arrest has to be ordered or, at least, confirmed by the Prosecutor’s office within a reasonable time. These guarantees are given to avoid deprivation of the fundamental right to personal freedom without grounds for doing so, allowing the suspect to exert his defence from the very beginning.

Needless to say, none of these guarantees, which represent the essence of constitutional principles applied to criminal law, is respected within extraordinary renditions. Within such operations the suspect is the victim of a *de facto* kidnapping, without any notice or information, often by means of force and secretly held captive with no access to the outside world: no information is provided to the family or to consular authorities so that the detainee to all intents and purposes “disappears”. What is more, there is no certainty (and no remedy for possible violations) on detention conditions and interrogation techniques adopted by US and foreign Government officials, far beyond the jurisdiction of US courts, with the risk of mistreatment and torture, both of which are prohibited by national and international law.

Certainly the scenario we describe above might seem simplistic if compared with the very real challenges of the fight against terrorism. Usually suspected terrorists hide far away from the States that have been attacked, beyond the boundaries of their jurisdiction, with little or no chance of being captured if national law enforcement operations only are relied on. One may reasonably object that forms of international cooperation between States in the field of law enforcement and criminal prosecutions actually exist, and they do, but they necessarily depend on the will to cooperate, which no one would take for granted. Some States, in effect, (more or less) overtly refuse to cooperate with western law enforcement agencies in pursuing suspected terrorists; others are simply unable to do so, due to the lack of resources or an incomplete control over their territory.

A direct intervention on the territory of a third State, without its consent, either to kill or to abduct a suspected terrorist, clearly violates the principle of sovereignty upon which the international legal order is based, and can be considered an act of armed aggression against that third State, with potentially disastrous consequences in terms of international relations.

Furthermore, even if we assume that a third State offered its full consent to targeting or rendition operations, the “cooperating” State could not grant the “intervening” State more powers than those provided by the former’s domestic law; on the other hand, the State intervening on a foreign territory cannot disregard the limits imposed by its own laws and Constitution.

Therefore, within an ordinary criminal law model (even in the case of full cooperation between the intervening State and the State on whose territory the operation takes place) targeted killings and extraordinary renditions cannot be considered legal practices. Resort to lethal force encounters the inescapable limits we mentioned above and, with regard to extraordinary renditions, arrest and detention powers have to be exerted in a way that is consistent with the guarantees provided by the laws and the Constitution. Moreover, the transfer of captured suspects from one country to another should respect the procedures laid down in extradition treaties (which usually involve some judicial or administrative review, allowing the detainee to challenge the charges and the request for extradition) and should be banned whenever it might be feared that the extradited person may be subjected to torture or inhuman treatment.

5. As we pointed out from the very beginning, the criminal law model has not been the only legal paradigm to be applied to the fight against international jihadist terrorism over the last decade. Other legal frameworks, either traditional or “hybrid” ones, have led to different operational approaches. Notably the so-called war model[[71]](#footnote-71) has been adopted – with some exceptions – by the US Administration since 9/11 to take action against Al-Qaeda and other terrorist groups, affiliated to the same network to a greater or lesser degree. Both President George W. Bush and President Obama supported this position, mainly in their respective capacity as Commander in Chief of the Armed Forces and publicly employing the word “war” to address the fight against jihadist terrorism, in a way that suggests consistency with the Authorisation for Use of Military Force Against Terrorists approved by the Congress on 14 September 2001.[[72]](#footnote-72)

However, waging war is not without consequences from a normative point of view, since particular and specific rules exist to regulate armed conflicts, namely the laws of war and humanitarian laws.[[73]](#footnote-73)

According to a majority of scholars, should one wish to consider the fight against terrorism as an armed conflict, such conflict would be international in nature; fewer have tried to describe the war on terror as a non-international armed conflict, recalling a slightly different regulatory framework, which usually applies to civil wars(notably, this is the position adopted by the US Supreme Court in *Hamdi*).[[74]](#footnote-74)

Indeed, the fight against international terrorism can hardly be described by means of traditional categories, given its peculiar characteristics that we will point out, and demands – in any case – a wide interpretative effort, which does not lead to satisfactory results.

The invasion of Afghanistan, a few weeks after 9/11, paved the way for the internationalisation of the fight against jihadist terrorism, clearly shifting from the historically predominant idea of transnational serious crime to a concept of war proper. By intervening in Afghanistan, the United States and its allies acted within the common paradigm of international armed conflict (State *versus* State), blaming that country – and the authoritarian Taliban regime – for offering a safe haven to Al Qaeda’s recruiting and training camps. At the time, the international community–almost unanimously–condemned the 9/11 attacks as an unacceptable act of aggression on American soil and – while the United Nations refrained from taking joint military actions against Afghanistan –the US-led campaign was generally accepted under the wide umbrella of the “self defence” principle, according to art. 51 of the UN Charter.

Such an international armed conflict, even if the US Administration argued to the contrary, certainly falls within the scope of the *ius in bello*, notably the III and IV Geneva Conventions.[[75]](#footnote-75) The two conventions are aimed at safeguarding two macro-categories of subjects, respectively: enemy combatants captured during the course of war operations (prisoners of war) and unarmed civilians.

According to the III Geneva Convention, enemy combatants should belong to regular armed forces, irregular militias or armed corps of volunteers, provided that they answer to a chain of command, wear uniforms or clearly visible identification marks, carry arms openly and fight within the *ius in bello*. Such conditions must all be simultaneously met by a fighter, in order to satisfy the “membership criterion” and, therefore, be classified as an enemy combatant, thereby becoming a legitimate target.

As is widely known, during an international armed conflict, enemy combatants do not enjoy any right to life and can, as a consequence, be legally targeted at any time, either while engaging in fights or while sleeping in barracks, unless they have laid down their arms, are injured, ill, shipwrecked or have been captured. Legal authority to kill any enemy combatant during wartime encounters other strict limits with respect to medical staff or chaplains whose killing would entail a war crime. If they are captured, enemy combatants should not be tortured or subjected to inhumane treatments and their status, as prisoners of war, should properly result from official documents. According to customary international law, in addition, they should be promptly released and repatriated after the cessation of hostilities; civilians captured during wartime, for security reasons or because they are engaging in hostilities, enjoy similar protections.

The civilian status is not properly defined by the IV Geneva Convention; civilians, in fact, can be identified *a contrario*, given the definition of enemy combatant offered by the III Geneva Convention and additional protocols. Namely, those who do not satisfy the membership criterion mentioned above – becoming legitimate targets – shall be deemed as civilians and protected accordingly. Civilians cannot be targeted or harmed unless they engage in hostilities and solely for the lapse of time during which they perform hostile actions. In fact, no shared interpretation of this latter provision has been reached so far: according to some scholars – who tend to tighten the scope of such exception – civilians should be considered legitimate targets as long as they are materially taking part in the fight (e.g. placing a bomb on the roadside) and limitedly to the time necessary to complete their hostile action. A wider interpretation, proposed by the Israeli Government, tends to extend the lapse of time during which the hostile actions are performed to all those preparatory acts that lead to the attack itself, such as organisation and training. According to the Israeli Supreme Court, which denied the illegality of targeted killings on this basis, the provision at stake can be read so as to seamlessly apply the exception to the whole series of hostile actions that a civilian may take part in, thus avoiding the so-called “revolving door effect”.

This interpretative effort was aimed at finding a justification for the targeting of members of the Hamas militia and other extremist organisations, acting within the Gaza strip that do not satisfy the membership criterion and therefore, cannot be considered enemy combatants.

The United States, under President Bush, tried to move along a different path to confront Al-Qaeda members and their hostile actions, developing a sort of *tertium genus* and introducing a distinction between lawful and unlawful enemy combatants. The former category, in particular, is characterised by the almost complete absence of protection afforded to its members who, while being still considered legitimate targets, could not enjoy the safeguards provided by international humanitarian law. In other words, if we apply the “Bush doctrine”, Al Qaeda members do not respect the laws of war and therefore they do not deserve to be treated as legitimate combatants.

Therefore both the Israeli and the American positions considered Al-Qaeda members and jihadists in general as legitimate targets (as civilians engaging in hostilities or unlawful enemy combatants) by means of broad and evolutionary interpretations of international law and the laws of war, which lack of international recognition fails to provide a strong legal basis for widening the range of legitimate targets.

To this extent, neither targeted killings[[76]](#footnote-76) nor extraordinary renditions[[77]](#footnote-77) can be considered legitimate options. Even if we consider the laws of war to be applicable to the war on terror, only enemy combatants or civilians engaging in hostilities could be legitimately killed and the rule should apply to targeted killings as well.

Extraordinary renditions, extensively described above, violate – in any case – the protection afforded by the IV Geneva convention and customary international law to prisoners of war and civilian internees that should be protected from torture and inhumane treatment and whose detention should always be officially recognised.

All these considerations, however, assume that the fight against international terrorism can be addressed as a conventional conflict; if this assumption was partially true in the Israeli case and – with respect to the US – during the invasion of Afghanistan, it can be argued that this is no longer the case. With the overthrow of the Taliban regime and the formal end of hostilities, the war on terror continued without a State-enemy, beyond every boundary of time and space.

Such a globalised war, made up of scattered military actions, on the territory of States formally allied to (or, at least, not in a conflict with) the United States, can hardly be addressed by resorting to traditional international law, for how broad its interpretation could be[[78]](#footnote-78); it is simply “extra-legal”, a grey area that has overturned accepted academic legal interpretation.

6. This analysis of targeted killings and extraordinary renditions – viewed in the light of the main legal paradigms, which have been applied to the fight against jihadist terrorism over recent years –leads us to conclude that none of the existing models (i.e. the criminal law model, on the one hand, and the war model with its hybridizations, on the other hand) can be interpreted so as to reasonably assert the legitimacy of the practices at stake. Such practices, as we have seen, conflict with many of the fundamental principles that regulate both criminal law and the laws of war.

In the first case, during peacetime, targeted killings and extraordinary renditions are enacted in overt violation of fundamental constitutional principles, which include the due process of law (and every related guarantee), the right to life and the right to psychological and physical integrity; in the second case, such practices –targeted killings in particular – have required a strong interpretative effort to bend and widen traditional international legal standards and adapt them to the expediencies of the war on terror.

The war on terror has lost the character of a conventional international armed conflict, gradually evolving into something very different and unprecedented: the potential battlefield extended to the whole world, with no sovereignty or alliance preventing the United States from taking action against its “enemy”. The enemy itself, once the Taliban regime was defeated, has become somewhat vague and amorphous, since Al-Qaeda is a network of separate cells rather than a structured organisation *per se*. What is more, the war is no longer limited in terms of either time or space, eventually becoming a “patchwork” of single attacks that could potentially last indefinitely. If “the war goes where the enemies go”[[79]](#footnote-79) it is quite reasonable to hold that there is no war proper, but just a global theatre of perpetual operations, which set aside any existing rule and place the entire world into a grey area of exceptions and legal anomalies.

However, the notion, shared among western democracies, that we can simply abandon centuries of constitutional and democratic progress, when faced with exceptional circumstances, is patently unacceptable. The very strength of the rule of law can be measured in times of crisis and, we should think extremely careful before finding a justification to abandon it *en bloc*.

In the attempt to discover the best way to confront international terrorism we should starts from the point of refusing to behave like those we aim to defeat. The only permissible point of departure and final destination is our constitutional traditions and criminal law systems that offer the best guarantees in terms of preservation of the rule of law.

It should, first of all, be recognised that international terrorism is serious crime and should be treated accordingly. It has been suggested that there is no adequate definition of “terrorism” in existence nowadays, at the international level, and this lack of consensus prevents terrorism from being considered an “international crime” proper, but rather as a “transnational” one.[[80]](#footnote-80) It can be argued, by contrast, that reaching a unanimous consent is not the only way to ensure a strong international action.

Over the centuries, democratic countries have developed several forms of cooperation regarding criminal and judicial matters, without necessarily resorting to international criminal law. European States, in particular, have a longstanding tradition of police and judicial cooperation, conducted either through the European Union – whose unique legal system has allowed Member States to achieve tremendous innovations such as the European Arrest Warrant and establish innovative “institutions” like *Europol*, *Eurojust* and the European Judicial Network – and by means of traditional inter-governmental links.

All these should be regarded as key tools in the fight against serious organised crime, and international terrorism in particular. Obviously, these forms of cooperation should be further reinforced by favouring a stronger mutual trust between national law enforcement agencies and judicial authorities, based on shared procedural safeguards, evidentiary rules and –eventually– a shared set of constitutional values.

A stronger and established cooperation at the regional level could represent a solid and reliable foundation on which to build a wider international network of Countries, committed to fighting jihadist terrorism within a criminal law paradigm, without necessarily resorting to the use of military force.

In this context, the United Nations should play a new central role, in developing *ad hoc* instruments to formalise inter-regional cooperation and ensure democratic States the operational capacity to pursue jihadist terrorists beyond national and regional borders. In particular, quasi-judicial evaluation procedures could be established to assess the legitimacy of “extradition” requests under a set of clear and widely shared guarantees, thus avoiding unilateral initiatives. Once a request was duly evaluated, the State that is hosting the alleged terrorist should be duty bound to surrender the suspect to the requesting State. In the case of dissent, however, specific remedies could be provided to “force” the host State to comply with its obligations. In particular, the United Nations could resort to a wide and gradual set of counter-measures: the first step should always be represented by diplomatic and political suasion, whose effectiveness would greatly depend on the credibility gained by such a new form of cooperation; the second step could consist in the imposition of sanctions, either of an economic and political nature, to exert a form of indirect coercion and avoid moving to the final step, represented by the use of force. Armed intervention, by means of an “international police force”, should be as targeted as possible and represents the last resort option, for those States unwilling or unable to provide effective cooperation in the pursuit of suspected terrorists.

Professor Shimon Shetreet

AGENDA FOR FOCUS ISSUSES IN THE NEXT CONFERENCES

Based on the discussion in Ghent and Hong Kong ,the agenda of the debates regarding the amendments to Mt. Scopus will focus on three main topics : The legal profession and Judicial Independence, the drafting of a Global Judicial Ethics Code , and the developing of

Guidelines on Online Justice or Online Dispute Resolution

I) The Legal Profession and Judicial Independence

The lawyer and bar associations perform an important role both as individuals and as organisations of lawyers. It is therefore important that a special detailed amendment to the Mt. Scopus Standards of Judicial Independence be devoted to this issue after proper deliberations in the next conferences ( in Moscow and Osnabrueck). A background paper was prepared by Andrew Lesuer which will be the basis and other paper will also be distributed.

II.) Global Judicial Ethics Code

In Ghent and in San Diego it was resolved, at the suggestion of Marcel Storme ,to embark upon a project to develop a global judicial ethics code. It will be done in two parts. One part will deal with conduct on the bench and the other or the conduct off the bench ,on the rules governing the conduct outside his official duties .

III.) Online Justice or Online Dispute Resolution (ODR)

In online dispute handling, there is an increasing recourse to online justice in divorce, where uncontested divorce is completed totally by internet communication with the relevant court or state agency. When in such a procedure impartiality and fairness are not maintained, the outcome of some very important issues can be affected, from distribution of the marital estate to co-parenting plans and other important issues We must consider a proper guidelines that will apply to the online justice .

We should analyze the emerging and increasing recourse to the online justice practices and procedures whereby consumers are compelled to work out disputes and arguments against major companies online or in a digital procedures. The digital procedures of handling consumer complaints are conducted by phone centers and call centers which sometimes are not even in the jurisdiction where the dispute arose, but are conducted by out-of-jurisdiction outsourcing call centers.

The solution is to require separate complaints officers, meaning separate fom the ordinary company departments such as accounting and finance departments which now entertain the complaints and to impose a duty on these companies to establish separate departments presided over by persons who enjoy independence from the accounting and financial officers of the company.Only they should be in charge of handling the complaints from consumers.

**IN PURSUIT OF THE PROTECTION OF JUDICIAL INDEPENDENCE**

The activity of the JIWP Association is largely concerned with research and study .But the Association is also engaged in the pursuit of the protection of Judicial independence around the globe . Sometimes the JIWP Association is approached by Senior judges asking for materials and books and sources while the cases regarding judges are being considered, and the Association helps provides the sources expeditiously to the requesting judges .

The JIWP Association also was active in calling attention at the request of Judges from Egypt during President Mursy term of office to help protect the independence of the Judiciary and the rule of law regarding President Mursy’s measures to reduce the retirement age of judges and other measures adversely affecting Judicial independence and the rule of Law. The Bill was introduced with a view to lower the age of judiciary retirement that would aid in the replacement of secular judges with the Regime sympathizers.

The Association brought attention to cases of adverse legislation touching upon judicial independence and the rule of Law in other jurisdictions. The association brought the attention to Argentina’s Congress’ legislation limiting injunctions against government policies and creating three new appellate courts, making the legal system less beholden to special interest groups.

***Judges in public inquiries,* redivivus *(translated, ‘renewed’)***

*Sis Louis Blom –Cooper QC*

The ever-popular use of members of the higher judiciary to conduct public inquiries into major social scandals or serious human disasters (either alone, or with assessors) remains today fashionable, even if it is labelled euphemistically as a ‘quasi-judicial forum’. Governments are still inclined to seek judge-led inquiries, despite a professional debate about their utility following legislation in 2005 and the formidable lecture delivered in Jerusalem in 2006 by Lord Justice Beatson.[[81]](#footnote-81) He alluded to the fact that appointments of a senior judge should be made sparingly and that judges should be hermetically sealed off from inquiries that were politically sensitive, or those which might be susceptible to hostile criticism over the independence of the judiciary. Ministers should heed the warning against an urge to respond too readily to the popular clamour for a ‘*judicial* inquiry’. The report of the Select Committee of the House of Lords on the Inquiries Act 2005,[[82]](#footnote-82) however hesitantly, endorsed the popularity, if not priority, of judge-led inquiries. The early effect of legislative action is a distinct move towards treating investigation under the Inquiries Act 2005 as an endorsement of the public inquiry as an emanation of ministerial power by a Commission of Inquiry rather than an outcrop of legal proceedings. Is the Inquiry an act of public administration, outwith the purpose of legal proceedings?

The starting point in assessing the status of any public authority is whether it is a tribunal or body exercising the judicial power of the State;[[83]](#footnote-83) if it is not such a tribunal or court of law, then what is it? The public body springs from the declared provisions in the scope of the statute and its principal procedures. It is the nature of the beast – its legal labelling – that dictates the essence of the process. When Lord Scarman in 1974 classically declared that a public inquiry was decidedly *not* a species of litigation, but to be conducted inquisitorially, he did not elaborate upon the procedures of other inquiries. And little (if anything) was said about discarding the forensic habits of legal practitioners, beyond stating the limits of questioning of witnesses by advocates. For another two decades (until Sir Richard Scott’s assault in the *Arms for Iraq* inquiry (in 1996) did the procedures of public inquiries come into conflict, both within the Inquiry and extra-curially. The chairman of a public inquiry asks initially what procedure is adopted, both statutorily and by way of the Chairman’s discretion, to dictate the manner of investigation. Overall, the enquirer will want to know the basic principles that lie behind the inquiry’s process. Until 7 June 2005 (when the Inquiries Act 2005 came into force) the practice was variable until the Royal Commission of Tribunals of Inquiry (the Salmon Commission) reported in 1966, very much under the influence of legal habits adopted in legal proceedings. Thus a dose of legalism was injected into the practice, although the recommendations, generally acceptable, did not induce any legislation. But the legal profession neatly converted the procedure: it avidly adopted its habit of conducting inquiries ‘adversarially’, rather than ‘inquisitorially’. Legalism played a distinct role in the conduct of the Inquiry; it hijacked the process as if it were a trial. It adopted the euphemism of ‘semi-judicial’, whatever that meant precisely. To mark out the distinction between the legal system and public administration, one can do no better than quote the great exegetist, Lord Diplock: ‘The very concept of administrative discretion involves a right to choose between more than one possible course of action against which there is room for sensible people to hold different opinions as to which is to be preferred’.[[84]](#footnote-84)

Traditionally and historically the Common Law of England, in contrast with continental systems of western Europe, established a litigious process whereby the plaintiff in civil litigation and the prosecution in the criminal court engaged in an adversarial role: the claimant (or prosecution) has to prove his claims, in a civil court on the balance of probabilities, and in criminal proceedings to a higher standard of proof, that of being ‘beyond reasonable doubt’. The system of trial by jury in civil cases was almost entirely abolished in 1934; trial by jury for serious crime continues to this day in 95% of criminal cases. But the standard of proof remains distinctively higher, conveying the message of the severe onus of this mode of trial.

By contrast the rival European civil systems of a single judge (or a mixture of professional and lay members) adopted the more logical process of ensuring a true verdict, as opposed to the jury system of legally admissible proof, failure to attain which had the effect of acquittal of crime. The systems are based on opposing modes of trial, although the European Court of Human Rights has declined to differentiate between the two modes of trial. The verdict must rest on a ‘fair trial’ by either system. So in 2010 in *Taxquet v Belgium* (a country which had until than adopted the system of trial by jury) the case turned on whether extra-curial, untestified statements by an accused violated the Convention. But if the adversarial versus inquisitorial modes of trial remains rooted in the two systems, it is no longer sensible to regard the binary systems of trial as poles apart: over the years much more borrowing between the systems has been displayed.

The scene, if not the landscape of the judiciary in public inquiries, has perceptibly changed as a result of a House of Lords Select Committee report (*The Inquiries Act 2005: post-legislative scrutiny*, published on 11 March 2014), which generally endorses the workings of the Inquiries Act 2005, although the report wishes to sweep away some procedural rules affecting freedom of speech. The report awaits parliamentary debate and public discussion. What follows from the report about judge-led public inquiries?

The basic role in the civil courts imposed on the legal system a duty to active case management. Historically, litigation had been fundamentally adversarial, in the sense that evidence was proffered by the rival disputants to support their claim or defence, rather than by the court itself through witnesses, although increasingly it is forced to adopt the inquisitorial process, as, for example, with family law cases. Truth, if it emerges, does so only inferentially, as a by-product of evidential proof. But the Inquiries Act specifically debars the Inquiry from the exercise of any ‘power to find or determine any person’s civil or criminal liability’. It goes on to provide that the Inquiry is not to be inhibited in the discharge of its investigative function by any likelihood of liability being inferred from the facts that the Inquiry finds or the determinations that it makes.

An Inquiry, therefore, is not part of, nor does it emulate, the adversarial process (and does not ape the legal system): what then is there left of the rival attributes of adversarial versus inquisitorial? Is the ban on affixing liability merely procedural in the conduct of an inquiry; or is it fundamental to the institution established administratively, by statute, on Ministers? And if so, how should the role of the judge-led inquiry be regarded?

Nothing should prevent an inquiry panel from seeking evidence which will allow it to perform the central task of eliciting the truth. What the witnesses want to say is not necessarily what the Inquiry needs to know, but it is not debarred from ferreting out whatever relevant information it desires. In the sense that the inquiry is uninhibited in the search for truth, it is decidedly inquisitorial. As the House of Lords Select Committee observed (para 213, p 66), most of the Committee’s witnesses agreed that inquiries were best served by an inquisitorial rather than an adversarial procedure. The report cited approvingly a text-book author on *Public Inquiries* that an inquisitorial model best serves its task of investigation. It ‘allows the inquiry to remain focused on its terms of reference … It allows the inquiry to focus on the issues that are of concern to it, to the chairman or the panel members, because an inquisitorial method has the inquisitor at the centre. Lastly, it allows often contentious and difficult issues to be examined and determined in a relatively dispassionate environment, without the extra heat that is brought to an affair when people are adversaries to each other’. The Committee recommended adoption of an inquisitorial method for the Inquiry. It stated (para 215, p 67):

We agree with our witnesses that an inquisitorial procedure for inquiries is greatly to be preferred to an adversarial procedure, and we conclude that the Act provides the right procedural framework for both the chairman and counsel to the inquiry to conduct an inquiry efficiently, effectively and above all fairly.

But it fell short of abandoning the rival procedures, while recognising that both can be accommodated readily by the overall obligation to conduct the Inquiry fairly. Insofar as the Inquiry finds a technique of procedure taken from the courtroom (adversarial type) congenial, it can freely adopt that technique under its overriding duty to conduct the inquiry with fairness. Section 17 of the Inquiries Act explicitly treats ‘fairness’ as a prerequisite of the Inquiry. Yet the House of Lords Select Committee surprisingly seems to single out the judge-led inquiry in contrast to any inquiry led by a non-judicial chairman. It states (para 270, p 81) that ‘we consider that a serving judge who has chaired an inquiry not concerned with the practice or procedure of the courts should play no further part after submitting his report, leaving this to Ministers, others to whom the recommendations are addressed, or Parliament’. This recommendation was part of a wider responsibility on the chairman to follow up his own recommendations. Should that responsibility (exercisable at the chairman’s discretion whether to participate in public discussion of the Inquiry) include the judge-chairman? The Committee stressed this point, whereas Lord Justice Beatson had encapsulated it as a vital aspect between the judiciary and the executive:

Unless an inquiry directly concerns the administration of justice, or where there has been prior agreement about this (normally when the terms of reference are settled), a judge should not be asked to comment on the recommendations in his report or to take part in its implementation. This is the position of judges in relation to their decisions in legal proceedings over which they have presided. There are three principal reasons for the same principle governing judge-led inquiries:-

(i) the judge may be asked to give an opinion without hearing evidence;

(ii) the judge may be drawn into political debate, with accompanying risks to the perception of impartiality, as discussed above; and

(iii) implementation is the responsibility and the domain of the executive

Apart from the purported relationship between two of the three arms of government, there is no formal relationship between the judiciary and members of executive government. More pertinently, the rule (or convention) which excludes the serving judge from any external consideration of his/her recommendations as a chairman of inquiry applies only to a judge in the exercise of his traditional function within the legal system. And it does so only for the purpose of giving the rival disputants to the litigation of their issue a guarantee against potential bias in the subject under inquiry. Where, in an inquiry, there is no discrete issue to ‘find and determine’ any civil or criminal liability, and, where the witnesses at the inquiry are not witnesses to anything other than to questioning administered by the Inquiry without legal effect, the rule has no application. Judges, like all other inquiry chairmen, are treated statutorily on the same footing. Both are Commissioners of Inquiry; colloquially, if not legalistically, the chairman of an Inquiry under the Inquiries Act 2005 is the long arm of the Minister, carrying out an investigation on his behalf. In every respect, the judge-led public inquiry is in no different position from that of any other chairman.

Recently, in the inquiry into the standards and ethics of the press, this fact was misinterpreted. The problem started with an appellation, and not just a case of a terminological inexactitude. Every pronouncement called the chairman ‘Lord Justice Leveson’. But Sir Brian Leveson was sitting to conduct a public inquiry, not as one of Her Majesty’s judges sitting regularly as a member of the Court of Appeal with fellow Lords Justices of Appeal. He was a Commissioner of Inquiry, pursuing an investigation as a part of a process of public administration, acting under terms of reference dictated by a Minister or Ministers. What then was Sir Brian’s function, if he was not determining issues of criminal or civil liabilities of anybody? A public inquiry is palpably not a court of law. Legalism must play no part in its process. The conduct of the Inquiry is flexible enough to allow the maximum amount of evidential material to be adduced and evaluated.

The exclusive initiator of a public inquiry is a Minister (or Ministers) of the Crown and it is an act of public administration outwith the legal system (there is now not even a requirement to obtain the authority of a parliamentary resolution and there is no appeal). The 2005 Act provides for Ministers to set Terms of Reference. The Minister appoints an Inquiry chair, including specifically a judge as the chair. If the Minister thinks that the chair should be a serving judge, he is obliged to consult the head of the relevant judiciary. The Inquiry is not permitted to determine civil or criminal liability of those appearing before it, but in the course of the finding of facts the Inquiry is not inhibited from stating matters from which civil or criminal liability may be inferred. It is distinctly not a court of law and its recommendations cannot, and do not have any legal effect. The aim of an inquiry is to restore public confidence in systems or services by investigating the facts and making recommendations designed to prevent recurrence. Blameworthiness is not precluded but it is a subsidiary function. Sections 17 to 23 regulate the conduct of inquiries, including the express requirement that the chairman must act fairly throughout the inquiry. There is no reference to the chairman acting judicially as if he were conducting a piece of litigation. The only judicial control is by way of judicial review of any decision of the Inquiry and imposes a time limit of 14 days for bringing an application for judicial review. Of the thirteen inquiries conducted under the Act by October 2010, nine were conducted by retired English, Scottish or Northern Irish judges (although one of those nine retired during the course of the Inquiry), and three were conducted by others not qualified; the other was chaired by a leading Queen’s Counsel expert in mental health cases. In July 2011 Sir Brian Leveson, a serving Lord Justice of Appeal, was appointed as the sole chairman of the Inquiry into the Culture, Practices and Ethics of the Press, and he reported on 29 November 2012. In none of the 13 earlier inquiries did the chairman elaborate on his or her function under the Act.

Anyone conducting a public inquiry under the 2005 Act is a Commissioner of Inquiry, who may properly in his professional life be a serving judge functioning under a judicial oath to determine issues between rival disputants in litigation. Apart from Sir Brian Leveson, none of the inquiry chairmen was a serving judge and was then not referred to as other than their daily title. There is, of course, nothing improper in a Minister of the Crown appointing a serving judge as the Inquiry chairman, but if he does the judge is merely a Commissioner of Inquiry. Sir Brian purported throughout that he was performing a judicial-like act. He was not.

*Public administration*

When analysed, the public inquiry is part of the development of resolving public issues that are not or could not be encompassed in a system of law that is costly to the litigating public. Stripped statutorily of the judicial function of adjudicating on rival disputes and enforcing its orders, the Inquiry’s chairman has a primary role of fact-finding and evidentiary decision-making. These roles are exemplified by those administering the assessment and evaluation of, as well as the credibility and reliability of witnesses. As such they require the attributes of practising lawyers and other regular decision-makers and do not exhibit more than legal qualification. Additionally, they should be equipped with good judgment and common sense. Wisely, the Inquiries Act 2005 makes no distinction among potential Commissioners of Inquiry. The skills sought are to be found in persons both legally qualified and otherwise; Ministers will select those deemed suitable, whether judicially qualified or not. The statutory requirement then is that, in proposing to invite a judge to be chairman, there should be consultation with the judge’s superior office-holder directed to the availability of members of the judiciary; it is a sensible precaution against the misuse of available talent, and not just selection preference. There is deliberately no requirement that Inquiries should be judge-led, in contrast to Israel, and some other jurisdictions.

There are two distinct occasions where the choice of chairman should instinctively be preferred. First, the Minister of the Crown sponsoring the membership (a chairman, with or without assessors) must decide whether the subject matter calls for a judicial function for such an inquiry. The underlying question is whether the inquiry will depend on a fact-finding exercise, a test of a witness’ credibility and reliability. This is an exercise for which the elements of justiciability prevail. If, on the other hand, the topic to be inquired into evokes issues of social policy, or even requires a study of the systems and services at play, then the judge, unqualified on the topic, may not be a preferred choice. The next stage – the powers of the chairman, as a Commissioner of Inquiry, exercising his procedure and conduct of the Inquiry by virtue of the discretionary power in section 17(3) of the Inquiries Act 2005.

If the background to the establishment of an inquiry is a matter of public concern, the appointed chairman is, willy-nilly, embroiled in a matter of controversy, certainly less publicly articulated than the active politician or the engaged citizen. The enterprise of resolving disputes through the legal system, familiar to a judge, must not be injected into the inquiry system: section 2, which excludes any finding or determination of guilt by the Inquiry, but endorses otherwise by comment any inference of blameworthiness on any person, means essentially that the judge is for that purpose not a judge. He is under no judicial oath, but is the long arm of public administration and carries out the statutory duty to carry out the inquiry on the terms of reference given to him by the Minister, and reports on his findings. The evidence binds no one. The Minister may decline to act upon the report and any recommendations. Judges, familiar with the legal process from their daily occupation, can understandably slip into legal habits. It is all too easy to treat a public inquiry like a court of law. The chairman of the inquiry, whatever his normal occupation may be, is a Commissioner of Inquiry. It is one thing that proceedings are conducted well in the matrix of factual evidence, but on the conclusions fails to convince. There have been two examples which demonstrate the public reaction to the particular inquiry.

The first example is the inquiry which Lord Hutton (immediately on retirement from the Bench) conducted into the events leading up to Britain’s involvement in the invasion of Iraq in March 2003. About the conduct of the sessions held to elicit the evidence, Lord Hutton was hailed as the voice of reason, and the analysis in his report of the events surrounding the disclosure of the government’s approach to Iraq’s alleged weapons of mass destruction (WMD) was masterly. Lord Hutton’s report concluded with the question of whether the Government had misled the public in its report into the relevant weaponry in the hands of Saddam Hussein, and whether the early morning unscripted broadcast by Andrew Gilligan on the intelligence gathering of the WMD report was the result of defective management by the BBC. On the two rival issues of blameworthiness, Lord Hutton exonerated the Government, and strongly criticised the Governors of the BBC. The public reception was to a large extent unfavourable. By many commentators Lord Hutton was denounced as a lackey of whichever authority the reader of the report did not agree with. The judiciary was predictably regaled as expressing a politically controversial judgment, an impairment of the constitutional guarantee of judicial independence.

Whenever the projected inquiry presents within itself a host of political controversy, the judiciary may nevertheless be favoured, but only if on the panel of inquiry, the judge-chairman sits with assessors, to provide that element of expert knowledge of the topic under inquiry. There are within our society people well-versed in matters of procedural fair play – due process, if you will – to make suitable candidates for chairmanship. It may be sensible to select as an assessor someone with legal expertise, such as a practising member of the Bar. That precedent was present in the inquiry into Legionnaires’ Disease at Staffordshire Hospital in 1980 by Sir James Badenoch, a prominent physician, as chairman of a panel that included a leading Queen’s Counsel.

For very different reasons, the impropriety of a judge (with two Commonwealth judges sitting as assessors) held the second public inquiry into Bloody Sunday, which took 12 years to conclude and cost the public purse approximately £250 million. Among the legal profession at least, the subject-matter of the inquiry by Lord Saville into the tragic events of 30 January 1972 was very properly overseen by a very senior judge. The conduct of the case was a typical example of a public inquiry that, under the 1921 Act, held pre-2005, was popularly described as a judicial inquiry – namely that it had the value-added quality of judiciality that endorsed public confidence in impartiality and judicial independence. It was a disaster in terms of cost and delay, universally dubbed as ‘never again’. Public inquiries today should no longer be described as judicial inquiries: they are acts of public administration, conducted on behalf of, but independent in their conduct from, the sponsoring Minister.

The House of Commons Public Administration Select Committee, in a 2005 paper contemporaneous to the enactment of the Inquiries Act 2005, gave as its reasons to support the frequency of judge-led inquiries that they were arguably ‘a quasi-judicial forum’. After the 2005 Act the public inquiry ceased to have any judicial quality. The point is made clear in a passage in the judgment in *Kennedy v The Charity Commission*:[[85]](#footnote-85) if the Minister can decide whether to accept or not the findings of the Commissioner of Inquiry [under Section 19 of the Inquiries Act] (whether it is judge-led or not), it becomes an administrative decision, not a judicial or quasi-judicial act. Section 18(3) of the Inquiries Act 2005 requires, as with the Freedom of Information Act, disclosure of documents to be left to the Minister, that too renders it outside the route of being judicial or quasi-judicial.

The day-to-day occupation of its chairman as a judge is, if at all relevant, purely formulistic. As with every appointee as chairman, the judge in the chair is properly described and functions as a Commissioner of Inquiry in pursuance of public administration.

**The Enforcement Gap in International Criminal Law**

**Prof. Wayne McCormack**

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The international community has adopted substantive norms that proscribe four forms of

violence: war, terrorism, human trafficking, and piracy. The common theme among these, in addition

to the obvious destruction of human life and dignity, is that each is “illegal” under a variety of

international customs and covenants, but there is absolutely no international enforcement worthy of

the name.

Although there are several special tribunals to deal with particular episodes of “war crimes” and

there is now an International Criminal Court, the world has yet to implement a coherent body of

judicial authority and enforcement power with regard to serious intrusions into human dignity.

Oddly, there is an American TV series about a police force that does not exist. As one knowledgeable

reviewer put it, “I could almost accept a show that gave the ICC a police force; after all, who among

us doesn’t wish it had one? But I cannot accept a show that invents an ICC police force that

investigates” ordinary serial killers as opposed to war criminals. Not only is the jurisdiction of the

International Criminal Court very limited, it has no enforcement power of its own but must rely on

member states for the exercise of power.

***The Four Categories of Crime***

In folklore and movies, from Errol Flynn to Johnny Depp, a pirate is a swashbuckling

larger-than-life character somewhat akin to Robin Hood. In reality, an 18th Century pirate was more

likely to be a hungry derelict preying on whatever traffic he (or occasionally she) could find, and was

subject to instant punishment rather than movie royalties.

Slavery has existed through most of human history. The notorious traffic of the 18th Century

from Africa to the New World brought about 12 million persons to plantations. Human trafficking

today enslaves hundreds of thousands of persons every year, most of them children exploited in sex

markets but also many thousands of desperate immigrants and refugees. Estimates of modern slavery

range from 12 million to 27 million persons held in some form of forced labor today.

Mass atrocities, formerly known as war crimes and now subsumed under the heading of IHL,

continue to plague states with weak electoral or other accountability measures. As dictators are

challenged, or as ethnic hostilities break out, hundreds of thousands can be killed and the various

other forms of torture or predation multiply.

The numbers and level of suffering from forced labor and mass atrocities far exceed acts of

“terrorism” against U.S. persons or facilities. Yet the world reacted vociferously to terrorism

following 9/11, and two lone misguided young men in Boston can capture the voyeuristic media of

the US for months on end while dozens of deaths in other countries go virtually unnoticed. In terms

of loss of life, terrorism pales by comparison to traffic fatalities and gun deaths S even just counting

U.S. fatalities in the latter two categories – while death and suffering from natural disasters impact

thousands, almost always the poorer regions and persons of the globe.

These four categories of violence may be linked in a number of ways. Terrorist tactics can be

used to enslave a population, and enslaved populations can be trained in the ways of terrorism. In the

modern world, human trafficking may provide both funds and camouflage for terrorist organizations.

Both are linked in organized crime along with drug trafficking and piracy. Atrocities in time of armed

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conflict include attacks on civilians and trafficking along with other forms of predation.

There is another critically important link among all these threats to human life and dignity:

Although international norms condemn them and in some instances create international criminal

prohibitions, there is no international enforcement mechanism for any of them. Even the International

Criminal Court, created to prosecute “widespread and systematic” atrocities, has no enforcement

power of its own but must rely on member states for physical control of persons.

A spectrum of threats to human life and dignity runs inexorably from the examples of overt

violence to less overt violence in the form of labor conditions. The April 2013 collapse of a factory

in Bangladesh killing over 1100 people exemplifies the connection very clearly. Before delving

deeply into labor economics, however, I propose to focus first on the issues of overt violence which

should be easier to define and enforce.

As the title of the article suggests, the gap in enforcement of international norms is enormous –

and it provides a gigantic opening for organized crime. In many countries today, organized crime is

more powerful than the government and corruption is rampant. Criminal groups sell people, sell

weapons to terrorists, sell weapons and expertise to abusive regimes, and hire or invest in the

activities of pirates. While some countries and regional groups make unilateral inroads on

transnational criminal action, it is unrealistic to expect much progress until there is an international

police effort on all these fronts. It is toward creation of such a global effort that this hopeful bit of

prose is directed – obviously not in my lifetime but perhaps in my children’s lifetime.

**A. War – Crime and Punishment**

Humans seem to be unusually aggressive territorial animals. Indeed, humans were once thought

to be the only species that would kill others of its own kind, but Jane Goodall laid that belief to rest

with her observations of chimpanzees essentially committing genocide on other groups. And a recent

10-year study of a particular subspecies of chimpanzees found that they would kill to expand their

territory.

Steven Pinker has tried to speculate from these primate behaviors about the pre-human state of

violence in the world and wonders if our earlier ancestors took after the sex-loving peaceful bonobos

rather than the more violent chimps. As he recognizes, however, even bonobos will kill other

primates – although they have not yet been observed killing within their own species.

Although we can’t really know whether humans killed each other prior to the advent of

civilization, we do know that the earliest recorded history is full of organized violence, group against

group for control of food, territory, or procreation opportunities. As soon as humans began to settle

into communities, they went to war in community against community.

The drive for dominance is understandable. Just as a society needs a government with a

monopoly on the use of force, at the international level there may well be a corollary need for a

dominant force to restrain aggression. Perhaps the presence of the two superpowers during the Cold

War kept the lid on a number of volatile situations which blew apart with the breakup of the Soviet

Union.

The human impulse to violence has generated a counter-force in the form of rules to confine and

restrain the intensity of that violence – rules often violated but nevertheless recognized in the form

of a “law of war.” It is worth pausing to consider the impetus for a “law of war.” What is the point

of a gentlemanly insistence on “playing by the rules” in a “game” that is designed to kill people?

Most explanations for “rules of war” have essentially pragmatic roots. One is a straightforward

self-interested expression of the Golden Rule: “Do unto others as you would have them do unto you”

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in this context could be based on the hope that humane treatment of enemies will prompt their

humane treatment of you and your soldiers. Another aspect of self-interest is that some restraints on

force, especially those regarding environmental damage, is that it hardly makes sense to obtain

control of a piece of territory that is no longer useful for anything. In similar fashion, a sensible

leader would generally prefer a subservient population rather than a mass of bodies.

At a different level, but still within the arena of pragmatism, it is wise place limits on one’s own

capacity for violence. Allowing troops to degenerate into random or excessive violence threatens the

discipline on which commanders rely for all military operations, and it also diverts energy from the

defined military objectives. There certainly is a tendency for violence to degenerate in the absence

of social controls. I was particularly struck by the answer to the question of why bother with rules

given by one of my students, an active Marine Captain with experience in Fellujah: “It’s hard enough

to get a 19-year-old kid to kill another person. If he doesn’t believe in what he’s doing, he may not

obey orders.” To which his fellow Marine colleague added, “And, besides, it’s the right thing to do.”

Both these veterans were referring not just to ethics but to the necessity of maintaining control of

their troops for the sake of discipline.

In what is known as the Axial Age, the First Millenium BCE produced the Hebrew Torah, Sun

Tzu’s *The Art of War*, and the Hindu Book of Manu, all containing proscriptions protecting some

classes of persons and proscribing some forms of warfare.

Although international law developed over several millennia, the current version consists

principally of rules laid down in the 18th Century by the European nations during the colonial era.

These nations were running into each other in “remote” and “unsettled” places around the world.

They needed rules to set limits on their conflicts to minimize the possibility that those conflicts would

spill over into damage to their homelands. Without being conscious of all their motivations, which

included setting limits on how the “uncivilized” portions of the world should behave, they naturally

drew on their existing historical backgrounds.

The most visible enforcement mechanisms of current international law can be grouped into one

set of mechanisms for nations and another for individuals. The United Nations Security Council in

theory enforces rules of nonaggression by calling on member states to invoke sanctions against any

state which violates the U.N. Charter’s prohibition on aggression. There are obvious political gaps

in the decisions of the Security Council, but that does not take away the facial legitimacy of its

power. That legitimacy could be the basis for reforms that would lead to a genuine global

enforcement of LOAC. Moreover, the International Court of Justice has taken the position that the

role of the Security Council is not exclusive and that courts such as itself can also provide remedies

for violation of the law of armed conflict by nations.

The second set of enforcement mechanisms, applying the law of war to individuals, begins with

war crimes trials following World War II. The United States tried some German spies and saboteurs

in military courts. The United States also conducted military trials against vanquished Japanese

commanders accused of allowing their troops to violate the “laws and customs of war.” The highlight

for international enforcement of the law of war was the Treaty of London and the resulting

Nuremberg trials of high-ranking Nazi officials. The trials at Nuremberg were intended to import the

processes of law onto the international scene for dealing with war crimes. Prior to that time, “victor’s

justice” had been meted out at the national level. The Nuremberg trials have been followed in more

recent times by ad hoc Tribunals for Yugoslavia and Rwanda, the Special Court for Sierra Leone, the

Extraordinary Chambers in the Courts of Cambodia, and ultimately by the International Criminal

Court.

To take a current example, with all sources of law considered, there are at least three regimes

under which attacks on civilians in Syria could be prosecuted. They are subject to ICC jurisdiction

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over crimes against humanity (not the part of LOAC that defines war crimes because the violence

is directed against fellow nationals). Second, crimes could be tried by occupation forces as an

ordinary criminal. Third, if IHL is part of *jus cogens* and thus sufficient for invoking universal

jurisdiction, then it could be tried by any nation-state that could obtain custody of the person.

International tribunals will seek limitations on their own authority for the same reasons that

federal law in the U.S. has been limited so as not to occupy or preempt the roles of the states in

addressing violence against civilians. In the U.S. system, the states need to have some relative

autonomy in the operation of their criminal justice systems and in the definition of crimes, although

this autonomy is limited by procedural requirements of the Constitution, substantive limits gleaned

from Constitutional protections of individual liberties, and preemption in some instances by federal

law. With all these limitations, however, federalism has worked reasonably well to preserve some

level of autonomy closer to where the people live. That autonomy serves to enhance the perception,

if not the reality, of accountability of government to the populace.

At the international level, nation-states have been accustomed to independent sovereign status.

The inroads on that status have begun with statements of international criminal responsibility for acts

of state. As individual criminal responsibility expands, the autonomy of the nation-state will be

reduced to the extent that it cannot immunize its nationals for conduct that the international

community proscribes. In return, the international community will almost certainly be alert to

encroachments on state autonomy because all international actors are, to some extent, also nationals

of a nation-state themselves. In this sphere, the pressures for nation-state autonomy are identical to

the pressures for autonomy of the states in the U.S. federal system.

If the ICC could not obtain independent investigative authority, even less likely is there to be,

in the foreseeable future, legal recognition of the rights of one state to investigate within the borders

of another state. Thus, even under an international criminality regime, the investigation, pursuit, and

arrest are all likely to be contingent upon either the resident state’s consent, action of the UN Security

Council, or simple exertion of force by the investigating state.

In the U.S. analogy, the Civil War and the post-war amendments settled the proposition that the

federal government can intervene in the internal affairs of a State to enforce provisions of federal law,

although it took another 100 years to implement the proposition. Nothing in the American experience

implies that California can intervene in the affairs of Nevada without federal authority. Eventually,

it may become reality that the United Nations exercises the power to intervene in the affairs of a

nation-state to enforce norms of international law, in a fashion similar to the federal enforcement of

civil rights laws within one of the United States.

**B. Terrorism – Crime and Punishment**

Terrorism is now subject to almost universal condemnation but has a number of definitional

problems. Most of the problems in this area, however, stem not from the forms of terror but from the

question of which legal regime is involved. For example, state terrorism is subject to the Law of

Armed Conflict and to norms of international humanitarian law already described. The non-state

terrorist may be a criminal by the law of any country affected and may, depending on the connection

with state organs, also be subject to international humanitarian law. The question for the international

community is whether it can reach agreement on criminalizing the behavior of non-state actors

outside the scope of these existing legal regimes.

The definitional problem of terrorism leads to the most fundamental link between terrorism and

slavery. A great deal of collective violence is based on ethnic or cultural identity. The crimes of

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genocide and crimes against humanity reflect not just an intolerance of widespread violence but a

revulsion for treating people as less than human. Therefore, in thinking about the definition of

terrorism it will be helpful to keep in mind the history and legal regimes dealing with the most visible

form of transnational racism, human trafficking.

To return to the question of why terrorism is such a big deal, the terrorist uses the tactic for the

very reason that it will generate passion and fear, so some of the explanation is contained in the

nature of the acts themselves.

First, the act is “in your face;” it was never more dramatically so than on 9/11. Second, many

terrorist acts are designed for randomness S a bomb on a bus in the middle of the day or in a shopping

area or a nightclub on a quiet evening creates the impression that death can stalk in the most mundane

of circumstances. Third, the perpetrators fall into either of two camps, persons who appear to have

the official imprimatur of the victim’s own government or faceless unidentifiable persons who could

be standing next to you on the next street corner. Because they are not uniformed personnel of

another nation’s military, there are no ready avenues for seeking them out or guarding against their

next act. Fourth, modern terrorism challenges the very legitimacy of government itself. To the extent

that the terrorist can create the impression that government is helpless to protect its citizenry, the

government loses not just credibility but authority itself. This creates pressure for the government

to over-react and enforce severe restrictions on its citizenry, further undermining confidence and trust

between government and citizen.

For all these reasons, terror is an extremely effective weapon and has been for centuries. The first

recorded justification for the killing of noncombatants occurs in the description of the Hebrew

conquering of the lands of Canaan in the Second Millennium BCE. In the Torah, God’s instructions

to the invaders drew a distinction between cities that the invaders were to occupy and those that were

somewhat removed. When the latter were conquered, the male inhabitants were to be put to death

while the women, children, and cattle were to be spared. But with a city that resisted or was to be

occupied, the invaders were to “save alive nothing that breatheth.”

The rationale for such harsh treatment of an occupied land was that the new settlers might

otherwise be tempted to take up some of the customs of the former occupants and thus dilute their

own culture. Shakespeare attributes to Henry V, in his warning before the gates of Harfleur, a

different rationale for threatening rape and murder of the inhabitants, a threat that attempted to place

the blame for atrocities on the defenders for failing to yield. Thucydides, in his account of the ancient

Hellenic wars, asserts that wartime atrocities are inevitable because war has a debilitating effect on

public morality and stability.

In the modern era, as airplane hijacking unfolded, western nations enacted specific statutes

criminalizing the offense of air piracy and attempted to extradite perpetrators. The host country,

however, might be unwilling to extradite because it had promised safe haven to the hijacker as part

of a deal in which the plane was allowed to land and the hijacker freed the crew and passengers.

Reneging on that promise would then cause difficulties in future negotiations with hijackers.

The 1972 Munich Olympics saw the kidnaping of the Israeli wrestling team and the botched

rescue attempt at the Munich airport; the final outcome of this incident was 9 Israeli dead, 3 terrorists

shot and three terrorists imprisoned for a brief period. Then came the Achille Lauro, with the coldblooded

murder of a U.S. citizen in a wheelchair, and a series of kidnapings and murders of western

diplomats in various African and Middle East countries. The 1970's were most notable for the rise

of the Palestinian-oriented terrorist movements, although some leftist groups continued to operate

in various places around the world.

The 1980's were most notable for the collapse of the Soviet Union, which left Muslim freedom

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fighters trained and equipped by the U.S. with no target for their frustration and rage except for the

West in general and the U.S. in specific. The bombing of Pan Am 103 over Lockerbie, Scotland was

the first significant event to touch U.S. citizens or assets directly, but it was rather clearly a statesanctioned

act that was met with both military and diplomatic sanctions against Libya. The two key

events that triggered U.S. involvement in counter-terrorism were the first bombing of the World

Trade Center and the bombings of U.S. embassies in Africa, for which a number of associates of

Osama bin Laden were convicted and bin Laden himself was indicted. By the 1990's, the leftist

groups were more or less moribund, the IRA had entered into peace accords, and ethnic-religious

conflict took center stage. The transition from the second to the third millennium was accompanied

by the campaign of suicide bombings in Israel, widespread terrorism across the sub-Asian islands and

Africa, the ethnic bloodbaths of Yugoslavia and Rwanda, and then came 9/11.

Meanwhile, the diplomatic wheels were grinding out more Conventions: taking of hostages,

piracy against maritime shipping, acts involving airports, control of nuclear devices and plastic

explosives. Each of the conventions commits signatory nations to define the offenses as crimes within

their own law, which in turn leads to a commitment either to extradite or to place the accused on trial.

But enforcement is dependent on the internal domestic systems of the signatory nations, none of

which can reach into the interior of another country without either that country’s permission or a

credible threat of imminent harm coming from that venue. There is no international enforcement of

international norms.

**C. Human Trafficking – Crime and Punishment**

Like terrorism, human trafficking has ancient roots. Moreover, the two are closely connected in

the sense that enslavement may be both a technique of terrorism and a goal. Subjugation of part of

a population may serve to intimidate the remaining populace into submission, while terrorizing a

population by violence against random members may be an effective means of coercing the populace

into involuntary servitude.

Slavery became a subject of treaty law in the 1800's and some scholars believe it would have

been considered a crime under international law by the middle of that century. It was not until 1926,

however, that the subject was mentioned in an international document. Finally, in 2003 a treaty

committed most nations of the world to taking effective steps to stamp out trade in humans, placing

a special emphasis on children and women. Despite universal revulsion toward slavery, there are

many forms of forced labor still in practice, and international law retains some definitional issues to

be resolved.

Although it is impossible to get precise numbers on the phenomena, it is clear that there are many

thousands if not millions of people in various forms of forced labor today. The major components

are sex marketing, domestic servants, and agricultural workers, but other components of manual labor

may also involve some degree of coercion. Organ trafficking has also become a part of the

phenomenon in recent years.

There are no reliable estimates of numbers of persons or dollars involved in the sex or forced

labor trades. The United Nations Office on Drugs and Crime describes the phenomenon and numbers

this way:

In Asia, girls from villages in Nepal and Bangladesh – the majority of whom are under 18

– are sold to brothels in India for $1000. Trafficking in human beings is not confined to the

sex industry. Children are trafficked to work in sweatshops as bonded labour and men work

illegally in the "three D-jobs" – dirty, difficult and dangerous.

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But the numbers are inherently unreliable. For example, in 2001, the FBI estimated 700,000 women

and children were trafficked worldwide, UNICEF estimated 1.75 million, and the International

Organization on Migration (IOM) merely 400,000. In 2001, the UN drastically changed its own

estimate of trafficked people – from 4,000,000 to 1,000,000. The most cited statistics on trafficking

come from the U.S. State Department's annual reports on trafficking in persons. According to the

2005 report, 600,000 to 800,000 people are trafficked across international borders each year, with

14,500 to 17,500 trafficked into the U.S. But a recent CIA report estimated that between 45,000 to

50,000 women and children are brought to the United States every year under false pretenses and are

forced to work as prostitutes, abused laborers or servants.

The dominant international convention on forced labor is Protocol I of the Convention Against

Transnational Organized Crime, commonly known as the Palermo Protocol. It defines the

phenomenon this way:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer . . . of

persons, by means of the threat or use of force or other forms of coercion, deception, abuse

of power or of a position of vulnerability, . . for the purpose of exploitation. Exploitation

shall include, at a minimum, prostitution or other forms of sexual exploitation, forced labour

or services, slavery or practices similar to slavery, servitude or the removal of organs;

The Protocol obligates each signatory nation to criminalize trafficking and to provide assistance

to victims of trafficking:

International cooperation to end the slave trade can be dated from 1794 when the federal slave

trade act 0f 1794, “prohibited all persons from fitting out in, or sailing from, American ports for the

slave trade to foreign countries.” By 1810, it was a crime for a U.S. citizen to serve on a slave ship

trading between any two other countries. In a series of treaties between 1810 and 1817, Britain was

instrumental in establishing treaties to end slave traffic in the Atlantic among Portugal, Spain, France,

and the Netherlands.

International force was levied against slave trading beginning in 1819, when Britain began

patrolling the west coast of Africa to intercept slave traders operating in violation of treaties. In 1820,

the U.S. declared slave trading to be piracy punishable by death. U.S. naval forces joined the British

off the west coast of Africa but withdrew in 1824 when the U.S. and Britain negotiated a treaty

calling for joint operations against slavers. The Senate demanded amendments to the treaty which

Britain refused to sign, and the U.S. terminated the arrangement.

Illegal immigrants form a major social controversy in the 21st Century United States. Typically,

a “coyote” offers to bring migrants from Mexico to the United States for an exorbitant fee. If all goes

well, the coyote will not only transport them but set them up with a job. When things go poorly, the

migrant may be abandoned in unsafe conditions. The employer may or may not make good on wages

and other promises, but the worker has few rights because any recourse to the legal system to enforce

promises will bring the worker to the attention of immigration officials and result in deportation.

Running throughout all the international conventions and dialogue is the theme of preventing

involuntary servitude while allowing consenting adults to barter or sell their labor subject to

minimum standards of labor conditions. The modern dilemma with sweatshops can be simply stated:

a wage that would be substandard in one part of the world may be a boon to those in another locale.

The need for standardizing labor conditions, the economics of global labor markets, and methods for

making gains from globalization are mostly beyond the dimensions of this article. In the current

context, however, it is worth noting that labor conditions in the U.S. did not become subject to

standardized minima until the U.S. recognized that it was a single national labor market – when the

world recognizes that it is a single global labor market, then standardization of labor conditions

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should naturally follow. Until that occurs, the possibility of exploitation remains a local phenomenon.

With regard to enforcement issues, I want to mention one particularly tragic case of sex

trafficking from the European Court of Human Rights. This was about the suicide death of a young

Russian girl who took her life after being held to work in a “cabaret” in Cyprus. She had fled the

confines of her apartment and was found by the brother of the cabaret owner, who took her to a

police station. The police failed to detain her because she had broken no law and returned her to the

owner’s premises. Somewhat later she was found dead on the street below her open window.

The Russian father charged both Russian and Cypriot authorities with failure to protect her life

as well as failure to prevent her enslavement. With regard to the first charge, the Court held that the

Convention “enjoined the state not only to refrain from the intentional and unlawful taking of life but

also to take appropriate steps to safeguard the lives of those within its jurisdiction. For the Court to

find a violation of the positive obligation to protect life, it would have to be established that the

authorities had known or ought to have known at the time of the existence of a real and immediate

risk to the life of an identified individual.” But with respect to the claim under Article 4, the Court

held that the Cypriot authorities had sufficient notice of the girl’s circumstances that they should have

launched an investigation into the possibility that she had been trafficked and enslaved. The Court

took notice that “artiste” visas had been used for sex trafficking in a number of instances, and that

the practice should have led to an inquiry when she was brought to the police station.

**Sex Tourism**

The horrific circumstances of children engaged in commercial sex began to catch the world’s

attention in the 1990's following the demise of the Soviet Union and the shifting economic

arrangements of “globalization.” Cambodia and Thailand in particular became destinations for sex

tourists, many of whom were interested in younger and younger targets of opportunity. The

economics of those countries and their neighbors made it possible for purveyors to “purchase”

children from their families for nominal amounts and then employ those children in providing

services to sex tourists. The International Labor Organization led the way in developing Standards

of Good Practice for tour companies. Then international organizations moved to find other ways of

combating the practice.

The U.S. Criminal Code contains a number of provisions that can be brought to bear on the

commercial sex trade. One chapter deals with forced labor, 18 U.S.C. §§ 1581-1596. The chapter

dealing with “sexual abuse” criminalizes nonconsensual sex within federal territories or the

extraterritorial jurisdiction of the U.S., 18 U.S.C. §§ 2241-2248. The chapter on “sexual exploitation

and other abuse of children” criminalizes sexual behavior with children either within the special

jurisdiction of the U.S. or through use of the channels or instrumentalities of interstate commerce,

18 U.S.C. §§ 2251-2260A.

One approach to dealing with the phenomenon of commercial sex exploitation is to reduce the

demand by criminalizing the patron. In the leading case dealing with the U.S. statutes, the Eleventh

Circuit affirmed a conviction of a man who “merely” decided to have paid sex with a young boy in

Cambodia. “Traveling to a foreign country and paying a child to engage in sex acts are indispensable

ingredients of the crime to which Clark pled guilty. Congress did not exceed its power ‘to regulate

Commerce with foreign Nations’ in criminalizing commercial sex acts with minors committed by

U.S. citizens abroad.”

But for current purposes, the important point to note is that the U.S. does not claim jurisdiction

over the offense of sex slavery in another country, only jurisdiction over the consumer of that trade.

Thus, no country other than the country in which the slavery occurs or the country from which the

trafficked victim originates could claim authority to punish the perpetrator of the offense. That is

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truly abhorrent to universal principles of human dignity.

**D. Piracy – Crime and Punishment**

By customary international law as well as conventions, a pirate is subject to punishment by any

nation who can capture him or her. Universal jurisdiction over crimes *erga omnes* means that even

a land-locked nation would have an interest in punishing an act on the high seas or in unclaimed

airspace.

Piracy has been condemned as a matter of international law at least since the early 1700's when

commercial operations went to sea. The images of swashbuckling rogues in popular literature and

film are somewhat at odds with the hard realities of piracy. In the 18th Century, pirates were hanged

summarily in Caribbean ports by both British and Spanish governors. Today, the ragtag Somali

fishermen-turned-pirates are part objects of sympathy for their hard economic lives and part objects

of rage for their callous attitude toward life.

The critical issues for us are the extent to which nations have the power (or obligation) to use

military force or judicial prosecutions against pirates operating on the open seas, the extent to which

political motivations play a role in defining the criminality of piracy, and the appropriate responses

by the shipping industry (whether to arm civilian ships, whether to pay ransom).

All the world’s major economic players are now engaged in policing the seas of the Indian

Ocean, but that is still a vast area to patrol. With so many other military priorities, particularly the

continuing repercussions of the Arab Spring and other Middle East concerns, it is not realistic for all

of the worlds’ military fleets to concentrate solely on the Indian Ocean.

Modern piracy also presents a dilemma because of a change in strategy from the days of

Blackbeard. By contrast to the 18th Century pirate, who either killed or recruited the crew and sold

the cargo, the modern pirate may hold the captured ships and crews are held for ransom. Shipowners

typically will pay the ransom, and while some observers have objected that this encourages further

kidnaping, it is difficult to tell the shipowner to leave his/her crew in the hands of pirates. It has even

been observed that making ransom payments could be illegal if it were shown that the money was

going to support terrorist activity or going to a designated FTO under U.S. law. If Al Shabaab, a

designated FTO, is known to be receiving any portion of ransom proceeds, then the payment would

almost certainly be illegal under § 2339B. Even without that, the actions of the pirates themselves

could be deemed to come within the coverage of § 2339A.

In fairness, to round out the picture of Somali piracy, it must be observed that the collapse of

Somalia as a nation coincided with an influx of illegal fishing practices into the waters off the coast.

The devastation to the fishing grounds contributed to the taking up of pirate activity by the former

Somali fishermen. Some observers report now that, after the peak of piracy in 2010, the illegal

fishing ships are starting to be scared off and the fisheries are returning to a more profitable status.

Some reports indicate that the era of Somali piracy is ending. “Data released by the [U.S.] Navy

showed 46 pirate attacks in the area in 2012, compared with 222 in all of 2011 and 239 in 2010. Nine

of the piracy attempts in 2012 have been successful, according to the data, compared with 34

successful attacks in all of 2011 and 68 in 2010.” It is even possible that the success of the pirates,

combined with the patrolling naval vessels of other nations, have scared away the illegal fishing

marauders which threatened Somali livelihoods so that the fishermen can now return to their former

way of life. Or it may be that the pirates will simply relocate to Kenya or North Korea or more

remote places in the East Indies.

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One point stands out in this recitation of events. The pressure brought to bear by commercial

shipping through the International Maritime Bureau and the International Chamber of Shipping had

immediate and dramatic effect on the enforcement efforts of the world’s major naval powers. If the

same level of enforcement cooperation were brought to bear on issues such as human trafficking,

especially the sex trade, it would be interesting to see what effect the effort might have. With genuine

pressure from the business communities, the world could become a much safer place for young girls

and boys.

**E. The Problem of Sovereignty**

The dominant theme of international law has been the inviolability of sovereignty. One nation

does not intrude into the affairs of another. The law of war is designed to operate between and among

nations. Only in the last couple of centuries have international norms come to bear on the

wrongdoing of non-state actors. But the trend is inevitable and gaining in momentum. As the section

above on piracy demonstrates, when commercial interests are sufficiently threatened, they can bring

substantial pressure to bear on governments to crack down on a criminal environment.

The trend toward global definitions of substantive norms has given us rules on war, terrorism,

human trafficking, and piracy. There are also universal norms of personhood, which I will include

in a moment. What the world is lacking is a link from the substantive norms defined under

international law and enforcement mechanisms – the latter necessarily implicating judicial

independence.

International action to control violence comes in two forms. First is cooperation among states,

traditionally consisting of extradition of alleged offenders by one state for trial in another, and in

recent years emerging as codified agreements to cooperate in the detection, apprehension, and

prosecution of offenders. The second, and much more recent, phenomenon is collective action in the

form of supranational tribunals as the law of war has morphed into a body of international criminal

law applying to individuals engaged in particularly appalling behavior.

Why is it difficult to deploy global mechanisms to deal with crimes that are so obviously in need

of international attention? The objections to international criminalization are essentially the same as

the objections to federal criminalization of various behaviors in the United States – in both situations,

detractors object to the intrusion on the sovereign prerogatives of the state. These objections may be

camouflage for protection of potential malefactors or they may be sincere objections on principle.

But what principle or principles can be deployed to resist criminalization of violent or abusive

behavior? The notion of sovereign prerogative links with the ideal of self-determination. This takes

us into the realm of liberal ideology, that power flows from the people, which of course then leads

to the question of which “people” get to make the central determinations. Thus the conundrum for

any transborder reform, whether within the U.S. or across nations, has been the extent to which

externally imposed norms trump the wishes of the local populace.

The answer to that conundrum obviously is that when a norm becomes universally recognized,

then the relevant “people” extend beyond the borders of the nation-state. “We the People of the

World” should be free to impose human rights obligations on every nation when we feel strongly

enough about a given issue.

There certainly is room for some cultural relativism in the increasingly globalized community.

After all, what a boring place the world would be without Tchaikovsky, the Rolling Stones, and the

many forms of music that have grown from African roots. There is clearly room for different forms

of governance, ranging from the most primitive tribal systems of seniority through power-based

oligarchies to complex forms of parliamentary democracies.

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Because there are different systems of governance, there is room in those systems for different

forms of the Rule of Law. Obviously, not every dispute resolution will be the same. Tribal and

village elders can deploy extremely effective informal dispute resolution. Both elected and appointed

judiciaries can function under administrative systems within the executive or legislative branches,

although some degree of administrative independence is highly desirable. Any dispute resolution

system can adhere to the Rule of Law so long as it meets the basic requirements of transparency and

universality (some people add elements of fairness and consistency, but I think the twin elements of

transparency and universality are broad enough to include those).

Where there is not room for cultural relativism is on basic fundamental rights of personhood. The

Universal Declaration of Human Rights may have stemmed from Western liberal thought processes,

but it includes universal norms that reach beyond the traditional rights of Western nations, such as

rights of social and economic subsistence. I prefer to think in terms of universal norms of human

dignity.

For example, with regard to violence against civilians, the commodification of human beings,

especially the most vulnerable of the world, there should be little doubt of the universal norms in

play. There is no principle of cultural relativism that can justify either of those behaviors. There is

no justification for an informal dispute resolution system in which the village elders award the 9-

year-old daughter of one family to another man in the village to be his concubine.

Universal principles of human dignity make it easy enough to define behaviors as illegal. What

is much more difficult is finding the means and resources to deploy enforcement mechanisms. We

may not see an effective international police force within my lifetime, but surely the increasing

pressure for international cooperation in these arenas ultimately must lead to an effective law

enforcement response.

Thus runs the need for links from (1) substantive norms of criminal behavior to (2) supra-state

enforcement, to (3) a vibrant and independent international judiciary.

**Proposals for Amendments to The Mt Scopus Standards**

1. **Online Dispute Resolution ODR**

**The Challenge of Online Justice**

The difficulties in this field must be recognised when facing a client or customer on one side and an automatic machine on the other. It is important to demand every large, powerful company that has a dispute resolution center to deal with disputes between company and clients to have a consumer justice officer who will have the authority to rule in such disputes. Furthermore, this justice officer should not engage at the same time with ordinary tasks of the corporation.

We must meet the challenge of the emerging and increasing recourse to online justice practices and procedures whereby consumers are compelled to work out disputes and arguments against major companies online or in digital procedures. The digital procedures of handling consumer complaints are conducted by phone centers and call centers which sometimes are not even in the jurisdiction where the dispute arose, but are conducted by out-of-jurisdiction outsourcing call centers.

In addition to this type of online dispute handling, there is an increasing recourse to online justice in divorce where uncontested divorce is completed totally by internet communication with the relevant court or state agency. When in such a procedure impartiality and fairness are not maintained, the outcome of some very important issues can be affected, from distribution of the marital estate to co-parenting plans and other important issues.

**The solution**

The solution is to require separate complaints officers, meaning the ordinary company departments such as accounting and finance departments must be separate from the departments that handle disputes. This second department must also be presided over by persons who enjoy independence from the accounting and financial officers of the company if the goal is to be attained.

**Proposed Amendment to Mt Scopus :ONLINE JUSTICE**

**Section 9B**

**Complaints Officers in Government Agencies and business Firms shall be appointed in separate complaints department that handles digital or online disputes with consumers and shall not hold parallel functions in ordinary company departments such as accounting and finance departments**

**The complaints department must be separate from other departments.**

**This complaints department must be presided over by persons who enjoy independence from the accounting and financial officers of the company .**

**The procedure should insure fairness .**

1. **Lawyers and Bar Associations**

**Montreal declaration on the Independence of Justice 1983**

**Lawyers**

**Definitions**

3.01 In this chapter:

1. "lawyer" means a person ***qualified and*** authorized to practice before the courts, and to advise and represent his clients in legal matters;
2. "Bar association" means the recognized professional association to which lawyers within a given jurisdiction belong.

**General Principles**

3.02 The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.

3.03 There shall be a fair and equitable system of administration of justice, which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3.04 All persons shall have effective access to legal services provided by an independent lawyer, to protect and establish their economic, social and cultural, as well as civil and political rights.

**Legal Education and Entry into the Legal Profession**

3.05 Legal education shall be open to all persons with requisite qualifications, and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

3.06 Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer, and of human rights and fundamental freedoms *recognized* by national And international law.

3.07 Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to the poor and the promotion and defence of economic, social and cultural *rights* in the process of development.

3.0.8. Every person having the necessary integrity, good character and qualifications

In law shall be entitled to become a lawyer, and to continue in practice

without discrimination for having been convicted of an offence for exercising

his internationally recognized civil or political rights.

Education of the Public Concerning the Law

3.09 It shall be the responsibility of the lawyer to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties, and the relevant and available remedies.

Rights and Duties of Lawyers

3.10 The duties of *a* lawyer towards his client include: a) advising the client as to his legal rights and obligations; b) taking legal action to protect him and his interests; and, where required, c) representing him before courts, tribunals oradministrative authorities.

3.11 The lawyer, in discharging his duties, shall at all ***times act freely, diligently* and fearlessly** in accordance with the wishes of his client and subject to the established rules, standards and *ethics of* his profession without any inhibition or pressure from the authorities or *the public.*

3.12 Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law, and it is the duty of the lawyer to do so to the best of his ability. Consequently the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may *be.*

3.13 No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.

3.14 No court or administrative authoirty shall refuse to recognize the right of a lawyer to appear before it for his client.

3.15 It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

3.16 If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.

3.17 Save as provided in these principles, a lawyer Shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings, or in his professional appearances before a court, tribunal or other legal or administrative authority.

3.18 The independence of lawyers, in dealing with persons deprived of their liberty; shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestions of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.

3.19 Lawyers shall have all such other facilities and privileges as are necessary to **fulfill their professional responsibilities effectively, including:** a) absolute confidentiality of the lawyer-client relationship: b) the right *to travel end to* consult with their clients freely, both within their own country and abroad; c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional *work;* d) the right to accept or refuse a client or a brief.

3.20 Lawyers shall enjoy freedom of belief, expression, association and assembly; and in particular they shall have the right to: a)take part in public discussion of matters concerning the law and the administration of justice. b) join Or for­freely local, national and internationalorganizations c) prnpoe and **recommend well-considered law reforms in the** public interest and inform the public about such matters, and d) take full and active part in the political,

social and cultural life of their country.

3.21 Rules and regulations governing the fees and remunerations of lawyers shall be designed to ensure that they earn a lair and adequate income, and legal services are made available to the ***public*** *on* reasonable terms.

**Legal Services for the Poor**

3.22 it is a necessary corollary of the concept of an independent bar, that its members shall make their services available to all sectors of society, so that no one may be denied justice, and shall promote the **cause** of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

3.23 Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.

3.24 Lawyers engaged in legal service programmes and organizations, which are financed wholly:, or in part, from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

- the direction of such programmes or organizations being entrusted to an independent board, composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;

- recognition that, in serving the cause of justice, the lawyer primary duty is towards his client,: whom he must advise and represent in conformity with his professional conscience *and* judgment.

**The Bar Association**

3.25 There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or *person.* This shall be without prejudice to their right to form or join, in addition, other professional associations of lawyers and jurists.

3.26 In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar Association.

**Function of the Bar Association**

*3.27* The functions of a Bar Association in ensuring the independence of the legal profession shall be inter alia:

1. to promote and uphold the cause of justice, without fear or favour;
2. to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;
3. to defend the role of lawyers in .society and preserve the independence of the profession;
4. to protect and defend the dignity and independence of the judiciary;
5. to promote the free and equal access of the public to the system of justice, including the provision of legal aid: and advice;
6. to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal, and in accordance with proper procedures in all matters;
7. to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
8. to promote a high standard of legal education as a prerequisite for entry into the profession;
9. to ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give *assistance* to new entrants into the profession;
10. to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;

k) to affiliate with, and participate in, the activities of international organizations of lawyers.

3.28 Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall cooperate in assisting the foreign lawyer to obtain the necessary right of audience.

3.29 To enable the Bar Association to fulfill its function of *preserving* the independence of lawyers, it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice for: t) any search of his person or property, ii) any seizure of documents in his possessions, and iii) any decision to .take or calling into question the integrity of a lawyer. In such cases, the Bar Association shall be entitled to be represented by its president or nominee, to follow the proceedings, and in particular to ensure that- professional secrecy is safeguarded.

**Disciplinary Proceedings**

3.30 The Bar Association shall freely establish and enforce, in accordance with the law, a code of professional conduct of lawyers.

3.31 . The Bar Association shall have exclusive *competence* to initiate and conduct disciplinary proceedings *against lawyers on its own* initiative or at the request *of a litigant. Although no court* or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the Bar Association with a view to its initiating disciplinary proceedings.

3.32 Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar Association.

3.33 An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.

*334* Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this declaration.

**Resolution**

**To appoint a committee to revise the standards on lawyers in in the Montreal Declaration**

**The committee will submit a report in 3 months .**

1. **Global Judicial Ethics Code**

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In Ghent and in San Diego it was resolved, at the suggestion of Marcel Storme ,to embark upon a project to develop a global judicial ethics code. It will be done in two parts. One part will deal with conduct on the bench and the other or the conduct off the bench ,on the rules governing the conduct outside his official duties .

**It is resolved to appoint a committee to prepare a draft for approval in Osnabrueck Coference of the Association in October 2014**

1. 51st Cohen Lecture at the Hebrew University, Jerusalem in 2006. [reference to follow] [↑](#footnote-ref-1)
2. *The Inquiries Act 2005: post-legislative scrutiny* (HL paper 143, 11 March 2014). [↑](#footnote-ref-2)
3. Standards Preamble [↑](#footnote-ref-3)
4. Standards, Section 9A. [↑](#footnote-ref-4)
5. Swiss Federal Charter of 1291 [↑](#footnote-ref-5)
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