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From the Editor

Included in this issue of the Review are reports by the following visitors chiefly based on their recent ICCLP Seminars and Forums: Professor Adam Roberts of Oxford University, Professor Thomas Meyer of Dortmund University, Professor Brigitte Stern of University of Paris I, and Visiting Research Scholar of the Faculty, Mr Bruce Aronson. I thank them for their contributions.

Former Visiting Associate Professor Nakamura Koichiro's essay on suburbia, while alluding to Horie Toshiyuki's novel *Kogai e*, takes us on a tour of Paris, London, Moscow, and even Ulan Bator. Associate Professor Tanaka Koji and Dr jr Thomas Krohe have provided accounts of their respective experiences on exchange visits to each other's institutions, which we have printed in both German and English.

Following on from the Japan-Brazil Comparative Law Symposium held at the University of São Paulo in August 1998, the Anglo-Japanese Academy Workshop and Conference at Sheffield University was the ICCLP's second overseas endeavour in promoting academic exchange. The ICCLP took on administrative duties at the Japanese end. Thanks are due to so many people whose cooperation allowed the realisation of this project. Only the program of the workshop and symposium appears in this issue of the Review but it is planned that detailed reports will be carried in the next issue.

The shock of the September 11 terrorist attack in America, which occurred just before I was due to return from almost three weeks at Sheffield University, has yet to subside. The TV images must be from the latest Hollywood blockbuster, or so I thought until I saw 'LIVE' superimposed on the bottom corner of the screen and found 'Attack on America' used as a news headline. I was also struck by words such as 'This is War' and '...the second Pearl Harbour'. Both war and terrorism are acts of violence which destroy our usually peaceful lives, however, there is a need to differentiated between the two. 'This is not war but terrorism', I told myself.

In the previous week the Anglo-Japanese project had been concluded at Sheffield University and most participants had already made it home. Emeritus Professor Sakamoto Yoshikazu and his wife found their flight from Manchester delayed and missed their connecting flight. They were wait-listed for a flight the next day and eventually flew home two days later than planned. My own flight from Manchester was cancelled, and I worried that I would miss my connecting flight to Narita. Normally a day's delay would not concern me, but on this occasion I was driven by a sudden homing instinct. When the person at the check-in counter told me that the next available flight was the next day, I nearly shouted 'But I want to go today!'—I just wanted to escape the tense atmosphere of the airport. Just as Professor Sakamoto ran from Terminal 1 to Terminal 3 at Heathrow pushing a heavy baggage cart (so I later heard), I too was in desperate haste as I took the Heathrow Express from Terminal 1 to Terminal 4 and ran up the seemingly interminable concourse to the check-in counter. Despite experiencing this incident from the periphery, my own tension and anxiety gave me a small insight into its unimaginably horrific scope. After returning safely to Tokyo, I found the same words, 'This is War' written in large Chinese 'kanji' characters on the cover of a Japanese journal.

September 2001, Wada Keiko, ICCLP Coordinator and Review Editor
[Translated by Peter Neustupný]

Part I

IMPLEMENTATION OF THE LAWS OF WAR

ADAM ROBERTS*

On 28 June 2001 Slobodan Milosevic, former President of the Federal Republic of Yugoslavia, was extradited to The Hague to face trial. On 27 May 1999 he had been indicted in respect of the conduct of Yugoslav forces in Kosovo during the war there in 1998-9. Whatever the eventual outcome, this first-ever extradition of a former head of state to face trial before an international criminal tribunal is a suitable moment at which to reflect on the extraordinary part that implementation of the laws of war has come to play in international politics.

The terms 'the laws of war' and 'international humanitarian law' are interchangeable. I still prefer the first of these terms, being older and simpler. Whichever one uses, the scope of the law has significantly expanded in recent years. It has long been deemed to encompass the law on crimes against humanity and on genocide as well as the laws and customs of international armed conflict. It has in the past decade been increasingly viewed as applicable in conflicts which are partly or completely of a non-international character.

This is an exploration of how and why the laws of war have become a more important consideration than before in the foreign policies of major powers and the UN. My approach is not prescriptive, but is intended to set the scene for a discussion of where this strange state of affairs leads. The subject is explored under the following headings:

1. Changes in international politics and law
2. The UN and enforcement
3. The USA and enforcement
4. Challenges and conclusions

The main challenge facing the laws of war today is not devising new rules – though some are needed. It is implementation of the rules that exist. Unquestionably, the preoccupation with implementation is widely shared among those who have worked in the field of international humanitarian law; it has had a profound effect on policy and on treaty-making in this field; and it has been reflected in a number of UN reports and in certain actions of the UN Security Council.

'Implementation' is taken to encompass *(1)* the normal measures taken by states, and by international bodies such as ICRC, to ensure that populations and armed forces are aware of the laws of war and carry out their terms; *(2)* the actions taken by outside bodies, including states and international organizations, in response to systematic violations of the laws of war. My focus is mainly on this second and more difficult category, which encompasses the *enforcement* of the laws of war, but is not limited to coercive measures.

What induces parties to armed conflicts to observe certain rules of restraint? The 1992 German tri-service military manual lists no less than thirteen factors, mainly treaty-based, that 'can induce the parties to a conflict to counteract disobedience of the law applicable in armed conflicts and thus to enforce observance of international humanitarian law'. While its list is admirably broad, it is not complete. The German manual does not include as distinct factors either of the following:

(1) Certain national implementing measures that may be attempted., particularly national commissions of inquiry, which can be an important means of investigating violations and of bringing law and policy into some relation to each other.

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(2) The implementation roles of the United Nations and of major powers. This category includes cases in which multilateral military action is initiated against the violators, for example in order to protect civilians or humanitarian workers.

The central plea of my presentation is that we need much more systematic analysis of the implementation of the laws of war, and in particular of the protection of civilians, than is evident in much contemporary public discussion. There is a need to examine the many and complex ways in which implementation occurs in practice. Sometimes discussion of this subject is excessively narrow. For example, lawyers naturally tend to focus on treaty law, on treaty-based institutions, and on implementation through the classic legal process of trials. Sometimes they address the question of how this or that practice is deemed to violate treaty law in this area. However, there is little analysis of the whole process of implementation in all its dimensions.

Changes in International Politics and Law

Changes in the conduct of international politics

The developments in international law of the past decade are mere reflections of larger and more significant changes in the conduct of international politics. Three factors have reinforced the international concern to ensure implementation of the laws of war by belligerents.

First, many situations in which violations of international humanitarian law occur engage the interests of outside powers because they threaten to create huge refugee flows with which our not-very-liberal societies are unwilling to cope. Whether it is northern Iraq, Bosnia, Kosovo or East Timor, an unholy alliance of humanitarianism and illiberalism makes intervention within the state undergoing conflict a possible, even imperiously necessary, option.

Second, there has been a growing awareness that crimes committed by states have been among the most serious of the twentieth century. The international preoccupation with restitution for a wide range of state misdeeds is evidence of this.

Third, it is widely accepted that the post-Cold War international order has to be based on values other than, or additional to, mutual respect among sovereign states. Human rights and humanitarian norms are core parts of any such system of values. It is thus very difficult for states to ignore massive violations of fundamental norms.

Changes in the laws of war

In the laws of war, as they have developed from the mid-nineteenth century onwards, implementation was traditionally not treated as a major topic in its own right. The general assumption, reflected in certain early agreements on the laws of war (e.g. the 1899 and 1907 Hague Conventions) was that civilized states could be relied on to ensure that their own armed forces would act in a disciplined, restrained and professional manner. That idea was called into question by the events of the twentieth century. When the state that was supposed to take action was the very one whose armed forces had committed the alleged offences, the idea of purely national jurisdiction seemed optimistic; and when the state itself was committed to a criminal policy, it was absurd. That is why since 1945 there has been a definite movement towards a system of international criminal law affecting the activities of states and armed forces.

As far as treaties are concerned, the old pattern of treating implementation casually began to change significantly with the conclusion of the 1948 Genocide Convention, with its exhortation to parties to take action against genocide, including through the UN. Further milestones were the provisions in the four 1949 Geneva Conventions for: (1) universal jurisdiction as regards grave breaches, and (2)

'Protecting Powers' to ensure implementation of certain parts of the agreements in wartime. The implementation systems specified in these treaties have not been used much in the intervening years.

The 1977 Geneva Protocol I included some provisions that represented an attempt to break the impasse. In particular, in accordance with the terms of its Article 90, the 'International Humanitarian Fact-Finding Commission' was set up in 1991. Yet this too has not worked. Not a single one of the numerous problems in the decade of its existence has been referred to it. In this, as in many other ways, the actual forms of implementation that have been developed have been different from what was envisaged in treaties.

In short, the law developed before the 1990s had relatively few provisions regarding implementation, and those that there were not effective. This does not mean that there was no implementation – many states did a capable job. However, when they were faced with ongoing wars involving extensive violations of the laws of war, it is not surprising that states, NGOs and international bodies made further attempts to address questions of implementation and enforcement. Seven of the nine new international instruments on the laws of war concluded in the 1990s deal extensively with implementation and enforcement:

1. The *1993 Statute of the International Criminal Tribunal for the former Yugoslavia.*

2. The *1994 Statute of the International Criminal Tribunal for Rwanda.*

3. The *1994 Convention on the Safety of UN and Associated Personnel.* This is not part of the laws of war as such, but closely related. It contains extensive provision for prosecution or extradition of offenders.

4. The *1996 Amended Protocol II on Landmines to the 1980 UN Convention on Certain Conventional Weapons.* This requires states to take legislative and other measures against violations.

5. The *1997 Ottawa Landmines Convention.* This contains extensive provisions on transparency, compliance and dispute settlement.

6. The *1998 Rome Statute of the International Criminal Court* (not yet in force).

7. The *1999 Second Hague Protocol for the Protection of Cultural Property in Armed Conflict* (not yet in force). This contains numerous provisions regarding implementation and enforcement not just of the Second Protocol itself, but also of the Convention and the first Protocol both of which were concluded in 1954.

All seven documents have two critically important features. *First*, they contain some provisions that go beyond the old idea of essentially national implementation by the authorities of the state. *Second*, they have application in wholly or partly non-international armed conflicts.

The application of human rights law

It is not only the laws of war that have been involved in the new emphasis on implementation, including in civil wars. Human rights law has also played a part in this development. Since human rights law has its origins in the events surrounding the Second World War, its involvement in certain issues relating to war as well as dictatorship is not surprising. The 1948 Genocide Convention (which is equally part of human rights law and the laws of war) is the most obvious case, but certain other human rights agreements have application to armed conflict. For example, Article 2 of the 1984 UN Convention on Torture specifies that neither war nor any other exceptional circumstance can be invoked in justification of torture.

Human rights law has had particular relevance to certain situations involving armed conflict because it contains provisions for individual redress. In the past, one of the many side-effects of the inter-state character of the laws of war was that there was an absence of formal procedures for individual legal redress. If violations occurred, it was for governments to take action: the individual may have been the object of the law, but was not in any meaningful sense its subject. In the last three decades this situation has changed in a small but significant way. Under several national and regional legal systems – including those of Israel, Japan, the USA, and the regional intergovernmental human rights bodies of the inter-American system and of Europe – there have been cases in which individuals have brought to court issues arising from uses of armed force, including in areas under foreign military occupation. The individuals concerned used provisions of international human rights law (which have the quality of being justiciable) as the basis of their actions.

Certain European cases brought under the European Convention on Human Rights illustrate the point. Actions by armed forces in situations of conflict or public emergency have been the subject of several cases.[1] Some of these cases have been based on a fundamental right – the right to life.[2] Although the right to life is inevitably subject to certain limitations in times of war and insurgency, its existence can potentially provide a basis for those whose rights have been undermined (or their surviving relatives) to argue that an armed force acted recklessly granted its obligations.

The Pinochet cases in the UK and in Chile are interesting evidence of the growing acceptance of the applicability of human rights law even to the actions of a head of state or government. The facts at the core of this case arose mainly from the period of internal repression in Chile following the military *coup* there in September 1973. Thus they did not involve war, or even civil war properly speaking, but rather violent acts by a government against what it saw as a dangerous opposition movement. Basic questions in the case were whether the acts concerned were subject to universal jurisdiction, and whether state officials could be held responsible for these acts. On these matters, the key decision of the House of Lords was the second and last of its substantive decisions in this case, rendered on 24 March 1999. The provisions of the 1984 Torture Convention appear to have been decisive in persuading the judges in the case that the crime of torture was one of universal jurisdiction; and that even a head of state does not have immunity.[3]

The UN and Enforcement

Apart from providing a forum for the negotiation of certain treaties on the laws of war, and for pronouncements about ongoing situations, the UN system generally has been involved in another aspect of the laws of war: implementation, including enforcement. In the 1990s the UN became involved in three main ways: (1) The Security Council has provided a measure of support for certain military actions designed to stop violations. (2) The Security Council established the tribunals for former Yugoslavia and Rwanda. (3) The 1998 Rome Statute of the International Criminal Court, negotiated by states in a UN framework, is an important attempt to develop a system of universal enforcement.

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[1] In *Cyprus* v. *Turkey*, about alleged violations of human rights by Turkey in northern Cyprus, the European Commission of Human Rights declared applications admissible in decisions on 26 May 1975, 10 July 1978 and 28 June 1996, *Yearbook of the European Convention on Human Rights*, vol. 18 (1975), pp. 82-127, vol. 21 (1978), pp. 100-246, and vol. 39 (1996), pp. 130-66. In *Ireland* v. *United Kingdom*, about UK practices of detention and interrogation in Northern Ireland, the European Court of Human Rights gave judgment on 18 January 1978, *YBECHR*, vol. 21 (1978), pp. 602-12.

[2] This was the basis of the claims, in the case of *McCann and Others* v. *The United Kingdom*, which followed the British Special Air Service killing of three Irish suspects in Gibraltar on 6 March 1988. *YBEHR*, vol. 38 (1997), pp. 308-14.

[3] For a useful summary, see Colin Warbrick, Elena Martin Salgado and Nicholas Goodwin, 'The Pinochet Cases in the United Kingdom', *Yearbook of International Humanitarian Law 1999* (The Hague, T.M.C. Asser Press, [2000]), esp. at pp. 99-116.

UN Security Council support for certain military actions

The UN Security Council has long ago assumed a role in the investigation of certain violations of the laws of war, such as the use of chemical weapons in the Iran-Iraq War (1980-88). In addition, some of the cases of economic sanctions in the 1990s have been partly based on claims that the target state had violated fundamental norms of humanitarian law.

Within the UN Security Council the question of possible military action under UN auspices arose sharply in the 1990s in respect of at least nine countries or territories. In how many of these cases were failures of the parties to implement provisions of the laws of war factors a major consideration? It is difficult to give a precise answer, because frequently a major issue at stake was the refusal of parties to permit delivery of humanitarian aid – which is certainly a problem relating to the laws of war, but could also be considered a violation of other norms and agreements. Always there were several different stated purposes. The Security Council emphasized the implementation of international humanitarian law in at least five cases: Bosnia and Herzegovina (1992-5); Somalia (1992); Rwanda (1994); Sierra Leone (1997-2000); and Kosovo (1998-9).

The main problem in most of these five crises involving actual armed conflict has been the difficulty of finding outside forces willing to act in situations perceived to be dangerous. The failures of the UN, and of states, to act in time in respect of the crises in Rwanda in 1994 and Srebrenica in 1995, are clear examples. The enthusiasm for implementing humanitarian norms ran into the rock of national interests.

The establishment of ICTY and ICTR

The pattern whereby the Security Council got involved in setting up the Yugoslav tribunal was revealing. First, in 1992 the Council asserted the applicability of basic norms, and pressed those involved to comply with their obligations under humanitarian law.[4] This put the members of the Council on a moral escalator: entreaties had to be followed by action of some kind. Then in decisions of February and May 1993 the Council set up the International Criminal Tribunal for the Former Yugoslavia (ICTY). The process was influenced by the political and moral pressure, strong in many countries (especially the USA), to do *something* about Yugoslavia, and by the lack of agreement about what else could be done.

In the both the pre- and the post-ceasefire phases of the war in Bosnia and Herzegovina, the UN, NATO, and the Western powers generally, faced harsh choices about the extent to which they should pursue the war crimes issue. The 1995 Dayton Peace Accords obliged each party to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.[5] In the early post-Dayton phases the NATO-led international forces in Bosnia (IFOR/SFOR) were reluctant to arrest indicted individuals, partly out of concern that a fragile peace might be endangered. However, once the peace had begun to consolidate they became more emboldened. The numbers of indicted individuals brought into ICTY's custody increased impressively in 1996-9. This development confirmed the importance of the relation between law and power. It also confirmed the significance of the time factor in enforcement: what might not have worked at one stage was perfectly manageable later. In the case of Milosevic it was political change in Serbia – the revolution of September 2000 – that made possible his extradition to The Hague in June 2001.

[4] For example, regarding the conflict in Bosnia-Herzegovina, the UN Security Council called on all parties to assist with humanitarian assistance efforts in SC Res. 752 of 15 May 1992; and both SC Res. 764 of 13 July 1992 and SC Res. 771 of 13 August 1992 reaffirmed that 'all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949'.

[5] Dayton Peace Accords, 1995, General Framework Agreement, Article IX. Milosevic is bound by this provision. Thus his non-recognition if ICTY following his extradition there in June 2001 will be hard for his lawyers to justify.

The International Criminal Tribunal for Rwanda (ICTR) also demonstrates the importance of that link between law and power. Like the Yugoslav tribunal, it was created by the UN Security Council following indecision on that body about what to do in relation to an ongoing crisis – or rather, in this case, decision to do almost nothing. After the tribunal was established in 1994-5, it proved possible to arrest the leading perpetrators of genocide in Rwanda because they had been defeated militarily in July 1994, thus ending their reign of terror in the country. Some suspects were handed over to the ICTR by the states to which they had fled. The court's verdict on Jean-Paul Akayesu on 2 September 1998 was the first-ever conviction by an international court for the crime of genocide. However, the operation of the ICTR exposed certain problems in the international administration of justice: in particular, there were numerous well-substantiated complaints about its inefficiency; it was an odd anomaly that those found guilty by ICTR could not be sentenced to death, whereas others tried by the successor regime in Rwanda itself could be and in some cases were; and far more genocide suspects were detained for trial by Rwandan national courts than by the ICTR.

UN's treaty-making role: the International Criminal Court

After the establishment of the two *ad hoc* tribunals for Yugoslavia and Rwanda, the continued international preoccupation with international crimes in other countries not covered by the tribunals reinforced the pressures to create a permanent international criminal court – a project which had been proposed at the UN as early as 1947, had occasionally re-surfaced in the intervening years, and again came under active consideration from governments in 1993. Hailed by many as a milestone in the development of international legal restraints on conflict, the Rome Statute marked at best a beginning of what will still be a long process of bringing the International Criminal Court into a properly functioning existence. The first and most conspicuous problem was that many important states, including China, Russia and Japan, did not sign the Statute; and although the USA did eventually sign, it is not likely to ratify it.

The Rome Statute faces other potential hazards. Its entry into force requires 60 ratifications – an unusually high threshold for a treaty on international humanitarian law. By the end of June 2001 it had been ratified by 36 states. The slow pace of ratification is not surprising. Most states, before committing themselves, have to pass complex domestic legislation to provide for full cooperation with the ICC, and to ensure that all the crimes identified in the Statute are also crimes under national law. (The UK completed a key part of this phase on 10 May 2001, when the House of Commons passed the ICC Bill, but the UK has not yet deposited its ratification.) In addition, once the Court comes into existence, states will have to provide significant financial support for it. Finally, they will need to be confident that the ICC has sufficiently powerful support to be able to function effectively. This raises the difficult question of the US attitude to the ICC.

The USA and Enforcement

For the USA as the major military power in the world, the curious emerging partnership of power and law poses special problems. The USA is understandably concerned both about getting dragged into conflicts in which it does not have a direct interest; and about having its subsequent actions judged by the relatively high standards of the contemporary laws of war.

Woodrow Wilson's dilemma in 1914

The question of whether non-belligerent states should take an active role in calling for the implementation of treaty-based humanitarian rules is not a new one. Countless such issues arose in two world wars. For example, in August 1914 the Counselor for the US State Department, Robert Lansing, raised with the Secretary of State the question of whether, in view of the bombardment of Antwerp by a Germany military balloon, the United States should make a formal protest. One week later President Wilson made a clear decision:

I have thought a great deal about the matter of protest with regard to the dropping of the bombs and my present judgment is that we do not know in sufficient detail the actual facts and that we ought to be very slow to make formal protests, chiefly because we shall no doubt be called upon by every one of the belligerents before the fighting is over to do something of this kind and would be in danger of becoming chronic critics of what was going forward. I think the time for clearing up all these matters will come when the war is over and the nations gather in sober counsel again.

Cordially and faithfully yours, Woodrow Wilson[6]

In many subsequent crises the USA hesitated to take a strong role in implementation of humanitarian law. Many US vetoes in the UN Security Council have been to stop resolutions which sought to implement certain norms of the 1949 Geneva Conventions in the Israeli-occupied territories. Yet the US is now involved as a 'chronic critic', as are many other countries, including my own. This role is probably inescapable. Yet, as Wilson foresaw, it is not easy.

US non-participation in key treaties

Despite its conspicuous role in certain acts of enforcement of the laws of war, the United States is not a party to several important treaties on the laws of war. Its notorious difficulties in accepting international treaties produced the strange result that it took the USA forty years to ratify the 1948 Genocide Convention. (Sadly, Japan has still not taken any action to become a party.) The USA is still not formally a party to the following agreements. I have also noted the position of Japan in respect of each of them.

- The *1954 Hague Cultural Property Convention. Parties: 99.* (USA signed in 1954, but has not ratified. Japan the same.)

- The *1977 Geneva Protocols I & II on International and Non-international Armed Conflicts. Parties: 158 and 150 respectively.* (USA signed on 12 December 1977, but has not ratified them. Japan has not signed or acceded.)

- The *1980 Protocol III on Incendiary Weapons. Parties: 80.* (Japan is a party.)

- The *1995* Protocol IV on blinding laser weapons. Parties: 56. (Japan is a party.)

- *The 1997 Ottawa Convention on anti-personnel land-mines. Parties: 117.* (Japan is a party.)

- *The 1998 Statute of the International Criminal Court. Not yet in force. Parties: 36.* (USA signed on 31 December 2000 but has not ratified. Japan has not signed or acceded.)[7]

I do not view the USA's or any other state's non-participation in a treaty as in itself a failure. There are some questionable provisions in some treaties in this area. Although a non-party, the USA takes at least some of these accords more seriously than some states that are parties. The reasons for US non-participation go far beyond the obduracy of one single elderly Senator, and call for careful analysis rather than uncomprehending condemnation. In some cases they are based on serious arguments.

Indeed, there may be a price for like-minded states taking the lead in negotiation of particular treaties, as happened in the case of the Ottawa land-mines convention. The price is that states which are partially or wholly outside the consensus, and have particular problems which need to be addressed,

[6] President Wilson to the Secretary of State, 4 September 1914. *Foreign Relations of the United States: The Lansing Papers 1914-1920*, vol. I, p. 33.
[7] Information from ICRC, UN and UNESCO websites, June and July 2001.

feel side-lined. This also happened at the Rome conference in 1998. Add a prohibition on reservations – as was done with the Ottawa and Rome treaties – and there is a recipe for non-participation even by states, such as the USA, which have a serious record of supporting the general thrust of these projects.

The most sensitive issue in the USA is the International Criminal Court. The opposition of the USA, marking a reversal of its earlier support for the idea, raises questions about whether the ICC will have sufficient power to operate effectively. The fundamental American concern is that US forces deployed in a wide range of situations globally might face unfounded or politically motivated prosecutions, over which the USA would have no control. The detailed terms of the Statute contain certain safeguards against such an eventuality.[8] However, in Washington DC the fear of such prosecutions was and is real. I am tempted to say that the US is suffering from a case of 'prosecution mania'.

This pattern of US non-participation in existing treaties is, at least for this observer, worrying. Other states with a record of foreign military activity, including the UK, manage to be parties to many more of these agreements, and have been less nervous about seeing the actions of their forces being actually or potentially submitted to the not always tender mercies of foreign prosecutors and courts. When the state that on occasion acts as a principal guarantor of implementation of humanitarian norms itself avoids being subject to many of those norms through the regular mechanism of treaty ratification, it invites criticism.

Impact of legal norms in US-led combat operations

Whatever the US fears, the actual impact of international legal norms on US conduct of operations has often been positive. Commitment to the laws of war has contributed to the post-Vietnam rehabilitation of the US armed forces. In both the 1991 Gulf War and the 1999 war over Kosovo, the USA, though not a party to 1977 Protocol I, observed many of its provisions – whether because of their customary law status, because it was policy to support them anyway, or because of a need to harmonize targeting and other matters with allies. The experience of these wars suggested that most of these provisions represented a useful set of guidelines for professional conduct. Incidentally, the way in which that war ended ten years ago, with Saddam Hussein accused but not available for trial, contributed something to the concern with enforcement in subsequent years. The Pentagon ended the law section of its *Final Report* on the war pointedly: 'A strategy should be developed to respond to Iraqi violations of the law of war, to make clear that a price will be paid for such violations, and to deter future violators.'[9]

In the 1999 Kosovo war the USA, having been campaigning diplomatically against the ICC for the previous six months on the grounds that the actions of US forces should not be subject to a foreign prosecutor and tribunal, chose to wage war in the one part of the world where ongoing war was subject to such a tribunal. The ICTY has much stronger powers of independent investigation and prosecution than are provided for the ICC. On 1 February 2000 its Chief Prosecutor stated that there was no evidence that NATO's bombing campaign had violated international treaties on the conduct of war. Subsequent examination reinforced that conclusion. Its committee to investigate the NATO bombing campaign published a detailed report in June 2000 recommending that no action needed to be taken. Whether this experience could lead to an easing of US concerns about the proposed ICC remains to be seen.

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[8] Among the provisions of the Rome Statute offering safeguards: Article 8 on war crimes, which requires that they be 'committed as part of a plan or policy or as part of a large-scale commission of such crimes'. Certain safeguards in the case of 'second track' jurisdiction (i.e. where the matter has not come to the ICC from the UN Security Council): Article 16, enabling the Security Council to require the ICC to defer an investigation or prosecution; Article 17, providing that a case is inadmissible where a state is genuinely carrying out investigation or prosecution itself; and Article 18, enabling a state party to request ICC to defer an investigation if such state is pursuing the same matter, although such deferral is left to the ICC's decision.

[9] US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (Washington DC: April 1992), section O, p. 36. Reprinted in 31 *ILM* (1992) 612.

Conclusions and Challenges

Many of the developments have been positive. It is excellent that individuals involved in mass rape of women were found guilty of crimes against humanity by ICTY in its decision on 22 February 2001; that at least some forces and governments engaging in mass killings of civilians face forceful action, even sometimes military intervention; and that heads of state and government will know from the experiences of Pinochet and Milosevic that they may have to face legal processes if their actions violate fundamental norms. There may even be some long-term deterrent value in all this.

Some of those who committed the worst violations of humanitarian norms (the Rwandan regime in 1994, the Bosnian Serbs at Srebrenica in 1995, and the Yugoslav forces in Kosovo in 1999) subsequently suffered serious military and political reverses. The same pattern also happened in East Timor, where the Indonesian forces, following the terrible killing spree that they had done nothing to oppose, were forced to withdraw from the territory from September 1999 onwards. There may be useful lessons in this too.

Some of the developments seem likely to endure in some form. The emerging practice of military action as a response to violations of the law of war has created an interesting modification of the long-standing and important principle that the law relating to resort to war (*jus ad bellum*) is a separate and distinct subject from the law relating to conduct in war (*jus in bello*). Quite simply, massive violations of *jus in bello* can beyond doubt help to legitimize certain uses of force.

This change in the landscape has not been universally recognized. This is not surprising. Any suggestion that humanitarian workers and organizations may play some part in triggering military actions challenges their deep (and in some cases legally based) commitment to impartiality and neutrality. Almost all humanitarian workers and organizations are in a state of deep denial about the extent to which they, and the principles and laws for which they stand, have played a part in initiating military action.

Some words of caution about the new developments are needed. In particular, the developments confirm that, in the conduct of diplomacy in the post-Cold War era, states have often been more able to agree on judicial procedures than on substantive policies for addressing conflicts. Also, despite the growth of international enforcement in various forms, it is necessary to remember that much implementation and enforcement of the laws of war still happens within states, through commissions of inquiry, administrative measures, courts martial, boards of inquiry and so on.

Above all, the new developments pose four difficult challenges.

1. There is a risk that the emphasis on the implementation of fundamental norms, if badly handled, could cause *new problems and suspicions in relations between, and also within, states*. For example:
   (a) Might major powers find themselves in the position, not just of chronic critics of the conduct of belligerents in wars in which they did not have a direct interest, but actually of chronic intervenors, even imperialists?
   (b) Might many political and military leaders, from many countries, be at risk of being arrested and tried when they travel to a foreign country with a zealous prosecutor – with worrying consequences for the smooth conduct of inter-state relations?
   (c) Have the developments in international criminal law made it difficult to incorporate amnesties – an ancient and important instrument of statecraft – as one component of peace agreements?

2. If the emphasis on enforcement of international criminal law is to lead to results, it requires a *willingness of major regional and global powers to use their political and military influence to*

ensure the arrest of suspects and the efficient operation of coercive measures. Are such powers ready for that? The evidence of the past decade or so is by no means all encouraging. Indeed, a new factor inhibiting the use of force may be emerging. There is a risk that states, including the USA, may become reluctant to use military force generally, even in circumstances in which its application was important in the cause of international peace and security, for fear that their armed forces or their governments might become subject to prosecution under the laws of war.

3. NATO's conduct in the 1999 Kosovo war confirms that there is *continuing tension between certain contemporary strategic doctrines and the implicit vision of war contained in the laws of war*. Over recent decades the USA, and NATO, have developed a conception of how force can be applied which involves putting military pressure not just on the armed forces of the adversary state, but on its government. Such an approach was evident in some official thinking about nuclear deterrence, and also in the conduct of certain operations in which NATO members have been involved, including aspects of the bombing campaign against Iraq in early 1991. The approach is in tension with one underlying principle of the laws of war, as famously expressed in the 1868 St Petersburg Declaration, 'that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy'. After the Kosovo campaign, NATO members will sooner or later have to address the question of how their conception of war relates to the laws of war, and whether any modifications of either are indicated by this experience.

4. The contemporary emphasis on implementation implies that the law as it stands is in good shape and only needs to be carried out. Yet there are *weaknesses certain international legalist approaches to issues relating to the use of force*. For example:
(a) On some issues the modes of thinking of international lawyers, and those of strategic analysts, are separate and largely unrelated, with little attempt on either side to bridge the gap, and each side viewing itself as superior. For example, in the course of delivering the ICJ's 1996 Advisory Opinion on the threat or use of nuclear weapons, distinguished judges of the International Court of Justice appeared unaware of certain basic strategic concepts and considerations relevant to their deliberations.[10]
(b) There is a genuine question, seldom discussed, about the extent to which courts and diplomatic deliberative bodies are capable of making valid decisions about the role of force in international relations, and about events occurring in the midst of armed conflicts. For example, can courts effectively second-guess decisions which had to be taken, often on the basis of imperfect information, in difficult circumstances in which normal law and order has broken down?

In conclusion, the experiences and challenges of the last decade of the twentieth century and first of the twenty-first are forcing law and strategy into an improbable but close partnership. The ancient and

[10] The ICJ's 1996 Advisory Opinion on nuclear weapons strongly affirmed the application of the laws of war to questions of nuclear use. However, the Court showed no awareness of two possible perverse consequences of such a position. *First*, that the logical consequence of applying the laws of war would appear to be a 'counter-force' strategy, the possible destabilizing aspects of which have been recognized by strategic writers since the 1960s. *Second*, the essentially Gaullist approach adopted by the ICJ to the question of the circumstances in which nuclear use could not be wholly excluded was well known among strategic thinkers to be a doctrine with particular potential for encouraging nuclear proliferation.

enduring issue of the relation of power and law has taken disturbing and paradoxical, but also important, new turns.

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Party Transformation in European Media Democracies

Thomas Meyer*

Throughout the 1990s political parties as mass organizations lost much of their significance in the larger European countries like Italy, Germany and the United Kingdom. Their role as elements in political power struggles has receded, and they no longer have as much influence over societal discourses as they once did. In spite of some hastily initiated reforms, their membership base has also dwindled significantly. Until recently the parties have had three central functions in the political process, both in light of the normative standards of parliamentary democracy and in practical terms as well, because of their day-to-day influence on politics and the shaping of public opinion. First they aggregated the political interests articulated by a wide array of associations, interest groups, citizens' lobbies and organizations into a few proposals that stood a chance of achieving society-wide legitimacy. Second, they transmitted those socially articulated interests to the political system, especially at the level of parliament and government. Third, they recruited candidates and enabled them to run for office, whence, once in positions of power, they could ensure the implementation of the party's platform. By virtue of this variety of functions the parties succeeded in moving parliamentary democracy beyond the traditional liberal pattern in which individuals represented the popular will but lacked any specific, binding mandate. In Germany this approach is still evident in Article 38 of the Basic Law. As Justice Gerhard Leibholz of the Constitutional Court noted, the parties converted democracy into a kind of issue-plebiscite, since by voting for a party, the voters are also issuing a programmatic mandate. By contrast, media democracy as exemplified more and more unmistakably in US Presidential elections, strongly predisposes voters to give their consent to the person of the candidate as a "media artist" rather than to the programs he or she has been advocating. It must be conceded, however, that the pattern of American elections was set long before the rise of modern media democracy, and has a great deal to do with the decentralized, fragmented electoral system of the country. "Mediacracy" would be weaker and parties stronger in the United States if electoral laws were revised to favor straight-ticket party voting, and if parties had more control over the selection of their own candidates. In any case the transition in Europe's political system from party to media democracy involves a switch from issue plebiscites to personal plebiscites with far-reaching consequences for the role of political parties in the process of legitimation.

All along the line the logic of media democracy is forcing parties out to the fringes of events, even though they may still capture public attention through their activities in local politics and their residual power to set a tone and direction for the leadership. Under the pressure of media logic, there is a tendency for the communications strategies of the party leadership to lose contact with the rank-and-file and lose patience with its deliberate pace of deliberation. This disjunction is largely due to the relentless media pressure for immediate reactions and to trial balloons sent up by the politicians: in short, the media's "presentism," which leaves no time for the leadership to consult the grass-roots party councils. In the US, these trends have reached the point where political parties have even lost their old "kingmaker" function, once the guarantor of their unique role in the political process and their continuing control over the policies of elected leaders. There, the system of primary elections has slowly shifted preeminence in the selection of candidates from the parties' inner councils to the media. To win a primary election, a candidate often needs to have appeal in the media, since that will translate into political support and victory at the polls. Electoral laws in most states require the party to remain neutral in the primaries *vis-à-vis* the candidates, which effectively removes them from the process and, by elimination, pushes the campaign almost entirely into media channels. The inherent dynamics of media democracy thus have a tendency to assign the parties only a "bit part" in the drama of the broader political process. As communities of democratic discourse and decision with impressive grass-roots memberships, parties may go on for a long time as though

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nothing had changed, upholding the old rules, processes, and rituals, and claiming the right to establish authoritatively the broad outlines of policy for their political representatives. Yet in terms of their *de facto* opportunities to affect policy, they are moving from the center to the margins of the political process in media democracy.

During the postwar era in the US, the favorable image of a potential presidential candidate in the major media, especially television, has been the key criterion in securing his nomination. Even the parties looked on with fascination during the primaries, to see which of their candidates would be the media's darling, which left them with little to do but put their stamp of approval on whomever the media in effect had chosen. In no sense did American elections ever function in accordance with democratic theory, namely, as a competition between alternative political programs hammered out by the parties after significant citizen participation. Instead, they were mainly horse races that tested the media fitness of the candidates and their skill at embodying the broad moods of the public in the symbolism of their self-presentation. Looking comparatively at more recent developments across the Atlantic, it is true that Tony Blair had prepared the ground for his assumption of the leadership of the Labour Party by reforming the party and defeating the ultra-left in 1995. But his amazingly strong opinion survey results prior to the 1997 election and his subsequent convincing win gave him the overwhelming media backing he needed to marginalize the internal discourses, first of his party and then of its contingent in Parliament. By and large, he accomplished this by shutting down internal debates, manipulating them from above or simply ignoring them. Likewise in Germany, the skillfully staged race between potential SPD Chancellor candidates Gerhard Schröder and Oskar Lafontaine in the 1998 elections stirred up considerable media interest by a clever ploy. It was made known by the party leadership that the candidate who did the best in state elections would eventually be chosen as the SPD's candidate. This announcement had the effect of short-circuiting intra-party debates, in which it is expected that internal communications will be kept confidential. In the end it was even suggested that the high-profile state contests were a superior form of democratic legitimation compared to intra-party controversy. These developments show that the marginalization of parties does not always imply that they lack significance. But the role shift from the center stage to the periphery of the political process emerging under the pressure of the media's laws portends an uncertain future for traditional European party democracy.

In light of this logic even political scientists like Joachim Raschke who are committed to grass roots democracy have argued in favor of distancing the upper echelons of the party's communications structure from its political base. They claim that, without considerable independence from rank-and-file opinion, the leadership will not easily be able to implement the policies the party supports, because to succeed on the issues they need freedom to maneuver in the media arena. Given the short interval between political initiatives and media responses to them, and the equally short time frame in which leaders must react, the party would be tying leaders' hands and condemning them to failure if it insisted that they wait for party decisions to authorize their every move. In the rapid-fire sequence of initiative and response, the party leadership allegedly needs to react as quickly as the media does. Clearly it is not in the party's interest to hamper its leaders' ability to implement its program. So a contradiction ensues between one political orientation that puts a premium on success in achieving political goals, and another that sees parties as discursive organizations and favors more political participation inside them.

The risk of launching a long-term "campaign to enlighten the public" against the tide of majority opinion, however transient, is usually too great for most upper-echelon political representatives to contemplate. Given the pressures of competition for the top leadership posts, they rarely have the luxury of undertaking a deliberate process in which the better arguments eventually would outweigh unfavorable initial impressions and lead to a new majority. The rare exceptions to their reluctance would be cases in which there were palpable indications that a strategy of popular enlightenment could succeed in the foreseeable future.

As we have already seen, the dominance of mass taste over the political sphere in media democracy,

what we might call the mediocrity of "mediacracy", arises from the isolation of individuals in this kind of society. But it is also linked to the hegemony of "media time" over the public sphere. Any public that is given sufficient time and freedom from constraints can ultimately reach a reasonably enlightened consensus about what is necessary, just, sustainable and responsible. But communications that transpire in the media's time horizon tend instead to harden inchoate opinions and moods. Finally the opinions are simply added together to form an aggregate total against which it is useless to offer alternatives, go through the process of argument, or develop implications. The *staccato* beat of repetitive positions, even when these are in some ways open to learning processes and corrections, leaves no room for deliberation oriented forming a consensus. Thus, both the tyranny of mass tastes and the rigidity of opinion in media democracy have a common root: the isolation of the individual from the contexts of public discussion and exchange of ideas.

The demotion of intermediate actors to a secondary status within party democracy is a consequence of the tyranny of media time over political time. Without these actors it is no longer possible to articulate the interests of society and continually remind its members that they have a common life and shared concerns. The intermediary associations try to achieve consensus through deliberation, and even when they fail, they raise the awareness level of society as a whole. This happens because, in mediating between state and society, they express the latter's diffuse expectations and experiences, transforming them into demands for specific political measures. Thus, not only do they generate the raw material and essential energy of the political system, they also concurrently forge bonds of solidarity that promote social integration. Traditionally, political parties played a double role in this process. On one hand they sought to integrate particular interests into proposals that could gain society-wide support. On the other hand, when they succeeded at the polls and assumed the reins of government, they could implement and take responsibility for their programs. But under the prevailing conditions of media democracy, above all the logic of its time schedules, they are increasingly pushed out to the fringes of politics. The political process that takes place within society, which parties once embodied and enabled, thus exchanges its erstwhile role as the primary channel of influence upon the "finished product" of politics, for the status of marginal player. Top political actors of course still pay attention to it, and sometimes try to enlist it for their own advantage, but normally only within the limits of the media game, which are becoming more restrictive all the time.

It has been argued that the changing time dimensions of modern society, especially its accelerated tempo, have marginalized parties in still another sense. The people who work in the top jobs of the contemporary knowledge- and service-based economy are under constant time pressure from their professional responsibilities. They cannot afford to invest their skills in the time-consuming, snail-paced processes of political consultation and opinion-formation typical of political parties. So those who do attend party gatherings tend more and more to be people with spare time: local government officials, teachers, homemakers, retirees, drop-outs and adherents of a self-consciously slower-paced lifestyle. Whether stemming from more relaxed job demands or a conscious choice to cultivate a less frenetic tempo, they have enough time for the extended, continuing participation in party affairs needed to attain influence and success there. The very different temporal cultures and budgets of the time-rich and time-poor result from their respective positions in the economy and the divergent social cultures they encourage. According to the argument, the inherent selectivity exercised by time factors distorts the demography of political party membership, rendering parties as mass organizations far less representative of the wider society than they once were. His point is that, on account of this trend, the strategic centers of party leadership have no real choice but to marginalize the rank-and-file, since they are forced to try to build majorities in the entire society. If the leaders do not succeed in doing so, they will end up as the captives of a minority consensus shaped by the "logic" of party loyalists with time on their hands; in the long run they will not be able to keep the party abreast of the changing values, perceptions of interest, and opinions that emerge from evolutionary social processes. Accordingly, the more that the strategic power centers in the parties loyally uphold the values of the rank-and-file, the less able they are to succeed in the business of building political majorities through professional, flexible tactics. Democratic mass parties, which are actually supposed to be the transmission belts between society and the system of political

institutions, have instead become barriers between society and political power. Although the argument does exaggerate considerably, it convincingly grasps an actual tendency. It neglects, however, the fact, that it remains always the individual's choice where to be short of time and where to spend time.

The "mediazation" of politics is thus generating a conflict between different tempos to which politics itself may eventually succumb. The abbreviation of the time normally demanded by the political process down to what the media's production schedule demands, means abridging the process by deleting the procedural components that qualify it as democratic. Discursive exchanges between participating actors give way to a series of self-correcting media trial runs carried out by top-echelon political representatives and their media consultants. Germany's decision to abandon nuclear power would not have been possible or even accepted by a broad spectrum of the population if its "fundamentalist" advocates had chosen to submit it to a referendum early in the debates on the issue.

The process of maturation that applies to political problem-solving includes both dimensions: majority coalition-building in society and a more precise definition of the strategies to be adopted to solve the problems efficaciously. But media time does not allow decisions to mature, as it is wedded to the immediate present, an almost Cartesian or geometric point in time having no extension. Media time insists that everything be absolutely current and up-to-date; even the return message by courier is too slow, since the information it contains would be obsolete even before it arrived. Media time is not a continuous process, like development or dialogue, but the permanent addition of isolated, unconnected present moments. The media's "presentism", in other words, shows no patience or understanding for politics' characteristically slower pace as it methodically processes programs for action and allows majority convictions to take shape. Instead it caters to the transitory opinions of the public, nails them down (fixes them) and in fact indirectly reinforces them by way of repetition and cultivation. What is more, media "presentism" demands that politics immediately endorse the public's every ephemeral whim, which it has assiduously reflected, canalized and recorded. Everywhere its influence reaches, media-oriented politics imposes a time horizon that is incompatible with democracy's own characteristic tempo.

Modified temporal relationships play a consequential role for political parties in three distinct respects:

1) As organizations committed to discourse and interest-integration, parties are too slow-moving to keep up with the "presentism" typical of media communications.

2) They are exceptionally attractive to citizens whose occupational situation and lifestyle leaves them enough time, or who simply make time, for political consultations.

3) As the preeminent organizations in the system of intermediary bodies, they are losing a good portion of their effectiveness at integrating diverse interests and opinions, because the intermediary sector as a whole has been forced to the sidelines of the political process.

The criteria of selectivity in the temporal structures of media democracy diminish the parties' role, without completely devaluing it. However, the media's dominance over political communication devalues much of the very process by which political matters are communicated or transmitted throughout the system. To be sure, parties can always adapt to the changed temporal structures, to win back lost influence in new ways. In addition to the American model, we can now begin to discern the outlines of a European model of party behavior. Here the parties reorganize their communicative patterns to gain influence within civil society, thus preventing their exclusion from the centers of decision-making. But the parties' weaknesses will continue to surface whenever the media's communications dynamics require quick reactions to current events, and wherever the day-to-day exigencies of the national political scene demand practical implementation of political principles in the direct media spotlight. Parties are by nature unsuited to this sort of thing, and their

deficiencies in both cases are massive and probably beyond remedy. At their current stage of development parties show no signs of having conceived any reforms that could restore their old preeminence in either domain. Their strengths, which neither the practices of elite party communicators nor media communications processes can ever supplant, will become especially conspicuous whenever long-term political projects are at issue, in which continuity of personnel and accountability matter a great deal. In such cases what count most are the political principles and basic, trend-setting decisions taken at the highest levels of politics, as well as the communication and day-to-day practical politics occurring at the grass-roots level, in civil society and in local government.

Whether the marginalization of political parties in Europe will ever reach the point it has in the US since World War II remains an open question. There are three clearly distinct positions that have emerged in European mass parties both at the level of reform debates and among the leadership cadres as they weigh their options for internal party reform. The successful campaign and business manager of one of Europe's largest mass parties, Germany's CDU (Christian Democratic Union), has been arguing for almost twenty years that mass parties of the classical European type have become outmoded under the impact of modern communications techniques. Professional media consultants prepare communications, while the political leadership takes responsibility for them. But only the parties' much greater access to financial resources today can set the machinery of modern political communications in motion. Thus, it is the talents of the strategic communications consultants and the politicians' ability to raise funds to carry out their designs that will ultimately bestow success on parties in the age of media democracy. Anything beyond that should be considered at best a customer relations matter concerning citizens with specific problems, and should be handled by the party's elected representatives. In other words, democracy in the media age means fund-raising for sophisticated communications plus a little constituent service. In this model parties again become "machines" (Max Weber), since they are ultimately geared only to pass on centrally planned communicative strategies from the top to the bottom of the chain of command. If one accepts this model, it no longer makes sense to think of parties as associations of equally empowered members having deep roots in civil society and committed to the discursive formation of opinion.

A second model likewise envisages "realistic" reforms that would bend to the pressure of media democracy's communications rules by professionalizing party communications, and even more directly and unabashedly placing them under the authority of the top-echelon communications centers. The main difference is that this model would still leave a place for the hard core of activist members, who would be assigned two roles. First, they would help influence the formation of public opinion in civil society by actively participating in its discussions. Second, they would continue to take part in intra-party deliberations and so shape policy positions, which, though not directly binding on the leadership, would still carry great weight with them. Franz Müntefering, business manager of Germany's SPD (Social Democratic Party), created a reform proposal that dovetailed with this type of "communications party" in many of its details. His plan consistently envisioned a bridging strategy designed to strengthen both the strategic communications center and the party's grassroots in civil society, while downplaying the opinion-shaping role and public profile of hierarchical, complex bodies like the party organizations and apparatus. Even though this model may have a real chance of succeeding, certain points in it have yet to be clarified. How will the nexus between the communications center and the grass roots be organized? The former puts a premium on flexibility, while the latter is thoroughly intertwined with civil society and thus wedded to its leisurely pace of communication. Therefore, one might expect tensions, mistrust and alienation to spring up between the two levels of the party. It remains to be seen whether the internet might prove useful in defusing the potentially tense relationship inherent in this notion of how the party is supposed to work.

A third position simply involves a defense of the old way of doing things. Its adherents may just be convinced that the traditional party model still has life in it, or they may be fighting tooth-and-nail to defend hard-won and zealously guarded positions of power within mid-level party organizations.

Comparatively speaking, parliaments have experienced an especially drastic loss of influence over the political process in media democracy. This is more the case for European parliamentary democracies than for presidential forms such as that of the United States, in which the President has always had a source of legitimacy separate from that of the legislative branch. The election of the Chief Executive in the United States has long since become a personal plebiscite conducted in the media, whereas this media-dominated process of legitimation is only now getting established in European parliamentary democracies. There, constitutional norms and public perceptions still treat parties and parliaments as the supreme source of legitimacy for the incumbents of the highest offices. As American and French examples have shown over a period of many decades, presidential democracies often face the dilemma of divided government. The two independent conduits of legitimacy, presidential and parliamentary elections, may produce contradictory results, which means that the president, despite having enormous powers, has to confront a hostile majority in part of or in all of the legislative branch. He may then be forced to enter into difficult negotiations with the leaders of the legislative majority party in order to get his program enacted into law. Such cases generate a classic political problem of balancing conflicts of value and interest that afflicts both the incumbent of the (directly legitimated) chief executive's office and the leadership of the majority party in one or both legislative chambers. Normally, they can only be resolved by tough bargaining backed by significant resources on a case-by-case basis. Former President Clinton, for example, faced hostile majorities in both chambers of Congress for the final six years of his tenure in office. As a result–and because of spectacular debacles like his health care proposal– he had to change direction rather drastically or risk coming up empty in his many skirmishes with the Congress and so earning the image of a loser and a do-nothing President. His so-called "triangulation strategy, " an early variant of the "third way" between traditional Democratic thinking and the dogmatic anti-government rhetoric of the Republicans was part of his answer to that dilemma. Nevertheless, we should never underestimate the power of a US President. As Clinton learned his lessons and understood better the potentialities of his office, he was able to get much of what he wanted from a Congress whose leaders viscerally loathed him, often by threatening vetoes of their own pet projects.

European parliamentary democracies evolved in a quite different direction partly as a result of the influence of political parties. The original notion of a legislative branch removed from and overseeing the executive was in practice supplanted by the rivalry between the government and majority party acting as a single unit arrayed against a minority opposition party (or coalition of parties). To this extent the classical model of a tripartite division of powers had long since yielded to a different reality, in which political parties bridge the gaps separating the individual pillars of the division of powers, more strongly in the case of legislative and executive power, more weakly between both of these and the judiciary. The outcome has been a shift in the oversight relationship: rather than the parliament overseeing the government, now the minority opposition exercises some oversight and control over the governing majority. On account of specific parliamentary rights of oversight accorded even to the minority, this function can be exercised much more efficaciously than it might at first seem. Under these circumstances the politics of the governing majority typically emerged through a process of deliberation, consensus-building, and sometimes bargaining, between the cabinet and the leadership of the party's contingent in parliament. Depending on the political weight carried by the leading figures on either side, government representatives always tried to reach advance agreements with the chiefs of their party's parliamentary delegation, since they wanted to avoid later rumors of discord that might detract from their reputations as leaders.

In media democracy, by contrast, the marginalization of political parties has caused parliament to go into eclipse as well. The governing party's parliamentary representatives know from experience and prudential wisdom that they owe their electoral success primarily or even entirely to the media skills of their candidate for the top government post. Moreover, they realize that discrepancies between the proposals of the head of government and those of the party's parliamentary leaders only tend to diminish and eventually exhaust the former's media charisma. Therefore, they are almost always ready to work toward consensus beforehand, or even after the fact, by adopting some of the party chief's plans.

In a media democracy the head of government has planned and executed his rise to power on the assumption that such media-inspired harmonizing mechanisms will always work to his advantage. There is the chance, though, that things will go awry at some point, that a headstrong minority will not let itself be intimidated by the calculus of media oriented strategies or that the government's and party leaders' fondness for the media spotlight will set them at loggerheads. In this case not only political parties but also their representatives in parliament, the party contingents, will be pushed to the sidelines of the political process. And of course, given the principle of majority rule, that means parliaments as such suffer the same fate in media democracy. This tendency is intensified still more when government leaders organize extra-parliamentary negotiations and talks designed to foster greater cooperation and consensus among major interest groups, then publicly proclaim their efforts as evidence of their success in governing. The majority party contingent in parliament loses most of its room for maneuver, and is reduced to the role of auxiliary supporter of the government's policies, at most demanding minor changes in the details of government-sponsored initiatives. It has very little opportunity to participate in decisions that determine the broad outlines of the government's policies.

INTERNATIONAL ECONOMIC LAW AND NATIONAL SECURITY

(Report on the 99th Comparative Law and Politics)

BRIGITTE STERN*

INTRODUCTION

More and more rules of *international economic law* purport to impose on States a certain behavior concerning the way they manage their economies and conduct their international economic relations. We all know that the present rules of international economic law are designed to foster an international economic order, which is not the New International Economic Order (NIEO) called for by the developing countries in the seventies, but an international economic order based on liberalization in all economic fields, though primarily in trade relations.

Liberalization means the suppression of all trade barriers, whether barriers based on customs duties or on quantitative restrictions. GATT and now WTO are designed to insure that States abide by these rules tending to more and more liberalization. However, sometimes, the suppression of all barriers can be a threat to States, and it has been deemed necessary that in such cases they should be able to protect themselves. Naturally, not everything is permitted to the State in order to protect itself, that is, in order to protect what is known in a generic formula its national security.

Of course, before we discuss the issue more deeply the meaning of national security should be ascertained. *National security* can, as most legal terms, have a narrow or broad meaning. The first understanding of national security is naturally linked with the defense of the territory, in other words with military and political questions. However, security is not understood only in this narrow meaning, but is understood more and more as encompassing all kinds of aspects which all concur in a more secure world for human mankind. For example, the Secretary-General of the UN declared in his *Agenda for peace*[1] the following:

"The concept of peace is easy to grasp; that of international security is more complex, for a pattern of contradictions has arisen here as well. As major nuclear Powers have begun to negotiate arms reduction agreements, the proliferation of weapons of mass destruction threatens to increase and conventional arms continue to be amassed in many parts of the world. As racism becomes recognized for the destructive force it is and as apartheid is being dismantled, new racial tensions are rising and finding expression in violence. Technological advances are altering the nature and the expectation of life all over the globe. The revolution in communications has united the world in awareness, in aspiration and in greater solidarity against injustice. But progress also brings new risks for stability: ecological damage, disruption of family and community life, greater intrusion into the lives and rights of individuals.

This new dimension of insecurity must not be allowed to obscure the continuing and devastating problems of unchecked population growth, crushing debt burdens, barriers to trade, drugs and the growing disparity between rich and poor. Poverty, disease, famine, oppression and despair abound, joining to produce 17 million refugees, 20 million displaced persons and massive migrations of peoples within and beyond national borders. These are both sources and consequences of conflict that require the ceaseless attention and the highest priority in the efforts of the United Nations. A porous ozone shield could pose a greater threat to an exposed population than a hostile army. Drought and disease can decimate no less mercilessly than the weapons of war."

In this broad meaning, national security encompasses also social and economic issues of security: health security, food security, labor security, environment security, and so on... Understood in this

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[1] *An Agenda for Peace. Preventive Diplomacy, Peace-making and Peace-keeping*, 17 June 1992, UN Doc. A/47/277, S/24111.

broad meaning, the concept of national security is taken into account to a certain extent by international economic law.This is why GATT/WTO rules have embodied several articles in order to deal with this problem. And this is also why the IMF Articles of Agreement allow a place for such a protection. Although they are sometimes – and even frequently – interwoven, I shall discuss separately issues raised by military and political security (which will be studied in the first part) and social and economic security (which will be studied in the second part).

MILITARY AND POLITICAL SECURITY

Quite often in the name of the protection of their national security, countries adopt unilateral economic measures such as embargoes on importations or exportations or freezing of foreign assets. Both the rules concerning trade matters and the rules on financial and monetary questions foresee such a situation and allow States to take such measures in order to protect their security interests, but only under certain conditions.

The freezing of assets in light of IFM rules

The IMF Articles of Agreement for example provide in Article VIII Section 2 that:

"No member shall impose restrictions on the making of payments and transfers for current international transactions".

It is however understood that States can restrict financial flows for reasons of national or international security, as long as the IMF approves it. Since 1952, a specific procedure has been set up in order to control such behavior by the member States. Therefore, when the US decided in 1979 to freeze all Iranian assets, arguing that the hostages' taking at the American Embassy in Teheran was a threat to their national security, they informed the IMF. The same is true when they decided a unilateral freeze of Libyan assets in 1986, after the Lockerbie incident. But, in fact, the IMF has never objected to any such unilateral action of which it was notified, which means that the control it exercises is purely formal [2]. In other words, States have quite an unrestricted power to take financial measures in order to protect their national security.

Unilateral economic sanctions in light of GATT/WTO rules

As far as GATT is concerned, the possibility not to respect the international economic rules dealing with trade relations for reasons of national security is provided for in Article XXI.

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

(*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(*b*) to prevent any contracting party from taking any action, which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

[2] See in that sense, Cinthia Lichtenstein, "The Battle for International Bank Accounts: Restrictions on International Payments for Political Ends and Article VIII of the Fund Agreement", *NYU Law Journal of Int'l Law and Politics*, 1987, p. 981.

(iii) taken in time of war or other emergency in international relations; or

(*c*) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security[3].

The main issue here is to know who is going to decide whether the national security interests are endangered: is this left to the free – and possibly arbitrary decision – of the State concerned, or is there a control by the WTO, especially through the dispute settlement mechanism? That precise question was raised – although not solved – before the WTO panel to which the European Union had asked to control the Helms-Burton Act adopted by the US.

Two interpretations of this provision in Article XXI are of course possible. The main argument of the US was that they were justified to adopt this legislation in application of article XXI, whose wording allows the concerned State itself to take the final decision concerning the necessity to protect its national security interests: article XXI indeed says that the member state can take "any action *which it considers necessary* for the protection of its essential security interests". The American position relied on what the ICJ had said in another context in the Nicaragua case[4]. In this case, the US had adopted extensive economic sanctions against Nicaragua, stating that the Sandinist communist regime was a threat to its national security. These economic sanctions were taken on the basis of the 1956 Treaty of Friendship, Commerce and Navigation. In this Treaty, there was a provision – also strangely numbered XXI – providing the following:

"the present Treaty shall not preclude the application of measures:
...
c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;
d) necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or *necessary to protect its essential security interests*"[5].

The wording is indeed quite different from the wording of Article XXI of the GATT.
The Court was quite clear that this formulation gave it the power to control whether or not there really existed national security interests that were endangered. It is worth mentioning the whole paragraph[6] here:

This article cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provision in Article XXIV that any dispute about the "interpretation or application" of the Treaty lies within the Court's jurisdiction. Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article XXIV. That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear a *contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it "considers necessary for the protection of its essential security interests", in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of "necessary" measures, not of those considered by a party to be such.

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[3] Emphasis added.
[4] Military and Paramilitary actions in and against Nicaragua, *ICJ Reports* 1986, par. 222, p. 116.
[5] Emphasis added.
[6] Op. cit. note 4, par. 222, p. 116.

Of course, this means also that, *a contrario*, the wording of Article XXI of the GATT could be construed as allowing unhampered discretion to the States to qualify any situation towards which they wanted to react, as a threat to their national security.
In the Nicaragua case, the Court decided therefore that it could control the measures taken by the US, arguing that they were protecting their national interest by taking measures of individual and collective self-defence against aggression by Nicaragua:

It is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests. But the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past. The Court has therefore to assess whether the risk run by these "essential security interests" is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but "necessary". [7]

In the end, the Court did admit that security means more than protection from an armed attack, did decide that it had the power and the duty to control whether there was a threat to a State's national security, and finally did not admit that the measures taken by the US were acceptable, as the Court considered that no serious threat existed to the US's national security from Nicaragua. In other words, the Court first denied the US the right to state for itself what its national security interests were, and second in the process of verifying if these interests were really threatened as the US pretended, it decided that they were not, and consequently that the actions undertaken by the US, both economic and military, were not justified. The European position was quite different: the European interpretation was based on a rigorous reading of Article XXI, and considered therefore that if the State is free to decide the measures it deems necessary in case of a threat to its national security interests, this is only so if the WTO is satisfied that the threat existed. In other words, the discretion exists in the consequences drawn from the existence of a danger to national security, not for the statement of the existence of that threat, which must be objectively proven.

Another European argument was that the Article itself gives several precisions on the kind of national security interests that can be taken into account. This would be unnecessary, if the State would be absolutely free to define and qualify its essential national security interests.

SOCIAL AND ECONOMIC SECURITY

The difficulty to find a consensus on social and economic security

A first remark is that there might be less agreement on what social and economic security means as this depends on socio-economic conditions that vary from State to State. A good example of these diverging views was given recently when US and Europe failed to reach a compromise on Greenhouse Gas and thus could not decide how the Kyoto Protocol – drafted by more than 170 States in 1997 – could be enforced more efficiently.

The basic idea is to adopt rules and even more economic practices that will curb global warming. Although the US is the main producer of greenhouse gases, the American negotiator declared: "*We will not give up. The stakes are too high, the science too decisive and our planet and our children too precious*".[8]

In many of the questions related to social and economic values, the States have conflicting interests. A good example is the divergent agendas of States as far as the elimination of carbon dioxide is concerned, depending on their economic power situation. Poor countries are asking for billions of dollars to help them to adapt to the new technologies more protective of climate and environment. Developed countries are trying to mitigate the effect of emission reductions on their economies by

[7] Op. cit. note 4, par. 224, p. 117.
[8] Cited in *Herald Tribune International*, 27 November 2000, p.1.

finding the least costly ways to cut warming gases, including the planting or taking into account of forests as "sinks" to absorb carbon dioxine, the dominant greenhouse gas.
This example illustrates the difficulty to reach a consensus on the rules that should be adopted to ensure social and economic security.
However, even assuming there is a consensus on some basic rules, a new question arises, which is probably an even more difficult question: the question is how these rules can be enforced, given the fact that liberalization is the key word of to day's international economic relations.

Liberalization has to be articulated with social and economic security concerns
Here I will start with a contemporary example of the possible negative side effects of liberalization. The European Union has adopted a unified market, and therefore no more barriers should exist between the different member States. Therefore, when some ten years ago, some people in France were alerted that the animal based feed could be dangerous, they wanted to stop their importations from England. But, what happened then, is that the European Commission, charged with the task of ensuring the respect of the European rules, threatened to bring France to trial in the European Court of Justice. In the end France continued to import the food of animal origin for the feeding of animals and the so-called "mad cow" disease has now dramatically spread in France and more generally in Europe.

The same type of problems is encountered not only on the regional level of Europe, but worldwide under the rules of WTO. The Hormones case is an illustration of the same problem under WTO rules and will be dealt with later.
The importance of an equitable articulation between trade and human concerns has also been stressed recently by the African Trade Ministers, meeting in Libreville who declared:

> We, the African Trade Ministers, meeting in Libreville, Gabon, from 13 to 15 November 2000;
>
> Aware of the profound changes that are taking place in the global economy and their implications for African countries, and of the efforts that are required to adapt the economies of our countries in order to pursue sustainable economic growth and development with a view to eradicating poverty;
>
> Recognizing that international trade contributes to economic growth and development;
>
> (...)
>
> 1. Reaffirm Africa's commitment to working in the framework of the multilateral trading system for a significant and equitable place in international trade;
>
> 2. Call on the WTO to play a more active role in this process by adopting and implementing a special capacity-building programme financed by its regular budget, and likewise encourage donor countries and institutions to supplement these efforts with additional financial contributions;
>
> 3. Reaffirm the African position, as already defined at the Algiers and Cairo meetings, which identifies *development issues as the key challenge to be addressed by the multilateral trading system.* Future multilateral negotiations must, therefore, be suitably prepared and take into account the development dimension, on an urgent basis.[9]

[9] Our emphasis.

All systems usually embody exceptions for special circumstances, and the rules of the WTO are no exception to this approach. Some exceptions are based on purely economic considerations, other on broader social considerations.

The GATT 94, which is an inherent part of the WTO rules, has indeed provisions in order for States to protect their economic sec urity, or more generally their general security, the first concern being dealt with by Article XIX, the second by Article XX.
First, States can protect themselves to a certain extent, if a specific sector of their economy is seriously threatened by "unforseen developments" of liberalization, more precisely in the terms of Article XIX in case the liberalization of trade allows importations of goods that "cause or threaten serious injury to domestic producers". In this case, the endangered State is allowed, under certain conditions among which the condition to give notice of its action to the Contracting Parties, "to suspend the obligation [to import] in whole or in part or to withdraw or modify the concession".
The details of this specific "escape clause" are given in article XIX:

Article XIX

Emergency Action on Imports of Particular Products

1. (*a*) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

(*b*) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (*a*) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which
has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (*a*) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (*b*) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(*b*) Notwithstanding the provisions of sub-paragraph (*a*) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

More importantly, Article XX deals with general exceptions. The full text is the following:

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(*a*) necessary to protect public morals;

(*b*) necessary to protect human, animal or plant life or health;

(*c*) relating to the importations or exportations of gold or silver;

(*d*) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(*e*) relating to the products of prison labour;

(*f*) imposed for the protection of national treasures of artistic, historic or archaeological value;

(*g*) **relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;**

(*h*) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(*i*) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(*j*) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June

1960.

I shall concentrate on paragraphs a), b), and g). These paragraphs deal indeed with serious interests that States consider as important for their general security.
Paragraph a) deals with public morals, paragraph b) with health, whether it be the health of animals, plants or human beings, and finally paragraph g) is concerned with aspects that might be of utmost importance for the future security of States, that is to say exhaustion of exhaustible national resources. It can be said that this last paragraph in fact allows exceptions to the liberalisation of trade, for the protection of the environment. More generally, if the three ot the mentioned paragraphs are read in conjunction, one could say that they guaranty a safe world; they protect human beings in their spirit (a), their body (b) and their future (g).

Health and environment are in fact two of the main concerns to day. *Health* was the background of the famous Hormones case. In this case, the European Union decided not to import American beef treated with hormones. The US brought the case before a WTO Panel. The WTO dispute settlement mechanism refused however that Europe could stop importation, as this violation of liberalisation was not based on sufficient scientific evidence that the Hormones beef was unhealthy. This is the limit of the often-mentioned "precautionary principle". It is possible to recall here the wording of Principle 15 of the Rio Declaration of 1992 usually considered as the most expressive definition of the precautionary principle, applied here to environment, but which is liable to be applied to all sectors where there are dangers for humanity:

"In order to protect the environment, the precautionary approach shall be videly applied by States according to their capabilities. Where there are threats of serious and irreversible damage, lack of full scientific certainety shall not be used as a reason for postponing cosy-effective measures to prevent environmental degradation."

But this general principle has not been used as such, rather the WTO enforced the much weaker precautionary approach embodied in the Sanitary and Phytosanitary (SPS) Agreement. ln my view however, if you need to be scientifically sure that a product is dangerous, it is no longer the precautionary principle that applies but just a scientific principle.

The same type of problems are naturally raised with the GMO, the genetically modified organisms, and has been raised before the WTO Dispute settlement mechanism in the Japan-Measures affecting agricultural products case.

Japan has a law on the protection of plants of 1950, which was modified in 1996. This law gives the government the right to decide a quarantine against fruits or vegetables imported from a foreign State, if there is a risk of introducing into Japan some diseases. By application of that law, the Japanese government decided a prohibition on the import into Japan of several species of fruits - among them apples, cherries, peaches, walnuts and so on – from the United States. Japan's prohibition was considered against the WTO rules for some of the fruits and in conformity with these rules for some others. It is not the place here to enter in all the details of this complicated case, but it can be said that the Hormones case and this latter case start to delineate how WTO understands the precautionary principle as embodied in WTO rules.
A few elements appear. First, it is admitted that the risk assessment done by States need not be based solely on the views of a majority of the scientific community concerned, but can also rely on the divergent opinion of a minority, if this minority represents qualified and respected authorities. Second, and this narrows the precautionary principle, it is stated that a risk evaluation must be based on a probability of damages and not on a mere possibility. Finally, it is clearly declared that the "precautionary principle" as such, as it couls appear in specific conventional international law or general customary international law, cannot be allowed to go against the clear rules of WTO.

Environment is another important concern in the world of to day. Environment has to be understood

here in its broadest meaning, the one put forward by the International Court of Justice when it stated:

"The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn"[10].

One of the most interesting cases rendered on the question on the confrontation between liberalisation and environment is the so-called Shrimp/Turtle case[11]. This case poses once again, in acute form, the problem of reconciling trade liberalization with national environmental protection policies[12]. Thus, the United States adopted legislation imposing an import ban on shrimp from countries that harvest them using methods, which could harm certain species of marine turtle. The implementation of this legislation was challenged by a number of shrimp-exporting countries in Asia on the grounds that it infringed GATT/WTO rules. The American measure was found to be discriminatory and therefore incompatible with the rules that govern international trade. However, the Appellate Body made it clear that this decision should not be understood to mean that the liberalization of trade was the sole objective and that any measure, which encroached upon it, should be regarded merely as a limited exception. On the contrary, the Appellate Body strongly insisted that the protection of the environment should be viewed as one of the WTO's central concerns and that the role of the Organization was precisely to reconcile the requirements of liberalization with the need to protect certain common values, such as the environment.
Other economic interests are also considered by some States worth of protection, if it is their own interests. In this respect, a last word must be said[13] here of the Article 301 Panel Report[14]. Everyone knows that the US has always used article 301 of its Trade Act, now the 1994 Trade Act, in order to

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[10] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996) 226, at 241-242, para. 29.
[11] Panel Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R, 15 May 1998, 482 p.; Appellate Body Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, 12 October 1998, 76 p.
[12] Many articles have been written on this case. See, for example: Panel Decision, 37 *ILM* 1998, p. 832 et seq., with an introductory note by Nancy Perkins; Appellate Body Decision, 38 *ILM* 1999, p. 118 et seq.; Robert Howse, « The Turtles Panel – Another Environmental Disaster in Geneva », *Journal of World Trade*, October 1998, Vol. 32, No. 5, pp. 73-100; Asif Qureshi, « Extraterritorial Shrimps, NGO's and the WTO Appellate Body », *ICLQ*, January 1999, pp. 199-206; Gregory Schaffer, « United States – Import Prohibition of Certain Shrimp Products », *AJIL*, 1999/2, Vol. 93, pp. 507-514; Joel P. Trachtman, « WTO Appellate Body Report: United-States–Import Prohibition of Certain Shrimp and Shrimp Products », *EJIL*, Current Developments, 6 November 1998, http/www.ejil.org/journal/curdevs.htlm; Jacob Werksman, « Import Prohibition of Certain Shrimp and Shrimp Products », Case Notes, *RECIEL*, 1999, Vol. 8, pp.78-81.
[13] See, for details: J. Bello & Alan Holmer, « The Post-Uruguay Round Future of Section 301 », *Law & Pol'y Int'l Bus*, 1994, p. 1305.
J. Eizenstat, « The Impact of the World Trade Organization on Unilateral United States Trade Sanctions under Section 301 of the Trade Act of 1974 : A Case Study of the Japanese Auto Dispute and the Fuji-Kodak Dispute », *Emory Int'l L. R.*, printemps 1997.
J. Gero & K. Lannan, « Trade and Innovation : Unilateralism and Multilateralism, *Can.- U.S. L. J.*, 1995, p. 91.
M. Minkler, « The Omnibus Trade Act of 1988, Section 301 : A Permissible Enforcement Mechanism or a Violation of the United States Obligations Under International Law ? », *J. L. &Com.*, 1992, p. 283.
S. Hernandez Puente, « Section 301 and the New WTO Dispute Settlement Understanding », *ILSA J. Int'l & Comp. L.*, 1997, pp. 213-234.
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C. Shede, « The Strengthening of the Multilateral System : Article 23 of the WTO Dispute Settlement Understanding : Dismantling Unilateral Retaliation under Section 301 of the 1974 Trade Act ? », *World Competition*, 1996/97, pp. 109-138.
J. R. Silverman, « Multilateral Resolution over Unilateral Retaliation : Adjudicating the Use of Section 301 before the WTO », *U. Pa. J. Int'l Econ.L.*, pp. 233-294.
C. O. Taylor, « The Limits of Economic Power : Section 301 and the World Trade Organization Dispute Settlement System », *Vand. J. Transnat'l L.*, 1997, pp. 209-348.
P. Stern, « Reaping the Wind and Showing the Whirlwind : Section 301 as a Methaphor for Congressional Assertiveness in U.S. Trade Policy », *B. U. Int'l L. J.*, 1990, p. 11
[14] Panel Report : United States– *Articles 301 to 310 of the 1974 Trade Law,* WT/DS152/R, 22 December 1999, 412 p.

make sure that not only its economic rights but even its economic interests are respected by the economic policies of all the other States. If they consider that their rights or interests are infringed by any other State, they consider that they can adopt unilateral measures of economic sanctions. Naturally, other States has often denounced this, but under the GATT/WTO rules, nothing much could be done against a powerful State. Things look differently with the sophisticated dispute settlement mechanism of WTO, and its "reverse consensus", that ensures the adoption of the Panel or Appellate Body Reports. The European Union has sued the US before a WTO Panel, arguing that the law was against the multilateral system set up by the rules of WTO, and Japan has been an intervening party in the case. The main defense of the US was that the law existed permitting unilateral sanctions, but that they will never use it in contradiction of WTO decisions. Europe, on the contrary contended that the mere existence of the law was a threat contrary to the multilateral rules of international economic law. The Panel accepted this idea stating:

"Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat, even before DSU procedures have been activated. To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick."[15]

The Panel then adopted a two-steps reasoning. First, it considered that on its face the American legislation allowing unilateral measures before the WTO had ruled on a controversy concerning a violation of trade rules, was contrary to the multilateral rules of WTO:

"Trade legislation, important or positive as it may be, which statutorily reserves the right for the Member concerned to do something which it has promised not to do under Article 23.2(a), goes, in our view, against the ordinary meaning of Article 23.2(a) read together with Article 23.1."[16]

Then, in a second step, the Panel accepted to take into account the Statement of Administrative Action (SAA) which "contains the view of the Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, on which domestic as well as international actors can rely."[17] But at the same time the Panel warned the US that it had really not to use that Article 301 in the future, adding:

"Should the US repudiate or remove in any way these undertakings, the US would incur State responsibility since its law would be rendered inconsistent with the obligations under Article 23 ."[18].

From this quick overview of the many current problems, it has appeared that the question of the extent to which GATT/WTO rules of international trade authorize the protection of national security interests of States – whether military, political, social, or environmental interests – is a crucial

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[15] Panel Report, par. 7.89. In the same paragraph, the Panel added that the mere threat «*would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures.*».

[16]Panel Report, par. 7.63.

[17] *Ibid.*, par. 7.111.

[18] *Ibid.*, par. 7.126.

question for the future of our society.

A PERSONAL VIEW OF THE TRANSFORMATION OF THE AMERICAN LAW FIRM: FROM GENTLEMEN'S CLUB TO MARKET COMPETITOR

BRUCE ARONSON[*]

Having moved from a smaller firm to a major wall street firm as an associate in 1986 and having served there as a partner from 1989-2000, I was in a position to witness a transformation in the operations of large U.S. law firms. A significant part of this transformation involves professionally oriented organizations evolving into business organizations in response to changing market conditions. But that is not the whole story. This kind of fundamental change affects every aspect of a law firm, including partner-associate relations and how the firm and the lawyers in it view their firm and themselves.

I. Traditional Wall Street Firm

When I moved to a major Wall Street law firm in 1986 as part of a six-attorney Japan practice group, the very fact of our joining was a harbinger of change for the firm. Traditional firms did not generally hire lateral attorneys, especially partners (the firm had hired its first and only lateral partner the previous year) or groups of attorneys. Although the process of transformation had already begun, the firm still retained the structure and trappings of a traditional large firm. The reception areas of the firm's offices at One Wall Street were traditional dark wood and oriental rugs. Lawyers' offices (particularly partners' offices) greatly varied in terms of both size and configuration. The firm had recently ended afternoon tea service on a silver tray, but still provided free bagels and muffins every morning for attorneys and staff in a pantry area. The main job of one staff member was to bring a variety of sharpened pencils to each attorney's office every day in order to exchange these for pencils used the previous day by the attorney.

Although not every associate became a partner, great time and effort were invested in associate training on the assumption that the associates represented the future of the firm. For example, the firm had a rotation program for new associates. Under this program new associates would work in different practice areas of the firm for one or two years in order to become well-rounded lawyers and to see what area of the firm's practice held the greatest attraction for them. Many of the staff, such as secretaries and messengers, had worked for the firm for a long period of time and were treated almost like family. I recall that the secretary to the senior partner in the office next to mine had worked for him for twenty years and even joined his family on their annual summer vacations in Europe.

When I became a partner in 1989, the traditional view that a partnership was based on trust and collegiality was still much in evidence. A week or so after I accepted the offer of partnership, a secretary came to my room with only the signature page of the firm's partnership agreement and requested that I sign it. No one showed me the rest of the agreement. As a sign of coming change, however, that same year the firm hired its first full-time managing partner. In the past, the managing partner had always been an attorney who practiced law on a full-time basis and acted as managing partner as an additional administrative duty. The partnership was now persuaded to hire a full-time "professional" managing partner, although in part this was due to the availability of a former partner of the firm who was working in-house as general counsel of a client.

II. Causes of Change

Although the traditional firm culture described above may sound appealing, it is clear that such firms were not operated in an efficient manner to maximize profits. Although there are a number of

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reasons why the primary focus of firms shifted to economic results, perhaps the two most important ones are a change in the relationship between law firms and clients and a change in the availability of financial information concerning law firms.

The most fundamental change occurred in the business operations of clients and their expectations concerning the role of law firms. During the 1980's many large U.S. corporations expanded the nature and scope of their business activities, including an increased emphasis on nationwide and international operations. At the same time they expanded and upgraded their in-house counsel and their method of utilizing law firms changed. Instead of assigning all or a major portion of their legal work to one law firm with whom they enjoyed a longstanding relationship, they began utilizing different law firms in accordance with the capacities and expertise of each firm. As they became accustomed to managing relationships with more firms, they also began to have firms compete directly for work assignments (with the most direct form of competition consisting of so-called "beauty contests"). The relationship changed from one of a general retainer to one which focused on specific transactions. While in the "good old days" firms had rendered one-line bills to their clients consisting of "X dollars for services rendered," clients now demanded detailed time records of all the work performed on their matters by each attorney of a firm. Clients' transactions also became larger, more time-sensitive, more complex and increasingly cross-border in nature.

Many law firms responded in a dramatic fashion to these changes in clients' businesses and expectations, as well as to the increased demand for corporate legal services. Firms grew rapidly in size and opened new offices both domestically and overseas, and also developed new areas of expertise to complement their existing practices. While a firm of 200 attorneys was considered a big New York firm in the early 1980's, today there are seven firms with over 1,000 attorneys and 57 firms with over 500 lawyers. A law firm currently needs over 350 lawyers for inclusion in a list of the 100 largest U.S. law firms, and firms in the 150-400 lawyer range are now routinely referred to as "mid-size" firms. In order to achieve a greater geographic reach and economies of scale, some fairly large firms have merged with other law firms. On the other hand, some traditional major New York firms which could not adapt to the new environment ended up in rather sudden dissolution. Whereas "international" work had been considered a specialty of certain law firms into the early 1980's, now every large firm engaged in significant cross-border transactions and we have recently seen the first major cross-border merger of law firms.

The largest firms have generally grown more rapidly than other firms in terms of both size and profitability because they have been successful in implementing a new model of the law firm. Under this approach firms can quickly mobilize large teams of attorneys, including attorneys with various specialties working out of multiple offices, in order to provide high quality services to clients on large, complex matters under severe time pressures. In order to provide this "one-stop shopping," law firms have not only grown in size and expanded geographically, but have also altered their internal structure. As discussed below, the rapid increase in the size and complexity of law firms meant that in certain ways they outgrew their traditional culture, staffing and promotion system and method of governance which were based on the existence of smaller organizations.

The other significant change was the availability of market information on law firms, including statistics on compensation. Open market access to relevant information is an important factor in stimulating market competition. Such information had not been available, as law firms are partnerships (with the partners being the "owners") and do not make public disclosures of financial information. Historically, Price Waterhouse, one of the major accounting firms, had conducted a private survey of large law firms on an annual basis, and then sold the survey results to subscribing law firms. The survey provided information on average compensation at large firms and other data by which a firm could make general comparisons of its performance with that of its peers. But the survey provided no data on individual firms and the results were not generally available to non-subscribing lawyers or the general public.

This all began to change when popular legal magazines, such as the American Lawyer and National Law Journal, began to gather and publish individual firm information in the form of ranking tables. The "AmLaw 100" contained the largest firms in the country, and data were provided for average partner revenue and income at each firm. Not only could partners (and associates) easily get hold of compensation figures for other firms, the firm comparisons had an impact on a firm's reputation among law firms, clients, potential clients, law students and the general public. In a sense, law firms, while still structured as private partnerships, now disclosed financial information as part of being "listed" on the "exchange" run by the American Lawyer.

III. Areas of Change

Let us examine briefly a few of the important areas of change that comprised or accompanied the transformation of traditional law firms to market competitors.

A. Productivity/Profitability

Perhaps the greatest change was an increased emphasis on productivity and profitability which affected all aspects of a law firm’s operations. As firms grew in size it became necessary to manage them more like the substantial businesses they were becoming. This meant that traditional practices which helped support or strengthen a firm's "culture" or collegiality were reexamined in terms of profitability, and were frequently modified or abandoned. Each attorney and staff member was expected to be productive and contribute to profitability. Increased competition among firms resulted in a new, aggressive form of law firm marketing, with firms striving to establish strong “brand names.” Some law firms have ventured into non-legal businesses and multidisciplinary practices in order to provide clients with more comprehensive services and to increase the firm's business opportunities.

This has led to a revision of the image of the "lawyer-statesman" and to the near disappearance of senior partners at traditional firms who focused exclusively on client relations. Nowadays, even partners with substantial client bases are expected to actively engage in the practice of law. One reason is the internal pressure from law firms for every attorney to be productive and bill hours. Of equal importance is the clients' expectation that even a senior partner is knowledgeable about current legal developments and practices, in order to ensure that the client receives the best possible legal advice and service. Even a long-standing relationship, in and of itself, may no longer be sufficient to obtain steady work from sophisticated clients.

More generally, law firms have restructured their operations into more of a “pyramid” structured in order to respond to pressure for continuous increases in growth and profitability. They now employ large numbers of associates and non-lawyers at the “bottom” of the pyramid in order to perform and support the firm’s work The “top” of the pyramid is kept small by limiting the number of associates who are promoted to partner and, to some extent, by reducing the number of equity partners. Maintaining and emphasizing this pyramid structure is one factor in the profitability of the largest law firms.

The most dramatic example of the increased emphasis on productivity occurred during a downturn in demand for legal services at the beginning of the 1990's. In the face of declining profitability a number of major firms took the unprecedented step of essentially firing a significant number of partners. In most cases, these were older partners who were not as productive as required under new firm standards.

One may wonder whether firm management can really dismiss a partner despite the fiduciary duties of partners under partnership law and, in many cases, the lack of such a provision in firms' partnership agreements. In fact, dismissed partners were victorious in a number of lawsuits against their former firms contesting such dismissals. Judges appear to have been unimpressed by the legal

arguments advanced by the law firms. One may surmise that judges were also not generally sympathetic to a situation in which relatively well-compensated partners at major law firms felt it necessary to dismiss their fellow partners for economic reasons --i.e., so that the remaining partners could further increase their compensation and meet the competition of their peers. (An additional reason for lack of sympathy by judges is that their own salaries were roughly equivalent only to those of first-year associates at large law firms). Some firms responded by amending their partnership agreements to provide express provisions for the dismissal of partners. Although a rapidly improving market for legal services in the 1990's muted this issue, it demonstrates clearly the extent of the clash between traditional firm structure and the new role of law firms as businesses.

B. Mobility

In the new world of market competitor firms it is quite common for lawyers (partners as well as associates) to change firms. This new role of lawyers as "free agent" adds to the pressure for each firm to perform on a par with its peers. A partner who changes firms generally brings his clients with him to the new firm. This raises an important question: do clients "belong" to the firm or to the individual partner in charge of their legal work?

The answer is clear in terms of law and ethics: clients belong to the firm. The initial engagement letter is between the client and the firm, and law firms generally prohibit partners from having personal clients which are not the firm's clients. All clients, including nonpaying pro bono clients, must be cleared by a firm's new business committee, which reviews conflict issues and the suitability of the proposed representation. In addition, a lawyer who is planning to leave a firm is ethically prohibited from soliciting clients on behalf of his new firm prior to his actual departure from his current firm.

It is nevertheless common for departing lawyers to take their clients with them to new firms. The reason is that clients no longer have the same kind of broad and deep institutional relationships with law firms that were prevalent in the past, but rather tend to identify with the individual lawyer(s) who directly provide legal services for the client. It has become increasingly important for a partner to have his own clients which form a "portable business" and enhance a lawyer's value and his ability to move among firms. And, in reality, clients generally will follow their primary lawyer from one firm to another when he changes law firms.

Despite the fact that the client is formally the "firm's client" rather than the "lawyer's client," law firms have been unable to effectively limit the movement of clients with a lawyer when he changes firms. This is due to legal and ethical considerations which act to prevent a firm from prohibiting or seriously restricting the movement of clients to a new firm. The underlying considerations do not involve protecting the lawyer's business or relationship with his clients; to the contrary, the issue is the client's right to retain the counsel of its choice following a change of firms by its lawyers. Law firms are thus unable to assert their formal legal relationship with the client in order to prevent or restrict the movement of lawyers and clients, and departing lawyers can utilize their clients' right to choose counsel to move their "business" from firm to firm.

C. Partner Compensation

Large New York law firms traditionally had a "lockstep" compensation system based strictly on seniority (such a system is still utilized by major London firms). However, over time nearly all firms have changed to an entirely different system under which compensation is decided each year based on an annual review of performance. This merit-based pay system is sometimes referred to by the inelegant expression that you “eat what you kill.” Under the traditional lockstep system, younger partners were generally underpaid for their efforts while older partners tended to be overcompensated relative to their contribution to the firm. This system worked in a well-capitalized firm in a stable setting where young partners were confident that the system would still be in place

and work to their benefit when they became senior partners. However, as firms grew and it became common for partners to move among firms, it became increasingly difficult to pay partners on any basis other than current performance. Young partners will generally not agree to delay receiving compensation and invest in a firm's future when other firms will pay them more in accordance with their current market value.

Another recent development in partner compensation is the growth of "non-equity" partners, which is a phenomenon resulting from the emphasis on a pyramid structure at large law firms. Non-equity partners are attorneys who are treated as partners in terms of outward appearance (i.e., in relations with clients and other outside parties), but do not share in a percentage of the firm's profits and are therefore not "owners" of the firm. This acts to reinforce the pyramid structure by further reducing the number of equity partners near the top end of the pyramid. A majority of large law firms now have non-equity partners and their numbers are increasing.

Recently a few law firms have even been accused of using the system of non-equity partners to unfairly boost their ranking in the AmLaw 100 and other annual law firm surveys. This is because some firms do not include non-equity partners as "partners" for the purpose of calculating the firm's average income per partner and other figures used in the surveys. This effectively limits the firm's "partners" to the higher income equity partners and excludes the lower income non-equity partners. This can result in an artificial boost to the firm's per partner income figure and possible "manipulation" of the market data which appear in the popular firm ranking tables.

D. Firm Governance

As law firms grew larger, the traditional partnership form of management -- important decisions reached following discussion among the partners without any full-time managing partner -- grew increasingly unwieldy. Firms have gradually evolved into a more corporate structure. This is similar to the path previously followed by other large professional service organizations such as accounting firms. In terms of legal form, many large firms changed from a partnership to a limited liability partnership when that corporate form became available in the mid-1990's. In a limited liability partnership, individual partners no longer have unlimited personal liability for matters in which they had no direct involvement. Day-to-day management has also come to resemble more of a corporate form with a managing partner (similar to the president of a corporation) and a management committee (like a board of directors). A majority vote of the partners is still generally required on certain fundamental matters such as making new partners, but even here the recommendations of firm management have assumed greater importance than in the past. And on a daily basis individual partners are not involved with, and are often not aware of detailed matters concerning, firm management.

Although the trend of law firms evolving to resemble businesses is clear, a question remains whether law firms can implement corporate-style management to the same extent as the big accounting firms. Not only are law firms still relatively smaller, but they also have legal issues and ethical considerations which are unique among professional service organizations. Ever-increasing size creates serious conflict of interest issues. Although the trend in the U.S. is toward greater permissibility for multidisciplinary practices, issues remain. For example, legal and ethical considerations have prevented the big accounting firms from also operating as law firms as they do in Europe.

E. Associates

Perhaps one of the most striking changes, partly because it affects the largest number of attorneys, is the role of associates in the new market-driven law firm. There is no longer an expectation that associates represent the future of the firm and should be trained accordingly. Rotation among different departments of the firm for training purposes is a thing of the past. Most associates have no

expectation that they will become partners at their firms.

One result is a tremendous rise in associate salaries, particularly for new associates (current associate starting salaries at major law firms are $130,000 or more per year). Without the incentive of a future partnership, associates must be paid their full worth. It may even be necessary to compensate them beyond their current value to the firm due to competitive pressures from other law firms and the lure of attractive in-house corporate jobs in the recently booming American economy. This trend in associate salaries has been intensified by deliberate strategies of large jumps in salary instituted by certain law firms (a New York firm in the latter half of the 1980's and a Silicon Valley firm in the last year or two) in order to attract the best law students and put pressure on their competitors.

This increase in compensation has come at a price. Firms now try to achieve profitability, despite ever-higher associate salaries, by having associates work very long hours and focus on a narrow area of law at an early stage so that they can master their area and work productively as quickly as possible. The career path for associates within law firms has become uncertain. Many associates now take the view that they intend to be at a large law firm only for a few years in order to obtain experience and general skills which will be transferable to their next job (and also, perhaps, in order to repay any student loans incurred while in law school). They, accordingly, often view working at a large law firm not as a career, but only as a stepping stone to another job such as an in-house corporate counsel.

Pressure for productivity and long working hours has raised serious lifestyle concerns on the part of many lawyers. Balancing work and life outside the office is becoming increasingly difficult, particularly for the significant and growing ranks of women attorneys who may also wish to raise families (women now comprise roughly half of law school students and one-third of attorneys at large firms). Although obtaining partnership is still considered attractive as a credential and a sign of professional accomplishment, associates recognize that partnership is no longer a stable sinecure. In a poll of associates at various firms last year, a majority responded that they did not even wish to become partners at their firms, given that productivity pressures did not appear to ease for partners either.

Associate dissatisfaction has manifested itself in a number of ways. A kind of associate "underground" network developed, beginning in 1990 with a newsletter called the Rodent and continuing more recently on a website chat room called the Greedy Associate. In these venues associates are free to compare their experiences and frustrations with big firm life with attorneys at other firms. Law firms have found it difficult to address associate concerns under their pyramid structure. They have continued to raise salaries and have instituted certain amenities, such as everyday casual dress, in imitation of the casual lifestyle offered by Silicon Valley firms.

IV. Concluding Remarks

The new model developed by large U.S. law firms for the provision of legal services has been a clear economic success. In addition to being utilized by major American firms, it also serves as an influential example to many other legal service providers -- public interest organizations, small "boutique" law firms, corporate law departments and law firms in other countries (including internationally oriented firms in Japan).

But this new model also raises many questions. Some fear a loss of important elements of professionalism, such as the independence of judgment, to the profit imperative. Others have more specific concerns about the legal and ethical permissibility of lawyers engaging in multidisciplinary practices with non-lawyers. Some believe the pressure for productivity has created severe lifestyle issues while others bemoan the loss of collegiality associated with traditional firms.

One thing seems certain --- the new model of large law firm is here to stay. Firms will continue to

wrestle with the issue of preserving some positive aspects of their "culture" in a competitive business environment. For the moment large firms and their attorneys seem to find it difficult to defy competitive market pressures by, for example, having somewhat lower compensation with a better lifestyle or greater amenities. However, one would expect that over time the most successful law firms would be those who somehow manage to be both a strong market competitor and an enjoyable place to work.

Thus, American-style capitalism, with all of its advantages and drawbacks, has reached one of the last bastions of tradition -- the large U.S. (in particular, Wall Street) law firm -- and transformed it from a gentlemen's club to a market competitor. This transformation has resulted in substantial economic success for the law firms and lawyers in them, accompanied, however, by considerable stress and anxiety. As one commentator observed, those who are quick to point to the desirability of competition and market solutions in all fields of endeavor are often academics and others who have never had to compete themselves. Indeed, perhaps academia is the last refuge from American-style capitalism. But even there, law schools have become the subject of their own ranking tables in a popular magazine. Can competitive capitalism be far behind?

Part II

Visiting Professors at the ICCLP

Lee Chang-Hee (Professor, Seoul National University)
(March 2001– March 2002)

Profile:
Professor Lee has studied at Seoul National University, Dongkuk University and Harvard Law School. He was appointed Professor at Seoul National University, College of Law in 1997.
He jointly conducted a class titled "International Transactions and Tax Planning" with Professor Kashiwagi and Associate Professor Masui of the Graduate School of Law and Politics. With the same faculty members, he is jointly giving a class on the topic of Tax Policy.

Major Publications:
"Impact of E-Commerce on Allocation of Tax Revenue between Developed and Developing Countries", 18 *Tax Notes International* 2569 (Tax Analysts 1999).
Seibob Gangeui (Lectures on Tax Law) (Pakyoungsa, Seoul 2001).

Adam Roberts (Professor, Oxford University)
(June – July 2001)

Profile:
After having studied at Magdalen College, Oxford University, Professor Roberts was appointed as the Montague Burton Professor of International Relations at Oxford University, and Fellow of Balliol College, from 1986. During his one month stay, he gave two Comparative Law and Politics Seminars entitled "Politics, Law and Military Force in International Relations (1): The New Interventionism" and "Politics, Law and Military Force in International Relations (2): The Implementation of the Law of War". He participated in and gave a presentation at seminars at the University of Tokyo.

Major Publications:
Documents on the Laws of War (Edited with Richard Guelff, 3rd ed., Oxford University Press, Oxford 2000).
Humanitarian Action in War: Aid, Protection and Impartiality in a Policy Vacuum (Adelphi Paper no. 305 of International Institute for Strategic Studies, London, Oxford University Press, Oxford 1996).

ICCLP Research Scholar

Walter Hutchinson
(April 2001 - March 2002)
After studying at Colombia University, Walter worked for American companies and visited Japan as a foreign research student at Faculty of Law, the University of Tokyo. His specialty is commercial law. He is conducting research into Big Bang deregulation during his stay in Tokyo.

Anglo-Japanese Project

Anglo-Japanese Academy Fellowships (1)

As part of the celebrations and events to mark Japan 2001, the inaugural Anglo-Japanese Academy Workshop and Conference were held at the University of Sheffield and Shrigley Hall, near Manchester from 3rd to 9th September. The AJA was inaugurated to promote scholarly activities and mutual understanding co-sponsored by the Graduate School of East Asian Studies, the University of Sheffield and ICCLP. With the underlying motivation to foster communication and the development of networks, the AJA focuses upon the following broadly defined areas: Politics, Law, Economics and Society. The first international meeting consisted of a workshop for young scholars awarded AJA Fellowships and a conference, where senior academics participated, entitled 'National, Regional and Global Transition: Common Agenda for Anglo-Japanese Relations in the Twenty-first Century'.

Workshop Schedule

Tuesday 4 September

Time:	8:50 - 9:30
Speakers:	Glenn HOOK, TAKAHASHI Susumu and Fellows
Title:	*Introductions and Aims*
Chair:	Glenn HOOK
Time:	9:30 - 10:40
Speakers:	Penny SIMONS and Helen PARKER
Title:	*Oral Presentations*
Chair:	Michael REDDISH
	10:40 - 11:00 MORNING BREAK
Time:	11:00 - 12:30
Session:	Fellows' Papers
Speaker:	SASAMOTO-COLLINS Hiromi
Title:	*The invention of authority: governmental formation of the concept of the state in modern Japan*
Speaker:	John WESTE
Title:	*The Japanese military industrial lobby: the defence production committee and Japanese economic rearmanent, 1950-1960*
Chair:	TAKAHASHI Susumu
	12:30 - 13:30 LUNCH
Time:	13:30 - 15:00
Speakers:	Martin SMITH and TAKAHASHI Susumu
Title:	*Securing Research Funding*
Chairs:	Glenn HOOK and WADA Keiko
	15:00 - 15:30 AFTERNOON BREAK
Time:	15:30 - 17:30
Session:	Fellows' Papers
Speaker:	Neil EVANS
Title:	*Community Participation in Urban Regeneration in the UK and Japan*
Speaker:	FUNAKOSHI Motoaki

Title:	*A Comparative Study of Anglo-American and Japanese Torts*
Speaker:	IHARA Motoi
Title:	*Transfer of production technology: A case of a Japanese Chemical Firm in the Philippines*
Speaker:	KINOSHITA Kazuaki
Title:	*Parliamentary democracy in Japan: constitutional perspective*
Chair:	MATSUBARA Kentaro

17:30 - 19:30 FREE TIME

Time:	From 19:30
Evening Speaker:	J.A.A. STOCKWIN
Title:	*The Reshaping of Japanese Democracy*
Chair:	Glenn HOOK

Wednesday 5 September

Time:	9:00 - 10:30
Session:	Fellows' Papers
Speaker:	Beverley BISHOP
Title:	*The impact of globalization and restructuring on women in the Japanese labour force*
Speaker:	KARATSU Rie
Title:	*Global capital and local production: importing management*
Speaker:	Peter MATANLE
Title:	*From Outside-In to Inside-Out: The Emergence of Contemporary Japanese Capitalist Modernity*
Chair:	TAKEDA Hiroko

10:30 - 11:00 MORNING BREAK

Time:	11:00 - 13:00
Session:	Fellows' Papers
Speaker:	David CRAIG
Title:	*Energy security versus non-proliferation - Japan's nuclear policy*
Speaker:	SASAKI Hiroshi
Title:	*'Atom-Politics' in East Asia: Toward a border-less democracy*
Speaker:	Christopher HUGHES
Title:	*Sino-Japanese relations and Ballistic Missile Defence*
Speaker:	John SWENSON-WRIGHT
Title:	*Post-Cold War US-Japan relations: incremental realism in a maturing security partnership*
Chair:	Hugo DOBSON

13:00 - 14:00 LUNCH

Time:	14:00 - 15:30
Speaker:	Alastair ALLAN
Title:	*Locating Web-based Resources*
Chair:	SOMEYA Masayuki

15:30 - 16:00 AFTERNOON BREAK

Time:	16:00 - 17:30
Speaker:	Alastair ALLAN

Title:	*Evaluating Web-based Resources*
	17:30 - 19:30 FREE TIME
Time:	From 19:30
Evening Speaker:	David FELDMAN
Title:	*Introducing Human Rights to an Uncodified Constitution: The Roles of Parliament and Others*
Chair:	KASHIWAGI Noboru

Thursday 6 September

Time:	9:00 - 10:30
Speaker:	Penny SIMONS
Title:	*Dissemination of Research*
Chair:	Hugo DOBSON
	10:30 - 11:00 MORNING BREAK
Time:	11:00 - 12:30
Session:	Fellows' Papers
Speaker:	Christopher P. HOOD
Title:	*Getting on track - high speed railways in Japan and the UK*
Speaker:	KITADA Akihiro
Title:	*Philosophy of/and Politics: Taking Rorty seriously and criticizing his criticism of the cultural left*
Speaker:	MOCHIZUKI Sawayo
Title:	*Analysing 'rights talk' in Japanese society*
Chair:	HASEGAWA Harukiyo
	12:30 - 13:30 LUNCH
Time:	13:30 - 15:00
Session:	Fellows' Papers
Speaker:	AMIYA-NAKADA Ryosuke
Title:	*Functional governance and democracy: a hidden agenda of globalisation?*
Speaker:	IOKIBE Kaoru
Title:	*The Globalisation and Party Politics of Pre-War Japan*
Speaker:	KODATE Naonori
Title:	The Politics of Scottish Devolution
Speaker:	TAMURA Tetsuki
Title:	*Democratic Theory and the Notion of 'Public'*
Chair:	MATSUBARA Kentaro
	15:30 - 16:00 AFTERNOON BREAK
Time:	16:00 - 18:00
Speaker:	SAKAMOTO Yoshikazu
Title:	*The making of a Social Scientist*
Speakers:	FUJIWARA Kiichi
Title:	*Panel Discussion*
Chair:	Glenn HOOK

Conference Schedule

Friday 7 September

Time:	9:50 - 11:40
Keynote Speakers:	SAKAMOTO Yoshikazu and Ronald DORE
Keynote Commentators:	John DUNN and KUDO Akira
Chair:	Glenn HOOK
	11:40 - 12:00 MORNING BREAK
Time:	12:00 - 13:30
Session:	Society - Global Level
Speaker:	YOSHIMI Shunya
Title:	*A Drifting World Fair: Cultural Politics of 'Environment' in the Contemporary Japanese Local/Global Context*
Chair:	HASEGAWA Harukiyo
Time:	12:00 - 13:30
Session:	Politics - Global Level
Speaker:	KAN Hideki
Title:	*The Dilemma and Problems of Postwar Japanese Diplomacy and its Implications for Asia-Pacific Order*
Speaker:	Andrew GAMBLE
Title:	*The Future of Anglo-America: the changing relationship between the United Kingdom and the United States*
Chair:	TAKAHASHI Susumu
	13:30 - 14:30 LUNCH
Time:	14:30 - 16:00
Session:	Society - Regional Level
Speaker:	HATSUSE Ryuhei
Title:	*Formation and deformation of Asian systems in the context of globalization*
Speaker:	Ulf HEDETOFT
Title:	*Britain vs. Europe - An Orthodoxy Revisited: On National Identity, Realist Ambitions and Institutional Imperatives*
Chair:	TAKEDA Hiroko
Time:	14:30 - 16:00
Session:	Politics - Regional Level
Speaker:	TAKAHARA Akio
Title:	*China's New Preference for Regionalism*
Speaker:	Christoph BLUTH
Title:	*Britain and Germany: Defining the European order in the contemporary era*
Chair:	FUJIWARA Kiichi
	16:00 - 16:30 AFTERNOON BREAK
Time:	16:30 - 18:00
Session:	Society - Local Level
Speaker:	Yoko SELLEK
Title:	*Okinawa: spatial and diasporic identity?*
Speaker:	Eberhard BORT

Title:	*A Braveheart Renaissance? Scottish Identity at the Beginning of the 21st Century*
Chair:	Hugo DOBSON
Time:	16:30 - 18:00
Session:	Politics - Local Level
Speaker:	MACHIMURA Takashi
Title:	*Narrating a World City for 'New Tokyoites': Economic Crisis and Urban Boosterism in Tokyo*
Speaker:	Randall GERMAIN
Title:	*London as a Global Financial Center: problems and prospects*
Chair:	TSUKIMURA Taro
	18:00 - 19:30 FREE TIME
	19:30 - WELCOME DINNER

Saturday 8 September

Time:	9:30 - 10:30
Session:	Economics - Local Level
Speaker:	SUEYOSHI Koichi
Title:	*'The Kitakyushu Renaissance': The Vision for Reformation of an Industrial City*
Chair:	KASHIWAGI Noboru
	10:30 - 11:00 MORNING BREAK
Time:	11:00 - 12:30
Session:	Economics - Regional Level
Speaker:	TAKAHASHI Wataru
Title:	*The East Asian Economy - After the financial crisis*
Speaker:	Brian ARDY
Title:	*The UK and the Euro: Exchange rate stability but at what price?*
Chair:	HASEGAWA Harukiyo
	12:30 - 13:30 LUNCH
Time:	13:30 - 15:00
Session:	Law - Regional & Global Level
Speaker:	MORISHIMA Akio
Title:	*Globalization in Asian countries as seen from the perspective of the legal system: the transition to a market economy*
Speaker:	Sharron McELDOWNEY
Title:	*BSE, Science and Regulation*
Chair:	CH'EN Paul
Time:	13:30 - 15:00
Session:	Economics - Global Level
Speaker:	SUDOH Osamu
Title:	*The Digital Economy and Sustainable Development*
Speaker:	Paul HIRST
Title:	*Globalization, Myths and Realities: Democracy and Global Governance*
Chair:	KUDO Akira

15:00 - 15:30 AFTERNOON BREAK

Time:	15:30 - 17:30
Speakers:	John McELDOWNEY and Bryce DICKSON
Title:	*Concluding Plenary Session*
Commentators:	FUJIWARA Kiichi and CH'EN Paul
Chair:	TAKAHASHI Susumu

17:30 - 19:30 FREE TIME
19:30 - CONFERENCE DINNER

Papers:
Harvey W. ARMSTRONG and Peter WELLS
The Role of Community Economic Development (CED) initiatives in Regenerating Local Areas of Economic and Social Exclusion: The Case of Yorkshire and the Humber

ANNEN Junji
Between Euphoria and Xenophobia - Rewriting the Japanese Constitution

ISHII Shiro
Japanese Conceptions of History and 'War Responsibilities'

Essays

Suburbia

by Nakamura Koichiro

The other day, Horie Toshiyuki won the Akutagawa Prize for his novel *Kuma no shiki-ishi*. Perhaps it is because he and I were born in the same year, but he is an author who has piqued my curiosity for some time.

This latest novel of his is typical of his style. The recurring subject matter of Horie's work is the foreigner in France, in particular the relationship between himself as foreigner and France as foreign culture. Perhaps it is this theme that gives me an affinity with Horie—my mind has forged a link with my own experiences studying and living abroad (although not France in my case).

The other important theme to which Horie frequently returns is suburbia. Tellingly, his first publication was titled *Kogai e*. The suburbs—not urban, not rural. It goes without saying that the suburbs Horie refers to are the suburbs of Paris. The suburbia he depicts, and which is depicted in the quotations he selects from French authors, is somehow very brutal. Out of empty space, low-income apartment blocks rise up methodically to fill the grid. It is a very different image from the detached housing, manicured lawns and swimming pools of the American middle class, or the crush of supermarkets and shopping malls around Japanese train stations from which extend the small ready built houses of the self-styled *chusan-kaikyu*. No, here are "un-French" rows of boxes aligned in a void. The residents are those shunned by French society, including immigrants and their families. This is where foreigners and suburbia coexist.

These aimlessly monotone suburbs of Paris evoke the memories of several suburbias I have seen myself.

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As it so happens, my first aspect of France was Horie's Parisian suburbia.

In the winter of 1988 when I first visited France, I had arranged to meet a friend in central Paris outside Notre Dame Cathedral. I had just flown in from London and he was going to put me up. Relying on my guidebook, I had rather tentatively caught the RER train from Charles de Gaulle Airport.

My train passed through the epitome of suburbia. Outside the window, there were broad expanses and "un-French" high-rise blocks. When I looked around, I realised that most of my fellow passengers were either tourists lugging their heavy suitcases or else people who appeared to be immigrants from former French colonies. All of us were rather "un-French". So I was thinking, rather absent-mindedly, as I was lulled by the train's rhythms.

The train pulled in to a station.

Suddenly there was a cry.

When I looked up, I could see several dark-skinned youths yelling and running towards me from the next carriage. They seemed to be fighting. One youth waved his arm and I saw a glint in his hand. Without voicing their own cries, the passengers sought the safety of the next carriage or the platform.

As I joined the fleeing throng, trying to keep my luggage together, I thought: "So, this is France".

Eventually a station attendant came and quelled the commotion. The youths, who had been in heated discussion with the attendant, soon disappeared. The train set off as if nothing had happened. And so we entered the city of Paris.

Later, when I told this story to friends who are familiar with France, they were unanimous in saying they had never experienced anything like it. "Paris is not such a dangerous city", they said.

However, the glint of that knife in the youth's hand left a searing imprint as my first live image of France: the brutal aspect of the suburbia of Paris.

"Compared to this, the suburbs of London are a different world," was my first thought.

I was in a small town about midway between London and Oxford. A motorway passed nearby. On the motorway or on the train, London was within one hour's commuting distance. A previous Japanese resident had labelled the town the *Den'en-chofu* of England. Leaving aside the question of whether such egocentric labelling is appropriate, it was certainly a beautiful and pleasant setting. The centre of town still had its original atmosphere. The residents of the surrounding cottages in their well-kept gardens seemed to be relatively affluent, even by English standards. Once you left town, you were surrounded by verdant grazing.

However, on the way back from a trip to Scotland I came across another town which was another version of suburbia entirely.

It may have been because it was more built up than where I lived that it was so noticeable, but the centre of this town was untidy and covered with rubbish like only the most lively areas of London after a busy night. Most of the passing pedestrians were immigrants from the corners of the British Empire. The men sitting in the park were grasping two-litre plastic bottles full of beer.

Moscow is round in shape, like Paris or London. A ring road clearly delineates the border between the inner and outer zones. The suburban Muscovites live in patches clinging to the lifeblood that is the ring road. In the centre of Moscow, the Russian capital since days of old, many venerable buildings stand proud; the Kremlin is perhaps the best known. But as my mind leaves the metropolis, I can't help but imagine the famous song *Twilight over the Moscow suburbs* used by Moscow Radio and the suburbs appearing in Russian literature.

However, the reality was quite different when once I went to the end of one of the radially-extending metro lines. Again I saw relatively new, but obviously cheaply constructed, apartment blocks rising up from the void. I have heard that in this country the older buildings are often better built. Many of the balconies of these shaky buildings had been enclosed using glass or vinyl sheeting: the additional "rooms" formed a buffer against the cold and provided space to grow plants and vegetables.

I visited the Mongolian capital Ulan Bator in 1989. There were almost no buildings there. I heard that most of the modern structures were built after the war using the labour of Japanese internees and Soviet money. Throughout the city, you could see second-hand cars from the Soviet Union; there were also used cars from Japan, still bearing the identifying markings of the companies that once owned them.

Just a few steps outside the city centre and you have yurt tents all around, each one on a fenced block of land. These tent homes, which were designed to allow their inhabitants to roam the grassy plains, have now been affixed to the city and lost their mobility. This assembly of ensnared yurts did not make me think of the single yurt in the middle of a plain extending towards the horizon, or of the massive yurt of Genghis Khan erected in the courtyard of the presidential palace. Rather, they made me think of those high-rise apartments, clinging to the edge of the city: it was another aspect of suburbia.

At present, I live on the eastern side of Tokyo Prefecture. I think of it as very much the centre of the city—I am on the inner side of the No.7 Expressway, after all. However, amongst those who live within the rarefied Yamanote circle, there are quite a few who think it is already part of Chiba Prefecture.

For an area within Tokyo Prefecture, the roads are wide, there are conveniently located facilities for the various sports, there are parks large and small, and towards the sea there are even a Ferris wheel and an aquarium. The housing is mostly high-rise, and unusually for Japan there is a great sense of space.

One newspaper article explained: "The view of rivers and sea is somehow reminiscent of Fukien in China. That is why the Fukienese staying in Japan congregate here." Having never been to Fukien, I am not qualified to attest the truth or falsehood of the article. However, I can say that it is an unusual space by Tokyo standards. Perhaps because this unusual space attracts a certain *je ne sais quoi*, there have been various incidents around here recently. I am sometimes asked why I continue to live here.

I don't know the reason myself. However, it might just be that I was called to this place and continue to live here as a result of the scenes of suburbia that were previously imprinted into my memory.

[April 2001, translated by Peter Neustupný]

My wonderful memories of Germany: why was it so exciting for Mr. Tanaka?

by Tanaka Koji

I started my study in Germany at the end of March 1999 for a period of two years. However, it actually began back in Osaka, when I saw Professor Dieter Leipold in the autumn of 1998 for the first time. A joint symposium of the University of Freiburg and Osaka City University takes place every three years and its third meeting was held in 1998 in Osaka.

Professor Leipold gave a welcome speech there in Japanese for over ten minutes - without notes! He spoke slowly, but the speech itself was perfect.

It must be very difficult for Europeans to learn Japanese, not because the Japanese use characters different to the Roman alphabet, but because Japanese is a tonetic language. It is easier for Europeans to read and to write Japanese than to speak Japanese.

Japanese has fewer consonants and vowels than German. For instance, Japanese has no consonants like F or V. The Japanese do not recognize long-vowels and the difference between L and R. Also, Japanese has very few combinations of consonants. In principle, a consonant in Japanese does not stand alone, it must always be accompanied with a vowel. For example, Japanese normally pronounce *Freiburg* as *Fureiburugu* and *Leipold* as *Leipoludo*.

But the fewer variations in the individual tones in Japanese are balanced with more variations in the intonations. For example, a German pronounces the word Tokyo with two long vowels, but it is originally a four- syllabic word in Japanese. The four "short" syllables are "To", "u", "kyo" and "u". One must pronounce only the first syllable low, and the intonation comes between "To" and "u". Each "u", "kyo" and "u" must be pronounced in the same pitch. Stress is not important. A further example is "Sake", which has two meanings. If it is pronounced with a rising intonation, it means "rice wine". If it is pronounced with a falling intonation, it means "salmon". Therefore, it is impossible for a German, who cannot speak Japanese, to deliver a comprehensible speech in Japanese by just memorizing the script written in the Roman alphabet.

It was clear that Professor Leipold had mastered the Japanese language. Any Japanese person who has tried to master a European language would have been able to sympathise with how long he was devoted to learning Japanese and would have been moved by his speech.

The goal of my study in Germany was to acquire the degree of LL.M. So I attended various classes, particularly seminars. In addition to taking examinations and writing papers, I also finished my master's degree dissertation. Throughout the whole process, I was taught, encouraged and inspired by Professor Leipold and am sincerely gratefully to him.

At the beginning of my stay in Germany, I learned German at the Goethe Institute but there was also time to enjoy myself. I thought that taking a dance course was a very German thing to do.

"Shall we dance?" Ms. *F*, a staff member of the Goethe Institute, suggested to me some days before the institute's summer festival. She explained to me that she had to find a partner to accompany her in a small play in the summer festival. The city of Freiburg once belonged to the *Habsburg* family, the feudal rulers of Vienna, which is where the Viennese waltz originated. No wonder the citizens of Freiburg like the Viennese waltz.

Ms. *F* 's request surprised me but this was soon to become a regular activity. At first I thought I should politely decline, but at the end of the day I thought it was a good opportunity to do something that the Germans like to do. Our task was to dance the tango for about two minutes. We needed to learn only two dance moves, the basic steps and the promenade. Ms. *F* taught me the steps in the

office and later I practiced them by myself in the car park.

The summer festival finally came. Ms. *F* was beautifully dressed and I was not sure if I was the right person to be her partner. The play started. Our appearance was getting closer and closer. The music started and we started to dance. I should have lead her, but instead, Ms. *F* lead, because I couldn't do it. The two minutes were awfully long for me but after the play everyone gave us a rousing applause. But when I later saw the photos of our dance, I was disappointed because my posture was just awful. I decided, "I will go to a dance school and master dancing!"

All the students in the class were Germans or other Europeans. I asked my instructor, " I can neither dance well nor speak German well. Am I eligible?" With an encouraging voice she said, "No problem!" Things were certainly not always comfortable for me at the dance school. For example if you could not find a partner you had to wait against the wall, which was very embarrassing.

However, the experience in the dance school was very valuable for me, because I had the chance to speak German with many people of different ages, occupations, and backgrounds.

In the beginning, going to the dance school was something of a burden for me. But as I became accustomed to it, I became hopeful of continuing to learn dancing. I was ready to progress to higher level class, but one can only do so with a partner. I had to find a partner.
"Shall we dance together in the next course?" Ms. *K* suggested to me one day. She was almost 20 years older than I, but a very friendly and likeable person so I was glad she suggested this. Ms. *K* was a German teacher at a high school. She spoke beautiful German and of course, her grammar was perfect. She corrected my German from time to time and that helped me improve my German a lot. Thanks Ms. *K*!

One day I got an unexpected request from the instructor at the dance school:
"I need a demonstration dancer for my beginners’ course in the next term because the previous demonstration dancer has left us."
She asked me whether I could take over his position. It was a huge surprise for me but she told me that because I danced well, she decided to ask. I couldn't believe it! However she was serious and I took her compliment by telling her that I would try.

On the first day of the beginners' course I went to the hall with the instructor and I found approximately 40 people waiting for us. She introduced me to the students.
"This is Koji, our demonstration dancer."
Everyone must have been surprised that the demonstration dancer was Japanese. In the center of the hall the instructor and I stood solemnly and began to show them the basic steps of the waltz:
"Right foot, left foot, close..."
I noticed that the eyes of all the male pupils were riveted on my steps. I was extremely nervous but I could hear the students say:
"Yeah, we should move our feet the way HE dose."

When I danced in front of the students, I concentrated on what the instructor pointed out. I also danced with female students if there were fewer male students. I danced without breaks and sweated a great deal -- so much so that the instructor laughed when she looked at me. Sometimes I could not dance correctly. Sometimes I could not understand what the instructor said. However she and all the pupils were extremely tolerant and friendly. After the class she said to me:
"I had a good time with you. You can come to the class next week too, can't you?"
I answered immediately, "Yes, of course!"
On my way back I was so happy that I shouted, "I made it!" and furiously pedaled my bicycle home.

Mr. Krohe had studied for one year at the University of Tokyo during which time I had got to know

him. He was a graduate student of Professor Leipold and became one of my best friends during my stay in Freiburg.

One day at the University he asked me,
"Do you have time next Tuesday evening?"
I replied, "No, I'm sorry, but every Tuesday evening I dance before the students at a dance school."
He couldn't understand.
"What do you mean?"
"I'm a demonstration dancer."
"Do you mean, you dance?"
"Well, not only do I dance, but I also dance as a demonstration in front of the pupils."
"A demonstration? What's the difference between *dance* and *demonstration dance*?"
"A dance instructor together with her demonstration dancer demonstrates different dance moves in a dance course. I act as the demonstration dancer."
"Are the students Japanese? If so, I didn't know that there was a dance school only for Japanese in Freiburg."
"No, they are Germans."
"Is it a decent dance school?" He couldn't stop quizzing me.
"The dance school is the largest one in Freiburg. You must know it," I said.
There was no doubt that Mr. Krohe, who always understands and helps me, did not believe my story – and to tell the truth I could hardly believe it myself.

I told my instructor about this conversation with Mr. Krohe and she laughed very much.
"So I have to issue a certificate of your demonstration dance," she said.
And in keeping with her German conscientiousness, the certificate was actually presented. The text reads as follows:
"Mr. Koji TANAKA acted as a demonstration dancer during the period of 01/18/2000 to 03/28/2000 in the beginners' course with the instructor. The course took place over ten weekly classes. The dances taught were:
Waltz, tango, Viennese waltz, fox-trot, cha-cha and jive.
The course was taught in accordance with the basic guide of *The All-German Dance Teachers Association of The Federal Republic of Germany.*"

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This essay was written as part of a report on my study in Germany to submit to my Japanese professors at The University of Tokyo. I always tell them that my study in Germany was a fruitful one. I hope the reader can share some of my wonderful memories of Freiburg and my gratitude to the professors at the University of Tokyo for their constant support, without which I couldn't have realised my dream of studying in Germany.

(August 2001)

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Erinnerungen an meine schöne Zeit in Deutschland: Gründe, warum Herr Tanaka in Freiburg glücklich war

Das zweijährige Studium in Deutschland habe ich Ende März 1999 angefangen. Aber eigentlich hat es bereits früher in Osaka begonnen, - nämlich als ich im Herbst 1998 Herrn Professor Dr. Dr. h.c. Dieter Leipold zum ersten Mal gesehen habe. Ein gemeinsames Symposium zwischen der Universität Freiburg und der städtischen Universität Osaka findet alle drei Jahre statt und das dritte Treffen dieser Art hat 1998 in Osaka stattgefunden.

Herr Professor Leipold hielt eine Begrüßungsrede von über zehn Minuten auf Japanisch – ohne Notizen! Zwar hat er langsam gesprochen, aber es war sehr verständlich.

Für Europäer muss Japanisch sehr schwierig sein. Nicht weil Japaner andere Zeichen als das Alphabet benutzen, sondern weil Japanisch eine Tonsprache ist. Japanisch lesen und schreiben kann man relativ schnell lernen, aber Sprechen ist nicht so einfach.

Japanisch hat zwar weniger Konsonanten und Vokale als die deutsche Sprache[1], und kaum Kombinationen von Konsonanten[2]. Aber die wenigen Variationen in jedem einzelnen Ton in der japanischen Sprache werden durch mehr Variationen in der Tonhöhe ausgeglichen[3].

Ich war beeindruckt, wie gut Herr Professor Leipold Japanisch gelernt hat. Ich glaube, jeder Japaner, der einmal versucht hat, eine europäische Fremdsprache zu lernen, war von seiner Rede begeistert. Denn man kann sich vorstellen, wie viel Zeit Herr Professor Leipold aufgewandt hat, um Japanisch zu lernen.

Das größte Ziel meines Studiums war der Abschluss LL.M. Dazu musste ich an Lehrveranstaltungen - besonders Seminaren - teilnehmen, eine Magisterarbeit schreiben und mündliche Prüfungen ablegen. Im Verlauf meines Studiums hat mich Herr Professor Leipold sehr gut betreut, wofür ich ihm herzlich danke.

Am Anfang meines Aufenthaltes in Deutschland habe ich am Goethe-Institut Deutsch gelernt. Da gab es verschiedene Veranstaltungen. Als besonders deutsch habe ich den Tanzkurs empfunden.

„Können wir zusammen tanzen?“ Frau *F*, eine Mitarbeiterin am Goethe-Institut, hat mir einige Tage vor dem Sommerfest des Institutes diese Frage gestellt. Sie erklärte mir dass sie einen Partner sucht, der mit ihr in einem kleinen Theaterstück beim Sommerfest tanzt. Freiburg gehörte mehrere Jahrhunderte zu den Habsburgern, die Fürsten von Wien waren, wo der Wienerwalzer herstammt. Ich glaube, Freiburger tanzen gerne Wienerwalzer.

Die Frage von Frau *F* war für mich der Anlass, richtig tanzen zu lernen. Ich wollte zuerst das Angebot ablehnen. Aber am Ende habe ich es angenommen, weil ich etwas Deutsches machen wollte. Wir mussten zwei Minuten Tango tanzen. Die erforderlichen Figuren waren nur der Grundschritt und die Promenade, die Frau *F* mir im Büro beigebracht hat und ich selber nachher alleine auf einem Parkplatz geübt habe.

Schließlich ist das Sommerfest gekommen. Frau *F* war schön angezogen. Ich fragte mich, ob ich wohl ihr Partner sein dürfte. Aber das Theaterstück hat angefangen und unser Auftritt kam immer näher. Als die Musik angefangen hatte, haben wir begonnen, zu tanzen. Eigentlich hätte ich sie führen müssen, aber Frau *F* hat mich geführt, weil ich es nicht konnte. Die zwei Minuten sind für mich sehr lang gewesen. Nach der Aufführung hat mich jeder gelobt. Aber als ich eine Aufnahme

[1] Japanisch kennt z.B. kein „F“ oder „V“ wie „**F**reiburg“ oder „**V**olk“, kein „Z“ wie „**Z**immer“, keinen Umlaut wie „Ä“, „Ö“, „Ü“, keinen langen Vokal wie „G**a**bel“ oder „V**o**gel“, sowie keinen Unterschied zwischen „L“ und „R“, wie „Bibe**l**“ und „Bibe**r**“.

[2] In der japanischen Sprache darf ein Konsonant im Prinzip nicht allein stehen, sondern wird immer von einem Vokal begleitet. Beispielsweise spricht ein Japaner normalerweise „**F**reibu**rg**“ wie „F**u**reibur**ugu**“ aus oder „Leipo**ld**“ wie „Leipol**udo**“ aus.

[3] Zum Beispiel ist „Tokyo“, das auf Deutsch mit zwei langen Vokalen ausgesprochen wird, auf Japanisch ein viersilbiges Wort, nämlich hat es vier kurze Silben, „to“, „u“, „kyo“ und „u“. Von den vier Silben wird nur der erste Ton „to“ niedrig ausgesprochen und die Tonänderung kommt zwischen „to“ und „u“. „U“, „kyo“ und „u“ werden in der gleichen Tonhöhe ausgesprochen. Die Betonung ist nicht wichtig. Ein weiteres Beispiel ist „*Sake*“, das zwei Bedeutungen hat. Wenn es mit steigender Intonation ausgesprochen wird, bedeutet es „Reiswein“. Wenn es mit sinkender Intonation ausgesprochen wird, bedeutet es „Lachs“.

gesehen habe, war ich sehr enttäuscht. Meine Haltung sah nämlich sehr schlecht aus. Daher habe ich mich dazu entschieden, an einem richtigen Kurs an einer Tanzschule teilzunehmen.

All die anderen Schüler waren Deutsche (wenigstens Europäer). Ich habe meine Lehrerin gefragt: „Ich kann weder gut tanzen noch gut Deutsch sprechen. Ich weiß nicht, ob es so geht." Sie hat mich ermutigt: „Es geht!"

In der Tat ist es nicht immer nett in der Tanzschule. Zum Beispiel, kann man nicht immer einen Tanzpartner finden. Dann muss man an der Wand warten, was sehr peinlich ist. Trotzdem waren die Erfahrungen für mich sehr wertvoll. Denn da konnte ich mit vielen Leuten sprechen, die nach dem Alter, dem Beruf, dem Lebenslauf oder dem Familienstand verschieden sind.

Am Anfang war es für mich eher belastend, zur Tanzschule zu gehen. Aber ich habe mich allmählich daran gewöhnt und ich hatte später Lust, weiter tanzen zu lernen. Aber man kann am Bronzekurs nur paarweise teilnehmen. Ich musste eine Partnerin finden. Da ist Frau *K* gekommen:
„Wollen wir zusammen im Bronzekurs tanzen?"
Frau *K* ist etwa 20 Jahre älter als ich. Sie gefiel mir direkt wegen ihrer Freundlichkeit und daher hat mich das Angebot sehr gefreut. Frau *K* ist eine Deutschlehrerin an einem Gymnasium. Sie spricht sehr schönes Deutsch. Ihre Grammatik ist natürlich korrekt und sie hat mein Deutsch immer korrigiert. Es hat mir sehr geholfen. Vielen Dank, Frau *K*!

Eines Tages habe ich von der Tanzlehrerin ein unerwartetes Angebot bekommen:
„Ich suche für meinen Anfängerkurs im nächsten Semester einen Vortänzer, weil der bisherige aufgehört hat."
Sie fragte mich, ob ich seinen Platz übernehmen könnte. Die Frage hat mich erstaunt. Sie hat mir gesagt, dass ich gut tanze, was ich nicht so sah. Aber weil sie es mir sehr ehrlich gesagt hat und ich es daher wörtlich nahm, habe ich ihr gesagt: „Ich mache es mal."

Am ersten Tag des Anfängerkurses bin ich mit der Lehrerin in den Raum, wo ca. 40 Schüler auf uns warteten, hineingegangen. Die Lehrerin stellte mich vor:
„Das ist Koji, der vortanzt."
Ich glaube, dass die Schüler vielleicht überrascht waren, weil der Vortänzer ein Japaner war. Im Zentrum des Raums standen meine Lehrerin und ich. Wir zeigten Schülern die Grundschritte des Walzers:
„Rechter Fuß, linker Fuß, schließen..."
Ich habe bemerkt, dass jeder Schüler meine Bewegung beobachtete. Ich war extrem aufgeregt. Aber ich hörte die Schüler auch sagen: „Ja, man soll es so machen, wie ER es macht."

Als ich vortanzte, konzentrierte ich mich sehr auf die Erklärung der Lehrerin. Ich habe auch mit Schülerinnen getanzt, wenn es an Männern fehlte. Ich habe pausenlos getanzt und sehr viel geschwitzt, worüber die Lehrerin gelacht hat. Manchmal konnte ich nicht richtig vortanzen. Manchmal konnte ich nicht verstehen, was die Lehrerin gesagt hat. Aber sowohl sie, wie auch die Schüler sind sehr tolerant und freundlich gewesen.

Nach dem Unterricht hat die Lehrerin zu mir gesagt:
„Mit dir macht mir Tanzen Spaß. Könntest du auch die nächste Woche kommen?"
Ich antwortete sofort:
„Ja, natürlich!"
Auf dem Rückweg nach Hause war ich sehr froh und ich schrie:
„Geschafft!" Ich bin sehr schnell Fahrrad gefahren.

Herr Krohe, der an der Universität Tokyo studiert hatte und den ich schon dort kennengelernt hatte, war eigentlich ein Schüler bei Herrn Professor Leipold. Er war während meines Aufenthalts in Freiburg einer meiner besten Freunde.

Eines Tages hat er mich gefragt:
„Hast du nächsten Dienstagabend Zeit?“
Ich habe geantwortet:
„Nein, dienstagabends tanze ich leider an einer Tanzschule vor.“
Er hat mich gefragt:
„Was meinst du?“
„Ich tanze *vor*.“
„Du meinst, Du tanzt?“
„Nein, ich tanze nicht nur, sondern ich tanze *vor*.“
„Vortanzen? Was ist der Unterschied zwischen *tanzen* und *vortanzen*?“
„Im Tanzunterricht zeigt eine Lehrerin mit ihrem Vortänzer zusammen verschiedene Figuren. Das Vortanzen mache ich mit ihr.“
„Sind die Schüler Japaner? Gibt es eine Tanzschule nur für Japaner?“
„Nein, sie sind Deutsche.“
„Ist die Tanzschule keine richtige Tanzschule?“
Er zweifelte weiter an mir.
„Das ist die größte Tanzschule in Freiburg.“ ‚sagte ich.
Es gab keinen Zweifel, dass Herr Krohe mir nicht vertrauen konnte, weil ich selber diese unglaubliche Geschichte kaum glauben konnte.

Als ich meiner Lehrerin von diesem Gespräch erzählte, musste sie sehr viel lachen.
„Dann muss ich für dich eine Bescheinigung für das Vortanzen anfertigen.“, schlug sie vor.
Aufgrund der typisch deutschen Ehrlichkeit wurde tatsächlich eine Bescheinigung erstellt. Diese lautet –
„Herr Koji TANAKA hat in der Zeit vom 18.01.2000 bis 28.03.2000 für den Anfängerkurs als Vortänzer mit der Tanzlehrerin vorgetanzt. Der zehnmalige Kurs fand einmal in der Woche statt. Unterrichtet und vorgetanzt wurden die Tänze:
Langsamer Walzer, Tango, Wiener Walzer, Foxtrott, Cha Cha Cha, Jive.
Die Kursordnung steht in Übereinstimmung mit der Rahmenordnung des *Allgemeinen Deutschen Tanzlehrer-Verbandes in der Bundesrepublik Deutschland e. V.*.“

Dieses Essay ist eigentlich als Bericht über mein Studium in Deutschland für meine japanischen Professoren, die mir an der Universität Tokyo Jura beigebracht haben, geschrieben worden. Ich sage ihnen immer, dass das Studium in Deutschland traumhaft war. Ich hoffe, dass sie sich vorstellen können, wie wunderbar mein ganzer Aufenthalt in Freiburg war und wie ich ihnen dafür danke, dass sie mich ständig beim Studium unterstützt haben.

“Are you Japanese?” : A short contemplation on the Japanese through German eyes

by Thomas Krohe

From August 1998 to September 1999 I spent one year at the University of Tokyo preparing a comparative dissertation on German and Japanese Insolvency Law which was finally completed in November 2000. During my time in Tokyo I not only made friends with many Japanese and other foreign students but also was presented with many occasions to enjoy the manifold beauty of the Japanese islands and the quality of Japanese cuisine.

More than a year after returning to Freiburg University I have now had the opportunity to think back to my time in Tokyo and to write about some of my experiences. In this brief article I would like to restrict myself to a point of special personal interest which was also often discussed among my foreign colleagues at the University of Tokyo.

Japanese are said to be very formal and their politeness is noteworthy. Because of this they are widely respected all over the world, and especially in Germany. However, the flip-side of this trait can easily engender problems for foreigners when trying to approach their Japanese counterparts in a conversation. I often failed myself in getting beyond those harmless topics such as the climate in Germany. Anything that could have given the slightest provocation for controversy was carefully avoided. What do Japanese people think about Japan's responsibilty for crimes during the 2nd World War? Or about the LDP's role and its internal machinactions? My thirst for knowledge was often unsatisfied.

In the beginning the difficulties resulting from this Japanese trait mean problems for only the foreigners – but only while you are in Japan. Once Japanese students or professors set out for abroad, the problems change for them. Japanese guests at the University of Freiburg often look helpless, some even timid. In this regard they even surpass guests from China or Korea, who are also said to be reticent. They speak with a soft voice, always ready to express their thanks or to offer their excuses. It is nearly impossible to make them give a critical statement on what is going on in Germany. When asked if everyday life poses difficulties for them, they will answer that everything is fine because Germans are so friendly and helpful, even though everyone knows that the shop assistants are mostly in a bad mood and even the slightest indiscretion on the streets can provoke a sharp rebuke by the passers-by.

As long as the exchange is limited to some meaningless compliment, both sides will remain unsatisfied and the Japanese will be frustrated in their attempts to establish contact with Germans. The Japanese finally return to their country having failed to capitalise on the original worth of a stay abroad, which lies in acquiring a knowledge of the country one has stayed in an attempt to enrich one’s experience of life.

An assistant at the university`s international office responsible for the foreign students is said to have once welcomed an Asian student, who had knocked very softly at her door and even after a distinct request entered anxiously, with the words: “Are you Japanese? ”

It is needless to say that a lot of exceptions can be found. There are several professors and students willing to get to know as much as possible about Germany and its people or just enjoy one year abroad free of any obligations and the range of possible activities is broad. Some Japanese are said to have profited from their stay by taking dancing–courses or acquiring a driver's–license.

By way of a conclusion I would encourage all those who get the chance of a stay abroad during their time at university. They should be open-minded and try to do as much as possible to learn about other peoples and cultures. They won't achieve this just by reading books or newspapers.

. . . .

„Sind Sie Japaner?“: Eine kleine Betrachtung der Japaner mit deutschen Augen

Von August 1998 bis September 1999 habe ich einen einjährigen Forschungsaufenthalt an der Universität Tokyo verbracht. Dort habe ich meine rechtsvergleichende Dissertation zum japanischen Insolvenzrecht vorbereitet, die ich im November vergangenen Jahres abgeschlossen habe. Während meiner Zeit in Tokyo habe ich viele Freundschaften mit Japanern und anderen ausländischen Studenten knüpfen können, die bis heute fortbestehen. Nicht zuletzt habe ich auch die vielfältige Schönheit der japanischen Inseln und die Qualität der japanischen Küche zu schätzen gelernt.

Mehr als ein Jahr nach meiner Rückkehr nach Freiburg habe ich nun Gelegenheit erhalten, an meine Zeit in Tokyo zurückzudenken und über meine Erfahrungen zu berichten. Ich möchte mich dabei auf einen einzigen Punkt beschränken, der mich seit langem beschäftigt und für den ich noch keine befriedigende Erklärung gefunden habe. Es handelt sich übrigens um ein Problem, daß auch vielen meiner ausländischen Kommilitonen an der Universität Tokyo immer wieder zu denken gegeben hat.

Die Japaner gelten als sehr formell, ihre Höflichkeit ist sprichwörtlich. Sie genießen aus diesem Grunde in aller Welt, gerade auch in Deutschland, hohes Ansehen. Kehrseite dieses Charakterzuges sind indes die Probleme, die sich Ausländern stellen, wenn sie versuchen, in Gesprächen Zugang zu ihrem japanischen Gegenüber zu finden. Oft bin ich selbst daran gescheitert, in Gesprächen über unverfängliche Themen wie das Klima in Deutschland hinauszukommen. Alles, was auch nur im mindesten zu Kontroversen Anlaß hätte geben können, blieb sorgfältig ausgeklammert. Was denken die Menschen in Japan beispielsweise über die Verantwortung Japans für die Verbrechen des 2. Weltkrieges oder die Rolle der LDP und ihre parteiinternen Klüngeleien? Mein Wissensdurst blieb oft ungestillt.

Die Schwierigkeiten, die sich aus diesem Charakterzug der Japaner ergeben, sind zunächst die Probleme der Ausländer – aber nur, solange man sich in Japan befindet. Brechen hingegen japanische Studenten oder Wissenschaftler zu einem Aufenthalt im Ausland auf, wechselt das Problem auf ihre Seite. Die japanischen Besucher an der Universität Freiburg wirken übertrieben zurückhaltend, oft hilflos, manche sogar ängstlich. Selbst im Vergleich zu Gästen aus China oder Korea, die ebenfalls als zurückhaltend gelten, fallen sie auf. Sie sprechen mit leiser Stimme, bedanken oder entschuldigen sich ständig. Zu kritischen Äußerungen über die Verhältnisse in Deutschland lassen sich Japaner in aller Regel schon gar nicht bewegen. Fragt man, ob Ihnen das tägliche Leben Schwierigkeiten bereite, erhält man zumeist die Antwort, alles verlaufe reibungslos, da die Deutschen so freundlich und hilfsbereit seien. Dabei weiß jeder, daß die Verkäuferinnen in den Geschäften meist schlecht gelaunt sind und schon kleine Unaufmerksamkeiten im Straßenverkehr aggressive Zurechtweisungen der Passanten zur Folge haben können. Beides in Japan unvorstellbar.
Solange sich der Austausch zwischen Gästen und Gastgebern auf belanglose Artigkeiten beschränkt, bleibt er für beide Seiten uninteressant. Der Kontaktaufnahme zu Deutschen ist das nicht zuträglich. Die Japaner haben entsprechend große Schwierigkeiten und ziehen sich letztlich oft auf ihre eigenen Landsleute zurück. Schade ist dies vor allem für die japanischen Gäste, die den eigentlichen Zweck eines Auslandsaufenthalts, neben den akademischen Inhalten auch Kenntnisse über das Gastland und Lebenserfahrung zu sammeln, nicht erreichen können.

Von einer Mitarbeiterin des Auslandsamtes der Universität Freiburg, die für die Betreuung der ausländischen Studenten zuständig ist, wird das Gerücht kolportiert, sie habe einen Asiaten, der besonders leise an ihrer Tür geklopft und auch nach deutlicher Aufforderung nur sehr vorsichtig das Zimmer betreten habe, mit den Worten empfangen: „Sind Sie Japaner?“

Selbstverständlich gibt es auch viele Ausnahmen, nämlich Professoren oder Studenten, die ihren Aufenthalt nutzen, soviel wie möglich über Deutschland und das Leben der Menschen in diesem

Land zu erfahren oder auch einfach das verpflichtungsfreie Auslandsjahr zu genießen. Die Palette möglicher Aktivitäten ist unbegrenzt, es wird sogar von Japanern berichtet, die ihre Zeit in Freiburg dazu genutzt haben, einen Tanzkurs zu belegen oder den Führerschein zu erwerben.

Ich möchte diese kurze Betrachtung mit der Ermutigung an alle diejenigen beenden, die während ihrer Studienzeit die Möglichkeit eines Auslandsaufenthaltes erhalten, diese Zeit mit Offenheit und Kontaktfreude zu nutzen, um möglichst viel über andere Völker und Kulturen, ihre Art zu denken und zu handeln zu erfahren. Dies ist mit bloßem Studium von Büchern und Zeitungen nicht zu erreichen.

Comparative Law and Politics Seminars & Forums

Held at the University of Tokyo, Graduate School of Law and Politics, April 2001 – September 2001.

[Seminars]

The 105th Comparative Law and Politics Seminar — 29 May 2001
Speaker: Professor Mark Barenberg, Columbia Law School
Topic: Enforcement of Global Labor Rights by United States Law
Language: English
Moderator: Professor Higuchi Norio
*Co-organized with Anglo-American Common Law Study Meeting

The 106th Comparative Law and Politics Seminar — 13 June 2001
Speaker: David Wright, Senior Lecturer, University of Adelaide
Topic: A Comment on U.K. Trust Law Reform from an Australian Perspective
Language: English
Moderator: Professor Higuchi Norio
*Co-organized with Anglo-American Common Law Study Meeting

The 107th Comparative Law and Politics Seminar — 15 June 2001
Speakesr: Professor Carl Schneider (University of Michigan Law School) and Research Group
Topic: Discourse between U.S. and Japan on Medical Information and Ethics
Language: Japanese and English
Moderator: Professor Higuchi Norio
*Co-organized with Anglo-American Common Law Study Meeting

The 108th Comparative Law and Politics Seminar — 20 June 2001
Speaker: Professor Adam Roberts, Oxford University, ICCLP Visiting Professor
Topic: Politics, Law and Military Force in International Relations (1):
The New Interventionism
Language: English
Moderator: Professor Ch'en Paul

The 109th Comparative Law and Politics Seminar — 5 July 2001
Speaker: Professor Adam Roberts, Oxford University, ICCLP Visiting Professor
Topic: Politics, Law and Military Force in International Relations (2):
The Implementation of the Laws of War
Language: English
Moderator: Professor Ch'en Paul

The 110th Comparative Law and Politics Seminar — 5 July 2001
Speaker: Professor Rebecca Eisenberg, University of Michigan Law School
Topic: The Shifting Function Balance between Patents and Drug Regulation
in Biopharmaceutical Innovation
Language: English
Moderator: Professor Terao Yoshiko

[Forums]

The 113th Comparative Law and Politics Forum — 21 May 2001
Speaker: Professor Harry N. Scheiber, University of California, Berkeley

Topic: History of Judicial Reform: California Courts, 1960-1990
Language: English
Moderator: Professor Ota Shozo

The 114th Comparative Law and Politics Forum — 24 May 2001
Speaker: Professor Justin Dabnar, James Cook University Law School (Australia)
Topic: Where to Locate a Corporate Regional Headquarters in S.E. Asia – the relevance of tax considerations
Language: English (with summary in Japanese)
Moderator: Professor Kashiwagi Noboru

Reports on Selected Seminars and Forums

[Seminars]

The 105th Comparative Law and Politics Seminar- 29 May 2001
Professor Mark Barenberg
Enforcement of Global Labor Rights by United States Law

The inclusion of international labor rights in multilateral trade agreements is a controversial proposal that impedes both a new round of global trade negotiations and a new Congressional grant of negotiating authority to the United States President. The United States already enforces the rights of workers overseas through several different legal mechanisms. Other mechanisms are contained in proposed legislation and in novel litigation strategies. These mechanisms implicate all levels of legal authority recognized by the United States legal system, including city and state law, federal legislation, federal constitutional norms, bilateral and multilateral treaties, and jus cogens norms of international law. These mechanisms offer practic al models for enforcing labor rights through multilateral legal regimes.

The most significant legal mechanisms include the following: (1) More than 65 state and local laws require government agencies to procure supplies only from contractors who pay a "living wage" and otherwise comply with domestic and international labor law. New legislation enacted by New York City extends this rule to protect workers in overseas companies supplying the city government. (2) Some U.S. courts have applied federal labor and employment legislation, such as the National Labor Relations Act, to extraterritorial activity. For example, a federal Court of Appeals has penalized a sympathy strike by Japanese unions in support of United States workers. The logic of such decisions would require the foreign affiliates and contractors of United States multinational corporations to comply with the rights already afforded U.S. workers domestically. The U.S. courts, however, are unlikely to make such radical extraterritorial use of domestic worker protections. (3) A federal statute, the Alien Tort Claims Act, authorizes United States courts to enforce jus cogens norms against forced labor by overseas parties. This law is limited in scope, because it does not authorize U.S. courts to enforce other international labor rights. (4) Labor-rights advocates have recently filed lawsuits that attempt to use federal racketeering statutes (civil and criminal conspiracy laws) to redress a wide range of labor abuses committed by overseas companies. The lawsuits claim that United States companies and their overseas suppliers "conspire" by means of ordinary contractual relationships. (5) Several members of Congress have proposed "anti-sweatshop" legislation that would specifically authorize public and private lawsuits against U.S. companies that are supplied by overseas contractors which violate domestic or international labor law. (6) United States trade legislation authorizes the President to penalize countries whose exports are made under conditions that violate "internationally recognized worker rights." This legislation, which authorizes unilateral action by the United States, may violate the international law codified in the multilateral dispute resolution rules of the World Trade Organization. (7) The North American Free Trade Agreement (NAFTA) requires member states to "effectively enforce" their domestic labor rights, a potentially significant requirement in light of the weak enforcement of domestic labor laws in the United States and Mexico. This requirement represents an important alternative to the proposed multilateral enforcement of universal "core labor rights" stated in abstract terms by the International Labor Organization. (8) In the last two years, the United States has entered into three bilateral trade agreements that require effective enforcement of both domestic labor laws and the core labor rights enunciated by the International Labor Organization. Therefore, the NAFTA and the bilateral agreements incorporate two very different legal strategies for enforcement of the labor rights of overseas workers. (9) These bilateral agreements and the NAFTA offer two different, but not mutually exclusive, models for enforcement of labor rights in the broader Americas region, as the United States attempts to achieve the expansion and revision of NAFTA to include all countries of the Western Hemisphere in a Free Trade Area of the Americas (FTAA).

Professor Barenberg recommends that labor rights, especially workers' fundamental right of association, be enforced through regional agreements such as the FTAA. The regional labor rights should be well-specified rather than abstract, starting with the obligation to effectively enforce the domestic labor rights of member states. Regional bodies should determine both the substance and procedure for continuing improvement and enforcement of labor rights by member states. The regional bodies should democratically represent the governments, worker organizations, unorganized workers, and the unemployed workers of the member states. Such bodies should offer economic incentives (trade and investment benefits) to those member states which most effectively improve and enforce labor rights, compared to other member states that have similar levels of economic development. In this way, the regional system would encourage a "race to the top" among countries' labor standards rather than the current "race to the bottom" caused by competition to attract capital through low labor costs. These regional agreements should be coordinated by the I.L.O. or some other agency of the United Nations that democratically represents governments, worker organizations, unorganized workers, and the unemployed.

[Mark Barenberg]

The 106th Comparative Law and Politics Seminar- 13 June 2001

Dr David Wright

A Comment on UK Trust Law Reform from an Australian Perspective

Initially it must be established what does the Trustee Act 2000 (UK) do. Fundamentally it contains five main areas. They are duty of care, power of investment, acquisition of land, agents and remuneration. Overall, the reaction to the Act has been positive, with one major exception. The Australian reaction to the Act is complicated by the fact that Australia is a federation and the central government does not have control over trusts. That is, control of trusts remains an individual State issue. But a way to avoid diverse approaches to this issue is for all of the States to adopt uniform legislation. Two very eminent Australian lawyers, one on the New South Wales Court of Appeal and the other on the High Court of Australia, have drafted uniform legislation for the individual States to adopt. They proposed this in the fourth edition of their book *Jacobs' Law of Trusts in Australia*, which was published in 1986. However, by the sixth edition of this book, published in 1997, this legislation, which was very similar to the Trustee Act 2000 (UK), was dropped as no State was interested in adopting it.

As was mentioned previously, the reaction to the Act has been positive, with one major exception. This exception also applies in Australia. It relates to the duty of care. The duty of care in the Trustee Act 2000 (UK) can be excluded, per schedule one, paragraph 7. That is, it allows for effective exemption of liability clauses in trust deeds. The position in Australia, the United States, Canada and New Zealand is that not all the duty of care that a trustee is under can be excluded by the operation of an exemption clause. That is, both actual fraud and some form of negligence, can not be excluded under a trustee exemption clause. This was the position in England up till the Court of Appeal decision in *Armitage v Nurse* [1997] 2 All ER 705, where it was held that an exemption clause in a trust document could exclude the trustee's liability for everything except for actual fraud. Schedule one, paragraph 7 of the Act permits trustee exemption clauses to be effective. Therefore, it allows the result that occurred in *Armitage v Nurse*.

Lord Goodhart, a very well respected lawyer in the House of Lords, was extremely critical of schedule one, paragraph 7 of the Act for allowing this result. His Lordship's contention was that all professionals should be incapable of exempting liability. The example his Lordship gave was the solicitor/ client relationship. If the solicitor attempted to rely upon an exemption clause a piece of contractual legislation, the Unfair Contract Terms Act 1977 (UK), would prevent this reliance by the solicitor. Although Lord Goodhart recognised that the legislation only applied to contracts, and that trust deeds would not be covered by it, his Lordship thought this was only a technicality and that professional trustees should not be about to rely upon exemption clauses.

This gives a hint of how to solve this problem, which is the fundamental flaw with the Act. It is to adopt a contractual analysis to trusts. Certainly this contractual analysis is consistent with the "trust" of the Hague Convention of 1991 and the dominant view, according to Professor Arai, of the understanding of Japanese trust law. Also Professor Langbein from Yale University has stressed the parallels between contract and trusts. Further, in England the recent Contracts (Benefits of Third Parties) Act 1999 is consistent with this greater application of the contractual framework to the treatment of trusts.

[David Wright]

The 108th and 109th Comparative Law and Politics Seminars – 20 June and 5 July 2001
Professor Adam Roberts
Politics, Law and Military Force in International Relations

These two presentations explored developments relating to sovereignty and international intervention from 1990 onwards, particularly certain new variations on the old theme of the relation between the international legal norms and the use of military force. The central question raised in both seminars is simple but disturbing. Does the widespread acceptance of human rights and humanitarian law create a necessity for international organizations and alliances to use force when these standards are flagrantly violated and large numbers of people are in extreme danger? Further, if there is such a necessity, can general principles be developed about when and how force is used? The first seminar was about the new interventionism generally; the second focussed on the specific question of implementation of the laws of war, an area in which there were particularly striking changes in the 1990s.

I. The New Interventionism

Intervention in the affairs of other states challenges, and even undermines, the non-intervention rule, which remains the indispensable basis of civilized relations between states. Since 1990 there has been an increase in the number of cases of interventionism with the approval of international bodies. The following are among the principal examples of interventions which had some degree of international authorization:

- Cambodia (1991-3)
- Bosnia and Herzegovina (1992-)
- Northern Iraq (1992-)
- Somalia (1992-)
- Rwanda (1994)
- Haiti (1994-)
- Albania (1997)
- Sierra Leone (1997-)
- Federal Republic of Yugoslavia - Kosovo (1999-)
- East Timor (1999-)

Many, but by no means all, of the interventions in these cases were without the consent of the government of the receiving state. Yet the question of consent has proved more complex and subtle in practice than in legal theory. Consent has sometimes been given reluctantly, or has not covered all the actions of the intervening forces. Some interventions started off without consent, but then agreement to an international presence was secured.

Intervention, at least when it is without host state consent, is continuing to be a divisive issue in international relations in the twenty-first century. Today, as in other eras, international debates on the matter are intense and acrimonious. Many states and individuals are suspicious of the motives of states intervening, and are also sceptical about the results. States doing the intervening are conscious of the criticisms to which their actions lead, the costs they incur, and the over-stretch that their armed forces

experience.

For many countries the new pattern of international interventionism presents special and difficult problems. Some states with a history of intervening abroad have learned much from their own imperial history about the short duration, limited achievements, and high costs, of engaging in interventions. Japan and Great Britain have both had such experiences, but have drawn very different conclusions from them. Others states, including China, have learned from their history to be suspicious of interventions against them by foreign armed forces. Indeed, most states, having emerged in the past sixty years from one or another kind of colonial domination, are sceptical about any pattern, or doctrine, of interventionism.

It is doubtful whether a consistent doctrine of interventionism can be developed. In particular, attempts to assert that there is, or should be, a 'right' of humanitarian intervention have not been successful. There is not now, nor is there likely to be, agreement among states about the existence or precise terms of any such right.

In international discourse, especially at the UN, the pattern of interventionism, having naturally caused unease, has led to regular appeals to support preventive diplomacy. The aim is to make military action less necessary. However, it is doubtful whether preventive diplomacy, which seeks to address the root causes of conflicts and to assist the negotiation of political settlements, can properly be seen as a likely means of reducing the necessity for intervention in the short term. Often it is precisely when serious attempts to negotiate a political settlement are made that a conflict reaches crisis point. The cases of Kosovo and East Timor in 1999, and the Palestine Israel dispute in 2000-1, illustrate the point.

A simple rejection of all forms of intervention is not a convincing policy for governments to pursue. Countries elected to non-permanent membership of the UN Security Council have often found decisions regarding intervention to be among the most difficult that they have to make. Faced with major crises, governments have to make difficult policy choices involving life-or-death decisions. The underlying factors leading to the increase in interventionism are not likely to change.

II. Implementation of the laws of war

This presentation (of which an edited text appears in Part I of this Review) looked at one particular set of norms affecting the use of force, namely the laws of war, otherwise commonly called international humanitarian law. This body of law had traditionally applied to international armed conflicts rather than civil wars; and its implementation had traditionally, and perhaps optimistically, been left to the states concerned. The grim history of the twentieth century suggested the need to change such traditional approaches.

There have been remarkable developments in implementation and enforcement of the law. On 28 June 2001 Slobodan Milosevic, former President of the Federal Republic of Yugoslavia, was taken to The Hague: the first-ever extradition of a former head of state to face trial before an international criminal tribunal. This is a suitable moment at which to reflect on the extraordinary part that implementation of the laws of war has come to play in international politics.

The main developments, reflected in seven new international instruments on the laws of war concluded in the 1990s, have been: (1) an attempt to develop forms of implementation and enforcement that go beyond purely national systems; and (2) an insistence on the application of international norms even to wars which are wholly or partly non-international in character.

These developments pose problems. They put the UN Security Council, and the USA, into a position that President Woodrow Wilson had warned would be difficult: that of chronic critics of events in distant wars. The emergence of supra-national tribunals -- in the form of the two tribunals for the

former Yugoslavia and for Rwanda, followed by the projected International Criminal Court -- exposes the US unwillingness to be judged by the same standards and procedures as apply to others. Further, the pursuit of justice may make the normal conduct of statecraft more difficult, and may in particular make amnesties harder to agree and observe.

Yet there have been significant gains from the increased emphasis in the past ten years on implementation of the laws of war. Rulers, even heads of state such as Pinochet and Milosevic, are on notice that their acts are not beyond the law. Cases of mass rape and genocide have been punished. Identification of individual criminals may help reduce the tendency to blame an entire people for evil actions. Above all, in the long run there may be some deterrent value in the new international emphasis on punishing violators.

The central plea of the presentation is that more systematic analysis is needed of the implementation of the laws of war, especially the protection of civilians. There is a need to examine the many and complex ways in which implementation occurs in practice.

[Adam Roberts]

[**Forum**]

The 113th Comparative Law and Politics Forum- 21 May 2001
Professor Harry N. Scheiber
History of Judicial Reform: California Courts, 1960-1990

In the US, the subject of judicial reform proposals and their impact has long been of interest to Law and Society scholars and the participants in the judicial system. This paper offers a brief overview of judicial reform in the State of California.

California is of special interest because of its enormous presence in the landscape of civil and criminal law in America. About one fifth of drug-related U.S. criminal prosecutions are filed in California courts; as to civil filings, they now number more than 3 million annually. As to population and the economy: the State's production ranks it as "the sixth largest economy in the world." Its population, now over 30 million, greatly exceeds that of many nations. The extraordinary cultural and ethnic diversity of the California population lends special interest to how the state responds to challenges to its judiciary.

The commission that released its report in 1993 was privately financed; it was clear, however, that the chief justice of the state supreme court participated actively in its public presentations. Moreover, the chief justice authorized a decision to permit the commission to have staff support by the California state Judicial Council, the administrative body of the state court system. The commission was composed of judges, lawyers, scholars, law-enforcement officials, and representatives and of the public. The commission was charged to examine the condition of justice in the California courts, and to chart a series of reform proposals to improve the quality of justice in the state by the year 2020.

What was especially intriguing to me was the way in which the commissioners proceeded in a way that indicated little knowledge of previous reform efforts. In this sense, the debate in California was typical of similar reform discussions elsewhere in America.

The foremost issue that prompted the commission was the deep concern being expressed by judges, politicians, and the public with respect to the pressures of rising case loads (and the consequent problems of delay) in the civil and criminal courts. There was a perception, accurate or not, that a "litigation explosion" was out of control.

That history of reforms, at least in its modern variant, stretched back to the early 1900s. Then, as now, the principal focus of debate was on the need to reduce delays and to address case-load problems. But, as historical studies have shown, even those reforms that were adopted to "speed up justice" were in most cases soon abandoned, and then largely forgotten. The case-load problems persisted. Among the remedies attempted were various "streamlining" (or speed-up) procedural reforms including pretrial settlement, adoption of varying judicial assignment techniques, changes in discovery rules, and increases in the numbers of judges and of staffing. This phenomenon was not restricted to California in the early 20th century.

Three methodological problems serve to frustrate the search for definitive explanations of how reforms have worked or ought to work: One is the fact that the "hard" data can be confusing and incomplete. The second problem derives from the fact that various reforms are promoted and implemented in overlapping periods and with intersecting impacts. Finally, in criminal law it is notorious that changes in economic conditions or other stresses in the social environment influence more. Also, it is notorious that the policies of prosecutors can be vastly more important than changes in procedure or sentencing rules.

All that I have said focuses on the problems of efficiency in the "processing" of cases; but the reform tradition in California also had a focus on another problem – the competence and the autonomy of the courts in dispensing justice. Their aim has been to increase the level of professionalism in all those roles, so that trained people with clear expertise would function in their assigned jobs to make the courts work not only efficiently but in conformance with the letter of the law and spirit of justice.

From the 1910s to the 1970s, these reform thrusts were all present at one time or another: (a) Reform of judicial selection and discipline. (b) Reorganization of trial courts to assure uniformity of procedure. (c) Professionalization of support staff. The California Judicial Council was founded in the 1920s. (d) Judicial rule-making authority: concentrating in the state supreme court and the judicial council powers over procedure. (e) Perennial issues of funding for the courts have been on the political table. The general "anti-governmentalism" associated with the new conservative movement that has included several Republican governors, and the fiscal crisis for the state associated with the post-1978 tax-cutting started by Proposition 13l have created new political problems for the courts. In addition, the courts have been subject to political firestorms as the result of controversies over the death penalty.

Since the late 1960s, three new forces have changed the context and emphases of judicial reform. The first is the public concern over crime, a subject closely interrelated to the problem of drugs in the society. The second is the increasing influence of popular initiatives and referenda that produce sweeping changes in law and procedure. Third was a shift in the emphasis of reformist concern from the technocratic issues, and instead concentrating on the possibilities and merits of "dejudicialization." This shift was the California version of the powerful national movement for alternative dispute resolution. It has been concerned with the achievement of "participation, flexibility" of both process and result, and greater access to justice of those previously foreclosed. A revulsion against adversarialism also gives impetus to this movement. For business contract disputes, the use of expensive private arbitrators is quite a different thing; described as "soft" versus "hard" alternative processes.

The strength of this new emphasis became evident when the 1993 commission report was issued. Much of the emphasis of the reports was concerned with ADR. Some of the proposals that the Commission produced were designed to advance the project of the "multi-door courthouse." Among them are: the idea of a comprehensive justice system with private-sector institutions as well as conventional court-annexed forums; new ideas of differentiating cases of "public significance" from more "routine" cases. There is also a cluster of recommendations for achieving gender and ethnic justice, requiring cultural sensitivity training of court personnel, etc. The design of the multi-door courthouse, similar to what had already been adopted in Massachusetts, was to provide a structure by

which professional evaluators would evaluate disputes as cases were filed, and then would refer them to one of the different processes available under the new structure. The proposal aroused immediate controversy, and though elements of it have been adopted in some measure by the courts, the larger, bold project is stalled as the result of skepticism, money, and politics.

The current status of reform can be summarized as follows. First, despite the implementation of some procedural reforms, there continues to be congestion and delay in the courts. Second, a great crisis in public consciousness of judicial process and criminal justice has resulted from the imposition of vast changes in criminal law and procedures by direct ballot of the electorate. Third, the ADR question may be resolved in a way that legitimates and absorbs into the larger judicial apparatus "soft" dispute settlement. Fourth, there may be an erosion of the traditional role of courts in articulating the "value-maintenance functions."

Whether incremental technocratic-style innovation is the keynote of the future, or instead, more radical moves will made-for good or for ill-is a question still very a matter only of speculation.

[Harry N. Scheiber]

Visiting Research Scholars of the Graduate School of Law and Politics
March 2001 – September 2001

Seol Beom Shik, Judge, Taejon High Court (Korea)
Term: March 2001 – February 2002
Research Area: A Study on New Bankruptcy Law in Japan
Host: Professor Takahashi Hiroshi

Lee Jong Kuk, Lecturer, Dongguk University
Term: April 2001 – March 2002
Research Area: East Asia Order and Detente of Korean Peninsula
Host: Professor Takahashi Susumu

Park Jeong Hun, Researcher, Kyung Hee Institute of Legal Studies
Term: April 2001 – March 2002
Research Area: General Theory of the Administrative Law
Host: Professor Kobayakawa Mitsuo

Chiu Hsuan Ju, Judge, Shih-Lin District Court
Term: April 2001 – October 2001
Research Area: The Law of Family Procedure in Japan
Host: Professor Nomi Yoshihisa

Roberta Romano, Professor, Yale Law School
Term: June 2001 – July 2001
Research Area: Research and Education in the Area of Business Law in Japan
Host: Professor Nakayama Nobuhiro

Chung Jae Kil, Professor, Chonbuk National University
Term: June 2001 – March 2002
Research Area: Legal System of the Electronic Commerce in Japan
Host: Professor Omura Atsushi

Kim Yong Suh, Professor, Ewha Womans University
Term: September 2001 – August 2002
Research Area: Asian Cultural Community; Its Logical Perspective and Approach Method

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