FOCUS on Law Studies

Teaching about law in the liberal arts

FALL 2005
Volume XXI, Number 1

PUBLISHED BY THE DIVISION FOR PUBLIC EDUCATION OF THE AMERICAN BAR ASSOCIATION

Defending Liberty Pursuing Justice

Law in the Global Community

The daily news provides frequent reminders that the laws of one country–statutes, court decisions, and rules–impact other countries and the wider international community. Here in the United States, in the midst of the war in Iraq, we debate the legality of some executive and military actions undertaken. A few months ago, when the U.S. Supreme Court struck down capital punishment for juveniles in *Roper v. Simmons*, the Court ignited (once again) a brief national fury about the appropriateness of considering the experiences and laws of other nations in U.S. constitutional jurisprudence. In an unusual public exchange of views at American University, shortly before *Roper* was announced, Justices Breyer and Scalia debated the validity of using foreign court rulings to influence American jurisprudence. And only a year earlier, Justice Kennedy cited a European Court of Human Rights case in deciding *Lawrence v. Texas*, which invalidated Texas' sodomy laws. This issue of *Focus* seeks to build upon these conversations by exploring a number of timely legal and political controversies that transcend national boundaries.

In "The Dilemma of Prosecuting Holocaust Deniers: A Comparative Perspective," Brooklyn Law School Professor Robert A. Kahn seeks to answer the question of how rules of legal procedure shape the outcome of controversial trials. Drawing upon his book *Holocaust Denial and the Law: A Comparative Study* (Palgrave-Macmillan, 2004), he analyzes holocaust denial trials in France, Germany, and Canada, where the subject is a form of proscribed hate speech. He also explores the issue in the United States, where First Amendment protections permit holocaust denial speech to take place in various settings, including student newspapers on college campuses. Kahn's primary focus is the interplay between legal procedures and the outcomes of Holocaust denial trials in France and Germany, which have inquisitorial legal systems dominated by the judge, and Canada, which has an adversarial legal system much like the United States.

In "Judicial Power in Canada," University of Guelph political scientist Troy Riddell assesses the growth in the influence of courts in Canada, particularly since the constitutional entrenchment of the Charter of Rights in 1982. Riddell observes that it was not until 1988 that Canada's Supreme Court struck down a highly restrictive national abortion law, citing *Roe v. Wade* and other U.S. abortion cases for support. More recent court decisions in Canada have expanded the rights of defendants in criminal matters, incorporated sexual orientation into the equality rights provision of the Charter, and guaranteed access to private health care. Riddell offers a keen eye toward comparisons with the United States, including current political controversies about judicial activism in Canada.

The dialogue shifts to international politics and law with the article by Georgia State University political scientist Henry F. Carey on "International Humanitarian Law and U.S. Policy." Carey reviews the development of treaties, conventions, and customary rules regarding the use of violence and humanitarian assistance in war. He then offers a critical assessment of when and how U.S. policies, particularly in Iraq, have failed to meet the standards of international humanitarian law, focusing on the concept of torture as well as cruel, inhuman, and degrading treatment. Carey also explores the complicated relationships of state power and national security to international law.

In the final section, *Focus* interviews Eric Posner, a University of Chicago law professor and co-author (with Jack Goldsmith) of the recently published book, *The Limits of International Law* (Oxford University Press, 2005). Citing the work and influence of Hans Morgenthau, Posner argues that states routinely act in their own self-interest and, accordingly, follow international law only when it is in their interest to do so. Posner also discusses the utility of rational choice models for understanding international law, the limited impact of human rights treaties, and the constraints on the UN's role in fostering international cooperation and peace.

Extensive references and resources on comparative and international law accompany the individual articles. We also provide a list of recently published books on subjects addressed in this issue.

To download copies of these articles or the entire issue, go to www.abanet.org/publiced/focus.

IN THIS ISSUE

The Dilemmas of Prosecuting Holocaust Deniers: A Comparative Perspective

by Robert A. Kahn

How do rules of legal procedure shape the outcome of high-profile trials? This is the question my book, *Holocaust Denial and the Law: A Comparative Study*, tries to answer. My comparison looks at how four legal systems (Canada, France, Germany, and the United States) responded to a common problem, namely the emergence of Holocaust denial in the 1970s, '80s and '90s. Not only are Holocaust deniers an example of the unpopular accused, but the belief (that the Holocaust never happened) itself is noxious and rejected by all mainstream historians.

Courts, however, find themselves in a difficult position. While Holocaust deniers are detestable, as criminal defendants in liberal democracies they have a panoply of procedural rights. My book is about how courts in all four countries struggled with treating the deniers respectfully as criminal defendants, without appearing to condone denial themselves. The book focuses on three dilemmas the courts faced: (1) the dilemma of proof (Can a court take judicial notice of the Holocaust even if this resolves the ultimate issue of the trial?); (2) the dilemma of trial uncertainty (How do societies respond when, as invariably happens in litigation, the defense wins a motion–or an acquittal–on technical grounds?); and (3) the dilemma of toleration (Can a country like the United States provide legal toleration of deniers while expecting informal groups–such as college newspapers–to censor them?).

How the courts resolve the dilemmas depends largely on the specific legal norms of the country in question–especially norms involving evidence and criminal procedure. For example, the burden of proof is much more stringent in countries with an adversarial legal system, where the parties present the evidence and the role of the judge is reduced (in theory at least) to that of an umpire. This adversarial ethos played a major role in *R. v Zundel*, a Canadian case from 1985 in which a trial judge refused to take judicial notice of the Holocaust because this would prejudice the defense. By contrast, in countries with an inquisitorial legal system, such as Germany, judges freely admitted the facts of the Holocaust. This reflects the power of the German judge as master of the proceedings, as well as the central role of the Holocaust in post-1945 Germany.

How courts resolve the dilemmas depends upon the legal norms of each country.

More generally, countries with an inquisitorial system provided a better ground for prosecuting Holocaust deniers for two reasons. First, because the judge–rather than the parties–presented the evidence, the Holocaust deniers in France and Germany had a harder time hijacking the trials than their Canadian counterpart, Ernst Zundel, who used his two trials to spread denial propaganda. Most of this evidence–including, for example, testimony that Auschwitz had a swimming pool–came in to show that Zundel, accused of "knowingly spreading false news," had an "honest belief" in the propaganda he disseminated. By contrast, German courts routinely rejected requests by the deniers to present "evidence" disproving the Holocaust. This raised little dispute because, under section 244 of the German Criminal Procedure Code, the trial judge has nearly complete control over the evidence he or she lets into the courtroom.

The second difficulty with the *Zundel* case involved the rule against hearsay. Because the events at issue took place over 40 years ago, both the prosecution and defense continually struggled with the hearsay rule. Holocaust survivors could relate the stories of the living, but not of those who died. For example, when survivors told the court that the deportees generally knew that Birkenau was a death camp, the defense objected on hearsay grounds. The problems only increased when the prosecution tried to present evidence from books and historians. While the court did a masterful job in adapting hearsay exceptions–including the business records exception to allow a document from the International Red Cross repudiating denial–these same exceptions were

Robert A. Kahn (robert.kahn@brooklaw.edu) is Assistant Professor of Legal Writing at Brooklyn Law School. A lawyer and political scientist by training, he is the author of Holocaust Denial and the Law: A Comparative Study *(Palgrave-MacMillan, 2004).*

FOCUS *on Law Studies*
Teaching about law in the liberal arts

Focus on Law Studies(circulation: 5,504), a twice-annual publication of the American Bar Association Division for Public Education, examines the intersection of law and the liberal arts. Through the articles, dialogues, debates, and book reviews published in *Focus*, scholars and teachers explore a wide variety of policy, empirical, and theoretical subjects pertaining to law, including race, affirmative action, and law; judicial appointments; gun laws and policies; law and families; and religion and law. By examining law from multidisciplinary viewpoints and across the ideological spectrum, *Focus* seeks to engage the community of law and liberal arts faculty in the social sciences, humanities, and related fields who teach about law and the legal system at the undergraduate collegiate level. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the American Bar Association.

then given over to the deniers. Author Raul Hilberg was allowed to testify as an expert, but so too was French denier Robert Faurisson.

The German trials generally went better for the prosecution, but there was a trade-off. A major reason German judges (and inquisitorial judges more generally) have such great control over the courtroom is that they must justify their holding in a written decision that explains both the criminal and the crime. This way, the general public can see how the judge evaluated the evidence. Moreover, unlike counterparts in the United States and Canada, the German judge is a life-long representative of the state and, generally speaking, is seen by the public as such. These two factors–the written decision and the judge as an extension of the state–came together in a series of scandals in which the German judges stood accused of using their written decisions to express sympathy for the deniers.

The most notorious of the scandals involved Gunter Deckert, who besides being a denier was the president of the far-right National Democratic Party. In August 1994 he was tried by a Mannheim court for Holocaust denial. While they found Deckert guilty, the three-judge panel did so in a written opinion that both praised the defendant and expressed anger at "Jewish pretensions on Germany." In the resulting scandal, which dominated the German press over the next month, two of the judges responsible were placed on "emergency medical leave." One of the judges apologized and returned to the bench, but the principal author of the opinion–Ranier Orlet–was forced into early retirement.

Sometimes, however, the written opinion could help the judge. In February 1995 Albrecht Kob acquitted two neo-Nazis, who were accused of "denying the Holocaust" for using the phrase "the Auschwitz myth." The initial outrage was soon abated by the release of Kob's written opinion in which he expressed his disdain for the defendants, recognized that right-wing circles used the phrase "Auschwitz myth" to connote denial, but also pointed out that the word *myth* had interpretations that did not connote falsehood.

Scandal was also the order of the day in France. During the 1980s French Holocaust denier Robert Faurisson was repeatedly prosecuted for denying the Holocaust, both under hate speech laws and a general tort provision which requires that professionals live up to their qualifications. (The latter provision was used to allege that Faurisson, by falsifying history, failed to discharge his duties as a historian). While the courts consistently convicted Faurisson, the written opinions refused to refer to his views on the Holocaust as false history, preferring instead to focus on how Faurisson expressed them. The reasons for this reflect a deep-seated reluctance on the part of French courts to judge history, yet the general public saw the courts refusing to take a firm stand against Faurisson.

Inquisitorial systems provided a better ground for prosecuting Holocaust deniers.

In part for this reason, in 1990 the French passed the Gayssot Law, which instead of punishing hate speech or falsifying history, made Holocaust denial itself the crime. The goal was to strip the courts of the task of judging history. Initially, the new law worked wonders. In a widely anticipated prosecution under the new law, a court found Faurisson guilty without equivocating about his historical views. As the years passed, however, the French deniers learned to speak in code and occasionally won acquittals under the new law. At the same time, the judges went further and further in prosecuting marginal cases of Holocaust denial. In 1996 these trends boiled over in the Pierre affair, in which Abbé Pierre, one of the most popular men in France, spoke out on behalf of the deniers. While he was roundly criticized, so was the Gayssot law itself.

When doing research for the book in the late 1990s, my initial thought as an American was to thank the heavens for the First Amendment–not only because freedom of speech is good in and of itself, but because prosecutions of deniers so often lead to scandal, either because of procedural difficulties or the judges. But as my research progressed, I came to see the American toleration of deniers as a trade-off as well. Alone of the four countries in the study, the United States does not punish deniers. Also alone of the four countries, the United States has student newspapers that run ads from Holocaust deniers on freedom of speech grounds.

Both Alan Dershowitz (1997: 115) and Deborah Lipstadt (1993: 183–208) have been quite critical of the students for misrepresenting both the law and history. In general, Dershowitz and Lipstadt are correct that the student newspapers have no legal obligation to run ads denying the Holocaust–even newspapers at state universities (at least when the school does not exercise editorial control over the paper). But my case studies of four newspapers that ran the ads–Michigan, Ohio State, Brandeis, and Queens College–reveal student editors who were very well-informed about the Holocaust but also deeply committed to the First Amendment as a cultural norm. The cultural power of the First Amendment also emerges in comparative context. In countries that proscribe Holocaust denial, informal bodies–universities, movie distributors, public libraries, and the like–are much more willing to censor denial than their libertarian counterparts in the United States.

Taken as a whole, my book, *Holocaust Denial and the Law,* shows that America is not the world and, therefore, high-profile trials in Toronto, Paris, or Berlin do not always work the way they do in New York or Los Angeles. More specifically, I show how countries with adversarial and inquisitorial legal systems have distinct patterns of high-profile litigation. To put it simply, in adversarial systems the potential for scandal comes during the trial itself from the application of arcane evidence rules and the power of very unpopular parties (who need not always be defendants) to hijack trials. By contrast, inquisitorial systems have much smoother trials–the power of the judge sees to that. The difficulties come later, when the judge is required to justify the legal outcome in a

continued on page 10

Judicial Power in Canada

by Troy Riddell

In its 2005 *Chaoulli* decision, a majority of the Canadian Supreme Court declared that Quebec's limits on private health care provision violated individual rights under Quebec's human rights law and the Canadian Charter of Rights and Freedoms. Three of the seven judges who decided the case argued that limits on private health care could jeopardize the rights to "life, liberty and security of the person" in section 7 of the Charter of Rights. Another judge did not address the constitutional issue but declared that limits on private care violated Quebec's human rights statute. By calling into question Canada's publicly funded health care system, the decision sparked renewed debate about judicial power in Canada. Using some comparative references to the United States, this article discusses briefly judicial power in Canada, with a focus on the Supreme Court, from both an empirical and normative perspective.

Although Canadian courts had performed judicial review based on federalism grounds since Confederation in 1867, the courts were not considered to be politically influential prior to the constitutional entrenchment of the Charter of Rights in 1982. The Charter had the potential to increase the policy-making influence of the courts by entrenching various rights, such as rights to freedom of expression and religion (section 2), democratic rights (section 3), legal rights (sections 7–14), equality rights (section 15), and official minority-language education rights (section 23), and by giving the courts explicit power to provide appropriate remedies for constitutional violations by either the federal or provincial governments (sections 24 and 52).

It turns out that Canadian courts have become significantly more influential in the Charter era. Interest groups, corporations, and individuals have embraced using the Charter and the courts to achieve legal victory and, in many cases, to help advance policy goals. The use of litigation as a political strategy has been facilitated by relaxed rules of standing and mootness, the Supreme Court becoming more receptive to intervenors (amicus curiae in the United States), and the federal government providing funding for certain official minority-language education rights and equality rights cases (Morton, 2002).

Canadian courts have become significantly more influential in the Charter era.

Approximately twenty-five percent of the Supreme Court's docket are Charter cases, and rights claimants stand a reasonable chance of success in those cases. After rights claimants won three of the first four Charter cases decided by the court, by 1989 the yearly success rate for rights claimants had leveled off to 33 percent, where it has remained relatively stable ever since. That is a much greater success rate than under the 1960 Bill of Rights–a human rights statute that applied only to the federal government (Morton et al., 1994). Indeed, early in its Charter jurisprudence, the court signalled that it would reject its Bill of Rights jurisprudence in favor of a more expansive and "purposive" approach to defining rights because the Charter was a constitutionally entrenched rights document.

A dramatic illustration of how this interpretative approach could lead to important policy consequences came in the Supreme Court's 1988 *Morgentaler* decision. At issue was Canada's abortion law, which made having or procuring an abortion an indictable offense (equivalent to a felony in the U.S.) unless the abortion was approved by a therapeutic abortion committee in order to save the life or health of the mother. In 1975 when Dr. Henry Morgentaler tried to get the law struck down under the 1960 Bill of Rights, the Supreme Court brusquely denied his argument stating that the court would not get involved in abortion policy; however, in 1988 by a 5-2 vote, the Supreme Court struck down the abortion law under the Charter. Like the dissenters in the U.S. decision of *Roe v. Wade* (1973), the dissenters in *Morgentaler* argued that the constitution was silent on the abortion issue and that these kinds of policy decisions should be best left to elected officials. Justice Bertha Wilson, however, referred to *Roe* and other U.S. decisions to support her argument that the right to "life, liberty and security of the person" enshrined in section 7 of the Charter gave women the right to have an abortion within the first trimester. All five judges who struck the law down said that the legislation could not be saved by section 1 of the Charter, which allows "reasonable limits" to be placed on rights that can be "demonstrably justified" in a "free and democratic society."

The existence of the "reasonable limits" clause is another justification used by the Supreme Court for expansively interpreting rights. Whereas the U.S. Supreme Court is forced to put internal definitions on rights in the absence of a "reasonable limits" clause, the Canadian Supreme Court prefers to read rights broadly and then shift the burden of proof to the government to justify rights limitations under section 1. For example, any limit on nonviolent forms of expression, even hate speech or child pornography, is considered to be a violation of free expression rights under the Charter, which governments are then forced to justify under section 1. Moreover, the Supreme Court operationalized section 1 in *R. v. Oakes* (1986) in such a way that it is equivalent

Troy Riddell (riddell@uoguelph.ca) is an Associate Professor of Political Science at the University of Guelph and has teaching and research interests in judicial and constitutional politics and public policy and administration. He has published articles in Law and Society Review *(2004) and* Canadian Public Administration *(2003) and has co-authored articles in journals including* The Canadian Journal of Political Science *(1998, 2004) and* The National Journal of Constitutional Law *(1994).*

to "strict scrutiny" in U.S. constitutional rights jurisprudence. The *Oakes* test requires governments to prove that there is a "pressing and substantial" objective behind the law or policy and that the means used to achieve the objective are "proportional," which includes "impairing rights as little as possible."

On its face, the *Oakes* test makes it very difficult for governments to win Charter cases, but the court and individual judges have not been consistent in its application. In *Keegstra* (1990), for example, the court was badly divided on whether to uphold Canada's hate speech law. The majority argued that some deference should be shown to government in the application of the *Oakes* test when the expression was "peripheral" in nature and the government was trying to protect other Charter values like equality. The dissent, on the other hand, argued that the law was overbroad and could actually end up drawing attention to purveyors of hate speech. Whether or not laws are upheld under section 1, the way in which that section has been operationalized clearly brings judges into the policy-making process by requiring them to evaluate policy ends and means, often with reference to complex social or legislative facts.

The policy area that has been most affected by Supreme Court Charter decisions is the criminal law process. In particular, the court has placed numerous limits on police investigative techniques and, with some exceptions, has made Canada more "due process" oriented than the United States (Harvie and Foster, 1992). In other areas the Court's record is mixed, especially in the social policy field, which reflects the struggles that judges have had with interpreting equality rights and deciding how far the rights to "life, liberty and security of the person" in section 7 extend. In some cases the court has shown deference to government; for example, the court narrowly (5-4) upheld a Quebec welfare policy that provided very minimal levels of support for individuals under 30 who did not participate in job-training programs (*Gosselin*, 2002) and unanimously did not make the B.C. (British Columbia) government pay for therapy for autistic children (*Auton*, 2004). On the other hand, the court has ordered the B.C. government to pay for sign language interpretation in hospitals (*Eldridge*, 1997); declared that limits on access to private health care can violate rights (*Chaoulli*, 2005); and read "sexual orientation" into the equality rights provision of the Charter, thereby forcing governments to change a host of laws that discriminated against gays and lesbians (*M v. H*, 1999).

The selection process for Canada's Supreme Court judges is not as politicized.

When the court finds constitutional violations with government laws or action, the most common remedy is a declaration of invalidity, but the court has been willing to take more direct remedial action. In one of its more controversial decisions, the court read "sexual orientation" as a prohibited grounds of discrimination into Alberta's human rights statute, arguing that its omission violated the Charter's equality guarantees (*Vriend*, 1998). Recently, a divided court supported a Nova Scotia trial judge's decision to retain jurisdiction over a case in which the Nova Scotia government was ordered to provide more educational facilities for the province's French-speaking minority (*Doucet-Boudreau*, 2003). This decision opens the door to greater judicial oversight of institutions as occurs in the United States In legal rights cases, the court

Books & Articles

Fletcher, Joseph, and Paul Howe. "Canadian Attitudes Toward the Charter and the Courts in Comparative Perspective." *Choices*, vol. 6. Montreal: Institute for Research Public Policy, 2000.

Harvie, Robert, and Hamar Foster. "Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the Charter." 24 *Ottawa Law Rev.* 39–115, 1992.

Hutchinson, Alan. *Waiting for Coraf: A Critique of Law and Rights.* Toronto: University of Toronto Press, 1995.

Mandel, Michael. *The Charter of Rights and the Legalization of Politics*, 2nd ed. Toronto: Thompson Educational Publishers, 1994.

Manfredi, Christopher P. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. Toronto: Oxford University Press, 2001.

Morton, F. L. *Law, Politics and Judicial Process in Canada*, 3rd ed. Calgary: University of Calgary Press, 2002.

Morton, F. L., and Rainer Knopff. *The Charter Revolution and the Court Party.* Calgary: Broadview Press, 2000.

Morton, F. L., Peter H. Russell, and Troy Riddell. "The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982–1992." *National Journal of Constitutional Law* 5: 1–60, 1994.

Roach, Kent. *Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* Toronto: Irwin Law, 2001.

Weinrib, Lorraine. "The Activist Constitution." 20 *Policy Options* 27, 1999.

Cases

Auton (Guardian ad litem of) v. British Columbia (A.G.), [2004] 3 S.C.R. 657

Chaoulli v. Quebec (A.G.), [2005] 1 SCR 791

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3

Eldridge v. British Columbia (A.G.), [1997] 3 S.C.R. 624

Gosselin v. Quebec (A.G.), [2002] 4 S.C.R. 429

M. v. H. [1999] 2 S.C.R. 3

R. v. Keegstra, [1990] 3 S.C.R. 697

R. v. Morgentaler, [1998] 1 S.C.R. 30

R. v. Oakes, [1986] 1 S.C.R. 103

Vriend v. Alberta, [1998] 1 S.C.R. 493

continued on page 10

International Humanitarian Law and U.S. Policy

by Henry F. Carey

International Humanitarian Law (IHL) comprises the treaty and customary rules and principles restricting the use of violence and permitting humanitarian assistance during armed conflicts (Aksar, 2004; Byers, 2006). In addition to such soft and hard laws as the Saint Petersburg Declaration of 1868, the Hague Conventions of 1899 and 1907, the 1949 and much of the 1977 Geneva Protocols I and II, and the other Red Cross Conventions, IHL now includes the additional subject matter treated in these books. For nearly 140 years, IHL governing the laws of armed conflict has emerged as an important factor limiting unnecessary, indiscriminate, disproportionate, and other inhumane methods of war. Since 1949 IHL has been bolstered by the new laws on crimes against humanity and genocide, which theoretically can occur any time but almost always occur during armed conflict. Then as in the 1990s, the engagement of international criminal tribunals (Tokyo and Nuremberg in the late 1940s and Yugoslavia and Rwanda in the 1990s) to prosecute war crimes from recent wars coincided with the establishment or clarification of these norms. Most wars are not accompanied by tribunals, humanitarian interventions, or unconditional surrenders, conditions that foster international judicial intervention and norm clarification. Since the 1991 Gulf War, armed conflict sometimes has become increasingly constrained during combat and subject to prosecution for crimes committed. During the U.S. direct participation in the Vietnam War, the United States was criticized for IHL violations by murdering and torturing soldiers and noncombatant civilians, in violation of the four 1949 Geneva Conventions.

Henry F. Carey (polhfc@langate.gsu.edu) is an associate professor of political science at Georgia State University, where he teaches international politics, organization, and law. He is the author of Dilemmas of NGO Peacebuilding among Former Enemies *(Palgrave, forthcoming), and he has published articles on humanitarian intervention, human rights, and transitional elections. He has conducted fieldwork in three regions and specializes in Romania and Haiti.*

The United States has argued controversially for both denying *habeas corpus* and for detaining terrorism suspects indefinitely, either because they were deemed unlawful combatants not covered by the Geneva Conventions or because they are lawful combatants and, therefore, prisoners of war (POWs). The latter, the United States further contends, can be detained until the end of a war on terrorism, which probably can never end except in global suicide. Yet the United States has discovered that if it is to be successful in Iraq and in many other arenas of the war against terrorism, it cannot willy-nilly reject core IHL principles. The resistance in Iraq, the noncooperation of Germany and France in peacekeeping in Iraq, and the threat of arrests of U.S. officials for crimes against humanity are just some of the examples of the costs of U.S. lawlessness. Furthermore, the potential publication of digital photographs of torture at *Abu Ghraib* is just the latest manifestation of the "CNN effect" (Strobel, 1996).

To be successful in Iraq, the United States has discovered that it can't reject core IHL principles.

War conducted in ways contradicting IHL can lead to political reversals in support of those legal rules, particularly when opposing political forces either believe in the legitimacy of IHL or find it expedient to use rhetoric espousing IHL. On the other hand, U.S. public opinion has not clamored for prosecutions for torture, whether allegedly by domestic police forces or the U.S. military and intelligence forces overseas at Guantánamo or *Abu Ghraib* or throughout the world (Bandes, 1999; Conroy, 2000). In particular, international law has outlawed torture or cruel, inhuman, or degrading treatment in the Torture Convention and various other human rights treaties. Yet the Bush administration has succeeded in avoiding domestic legal accountability for cruel, inhuman, or degrading treatment. Even after many revisions in U.S. military and intelligence rules governing the treatment of detainees, examples of approved U.S. practices include water boarding, use of menacing dogs, threats to kill family members, and sexual humiliation, all of which the Bush administration implicitly hinted or explicitly argued do not rise to prohibited torture. Inhuman treatment is categorically prohibited in the *Universal Declaration of Human Rights,* which is binding under customary international law, as well as in the following treaties that the United States has ratified: the 1949 Geneva Conventions, the International Covenant on Civil and Political Rights, and the Torture Convention, as well as treaties that the United States has not ratified: the European, American, and African Human Rights Conventions and the International Criminal Court (ICC) statute. To date, the Bush administration has succeeded in claiming that cruel, inhuman, or degrading treatment is permitted and that practices considered by many as torture are really just cruel, inhuman, or degrading. Of course, the "degrading treatment" criterion is the easiest to meet and consequently more difficult to prosecute. Also of note, the use of the article *or* as opposed to *and* means that any degrading treatment ostensibly violates the Torture Convention. Article 16 of the Convention Against Torture requires the United States to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The Bush administration argues that Article 16 does not apply to overseas detainees, even though the U.S. statute prohibits torture, defined as "specifically intended to inflict severe physical and mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person in his custody or

physical control" (18 USC Chapter 113C, Section 2340). Paragraph A provides the penalties for overseas violations and defines territorial applicability in Sections 5 and 7 of Title 18 and Section 46501 (2) of Title 49. These arguments have been carefully documented and contested (Danner, 2004; Greenberg & Dratel, 2005).

The U.S. public was scandalized, albeit within limits, by Seymour Hersh's (2004) revelations about U.S. torture at *Abu Ghraib*, the unwillingness of France and Germany to join U.S. peacekeeping in Iraq, the inability of the United States to exclude certain U.N. Members States from the U.N. Human Rights Commission, and the inability of the United States to gain U.N. Security Council support for a variety of sanctions, among many examples attributable in part to U.S. violations of IHL (Byers, 2006). However, one can agree with this observation but still feel as though the conclusion is weighted toward the proverbial glass half full instead of the glass half or more empty. The glass is at least half empty. The Bush administration, despite climbing down on a number of issues, has moved the bar after the fact down below the previous norm. This is the classic question of customary international law: Are new developments examples of lawmaking or lawbreaking, or some combination therein, which may or may not be describable? This raises the questions: What is power? What is law? The problem evokes Justice Potter Stewart's dictum about pornography to the effect that "I cannot define it, but I know it when I see it" (*Jacobellis v. Ohio*, 1964). At some point, power defines what law is because the powerful insist that a norm is legally binding. Yet substantial interference by a powerful state with an established norm is a legal violation, unless a state is so powerful that it can retroactively persuade other states that the norm has autonomously changed–despite the fact that law is not supposed to apply retroactively, and even if the common law precedent system also so operates when judges make new legally binding precedents. This complicated situation means that it is very difficult to know what one is talking about in analyzing the power of international criminal law.

Indefinite detentions of unlawful combatants by the United States have been restricted, most notably in two cases of U.S. citizens, by the U.S. Supreme Court in June 2004. Regarding the case of Yaser Esam Hamdi, who was born in the United States but was raised in Saudi Arabia, the Supreme Court partly struck down his detention since late 2001, holding that enemy combatants, even if U.S. citizens, are entitled to use a lawyer to exercise their *habeas corpus* rights in court, even for suspected terrorists and unlawful combatants (*Hamdi v. Rumsfeld*, 2004). The administration offered to deport him to Saudi Arabia and drop criminal charges if Hamdi would renounce his U.S. citizenship and promise not to travel to countries hosting suspected terrorists. After his case was dismissed in a Virginia district court, he was sent on October 11, 2004, to Saudi Arabia, despite the lack of assurances that his travels could be restricted by that government (Lewis, 2004).

In February 2005 a federal district judge ruled that another U.S. citizen detainee, José Padilla, also could not be indefinitely detained without filing criminal charges. The judge rejected the notion of the enemy combatant classification under constitutional or other U.S. law. As in the *Schiavo* "right to die" case two months later, a conservative judge held that to overturn due process procedures would amount to "judicial activism." The administration originally planned to appeal (Lewis, 2005) but then decided to prosecute Padilla on criminal charges, reserving the right to declare him an unlawful combatant again should Padilla be exonerated. However, the holding did not rely on IHL but on U.S. law reflecting it. By mid-2005 U.S. courts had insisted that even supposedly unlawful combatants were entitled to *habeas corpus.* As significantly, the courts had not challenged, or had not had the opportunity to challenge, the responsibilities of senior U.S. officials for torture and/or cruel, inhuman, or degrading treatment, which is outlawed by IHL and several human rights treaties, especially the Torture Convention. Mistreatment of detainees overseas by the United States or its allies have hardly been investigated, let alone prosecuted.

In politics, the issue of torture was hardly discussed in the 2004 elections, although it has remained an important issue in the press. Concern for IHL and human rights violations have not disappeared in an open society such as the United States; they are just competing for attention. IHL has been tested repeatedly for the ongoing relevance of its principles and rules. Even though many IHL principles on *jus in bello* [justice in war] relating to discrimination proportionality and necessity have not changed much since St. Augustin, some

References

Aksar, Yusuf. *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court*. London: Routledge, 2004.

Bandes, Susan. "Patterns of Injustice: Police Brutality in the Courts." *Buffalo Law Review*, 47, 1275–1341, 1999.

Byers, Michael. *War Law: Understanding International Law and Armed Conflict*. London: Atlantic Books, 2006.

Conroy, John. *Unspeakable Acts, Ordinary People: The Dynamics of Torture*. New York: Knopf, 2000.

Danner, Mark. *Torture and Truth: America, Abu Ghraib and the War on Terror*. New York: The New York Review Books, 2004.

Greenberg, Karen J. and Joshua L. Dratel, eds. *The Torture Papers: The Road to Abu Ghraib*. Cambridge, UK: Cambridge University Press, 2005.

Hersh, Seymour M. "Torture at *Abu Ghraib*." *The New Yorker* (May 10, 2004). Retrieved November 12, 2005, from www.newyorker.com/fact/content/?040510fa_fact

Lewis, Anthony. "Making Torture Legal." *The New York Review of Books*, 51 (12), 2004.

Lewis, Neil A. "Judge Says U.S. Terror Suspect Can't be Held as an Enemy Combatant." *The New York Times*, A14 (March 1, 2005).

Strobel, Warren P. "The Media and U.S. Policies toward Intervention: A Closer Look at the 'CNN Effect.'" In Chester A. Crocker & Fen Osler Hampson (with Pamela Aall), eds., *Managing Global Chaos: Sources of and Responses to International Conflict*. Washington, DC: U.S. Institute of Peace Press, 1996, 357–376.

continued on page 11

Talking International Law with Eric Posner

Q: How did you first become interested in international law? What led you to rational choice and game theory models to explain international law?

Posner: For a long time, I have been interested in the interaction between law and social norms. Social norms are rules that regulate behavior in the absence of a legal sanction. For example, there is a social norm that one should keep one's promises, and people usually do comply with this social norm even when there is no legal sanction, or likely legal sanction, for breaking a promise. About seven years ago, Jack Goldsmith pointed out to me that international legal norms are like social norms. Both international legal norms and social norms are rules that govern behavior and yet are not enforced by a central authority. Just as no central authority enforces social norms, no central authority enforces international law. By contrast, a central authority—the government—does enforce domestic law. Jack thought it would be useful to collaborate—to bring together his expertise on international law and my interest in social norms.

In my earlier work on social norms, I had used rational choice models because I believed that these models were useful for understanding social norms and the ways that they interact with the law. It seemed natural to use these models to understand international law as well. There were other reasons. Rational choice theory has proven its value for understanding domestic law, and it has been frequently used by political scientists interested in understanding international relations. With this body of research already in place, we had a springboard from which to launch ourselves onto the relatively unplowed field of international law.

The U.N. Security Council was supposed to be the world's policeman.

Q: One big theme of *The Limits of International Law* is that states view international law primarily through the lens of their own self-interest. How is this view different from prevalent theories of international law and politics?

Posner: In some ways, there is nothing new about our arguments; in some ways, our arguments are a radical challenge to prevailing wisdom. Let me explain. One of the founders of the so-called "realist" perspective in international relations—this is the view that, in international relations, states act in their self-interest and not according to some kind of international morality—was Hans Morgenthau. Morgenthau was an international lawyer whose major work was published during the first half of the twentieth century. He had enormous influence on the development of international relations in political science departments, where the realist school remains dominant. But although he had very important insights into international relations, Morgenthau had little to say about international law, and his writings on international law are not very interesting. He has had little influence on international law and international law scholarship in law schools. We think of ourselves as taking seriously Morgenthau's views about the motives of states, and applying them rigorously (more rigorously than he did) to international law. Modern realists—people like John Mearsheimer [a political scientist and international relations scholar at the University of Chicago] for example—tend to ignore international law because their interests lie elsewhere. So we see ourselves as filling an important gap in the literature.

Another view in international relations also assumes that states act in their self-interest but argues that states are able to cooperate in robust ways. These people usually call themselves "rational institutionalists." Robert Keohane [an international affairs scholar at Princeton University] is a prominent advocate of this view. We generally agree with people in this school, even though they and the realists spend a lot of time insisting on their disagreements, and a lot of our critics insist on calling us realists. For me, this is the narcissism of small differences. The common project is to assume that states act in their self-interest and to investigate the extent to which they are able to cooperate. Much work has already been done, but political scientists for the most part have ignored the specific questions about international law that have long interested international lawyers.

Meanwhile, most law professors take a much more optimistic view about the motives of states and the power of international law. For these law professors, our views seem extreme. They assume that states have an interest in following international law and do so because they internalize international law, not because they think that their self-interest dictates compliance with international law. This is deeply entrenched conventional wisdom among law professors, and I believe that it is also the wisdom among many journalists and commentators. I think this view is wrong.

Q: You argue that multilateral human rights treaties have had little influence on the behavior of states. What evidence or examples can you cite?

Editor's Note: Eric Posner (eric_posner@law.uchicago.edu) is Kirkland and Ellis Professor of Law at the University of Chicago. He is the author of a new book (with Harvard Law School Professor Jack Goldsmith), The Limits of International Law *(Oxford, 2005). Posner's current research focuses on international law, including the laws of war, international adjudication, and war crimes trials.*

Why do liberal democracies pay so much "lip service" to human rights treaties?

Posner: There is some statistical work to suggest that the factors that cause states to respect human rights are the wealth of the population, the strength of the states' democratic institutions, and similar factors, and not whether they have ratified a human rights treaty. In addition, states' human rights behavior tends to improve, as far as we can tell, when civil wars end, and, sometimes, when the United States and other major liberal democracies pressure them to improve their human rights record. Again, formal ratification of human rights treaties does not seem to be an important factor.

I think liberal democracies pay so much "lip service" to human rights treaties because their citizens care about human rights. But many international laws and institutions reflect our values without having much effect on the behavior of other states because there is no will to enforce them.

Q: Perhaps one of the book's more controversial claims is that states have no "moral obligation" to follow international law. Why not?

Posner: Philosophers doubt that we have a moral obligation to follow even domestic law, though I think most people think we do. But to understand why philosophers have this view, think of the civil rights movement and its opposition to Jim Crow laws. We celebrate rather than condemn these lawbreakers, and we do so because we think Jim Crow laws were bad. Still, I think in a liberal democracy, people have a presumptive obligation to obey the law because the law reflects, roughly, the will of the people, and our political system, while far from perfect, seems to be better than the various alternatives at advancing the public interest.

International law, by contrast, does not enjoy democratic legitimacy. International law, as usually understood, is a product of the consent of all states, and that includes authoritarian regimes like China. Moreover, the process by which international law is formed is hardly democratic. In theory, states have equal voice, but some states have populations over a billion while others have populations under 1 million. Why should we respect law that gives all such states equal influence? Of course, powerful states tend to have more influence on the formation of international law, in practice; but then this raises the question, why should we respect international law that reflects the interests of powerful states?

I think international law is highly useful; it is one way that states cooperate, and when states cooperate, they often (but not always) do so in a way that advances the well being of their populations. But it is one thing to say it is useful, and another to say that it is entitled to presumptive deference because it has moral authority.

Q: Do you think that international law does not matter?

Posner: No. A frequent misinterpretation of my work is that it asserts that international law does not matter. It does matter. When states seek to cooperate, it is often (but not always) useful for states to enter treaties that specify how they will cooperate with each other. And norms of customary international law also reflect valuable forms of cooperation and coordination. But I am skeptical about the ability of states to overcome collective action problems by entering multilateral treaties, and many such treaties do not accomplish much.

Some of our critics argue that we think that international law does not matter because we deny that states "internalize" international law in the sense of following it even when doing so violates their self-interest. It is true that we do not think international law matters in this way; we do not think states internalize international law, whatever that might mean. But international law embodies states' views about how best to cooperate; states follow international law in order to cooperate with each other and to show that they intend to continue to cooperate with each other; and states often incorporate international law into domestic law in order to bring themselves into compliance with it. For all these reasons, international law matters.

Q: The United States seems to have an ambivalent relationship with the United Nations (UN)–sometimes critical, sometimes supportive. In your opinion, of what international value, if any, is the UN?

Posner: I share the view of many other people that the UN is a useful place for diplomats from various states to get together and engage in diplomacy. But this is not what the UN is supposed to be about. Its founders sought to implement a mechanism of collective security based on the leadership of the great powers but also reflecting the legitimate interests of every nation in the world. Thus, we have the General Assembly, where every state has a vote, but there is little formal power; and we have the Security Council, which is dominated by the five great powers of 1945 (in China's case, what was expected to become a great power)–the U.S., U.S.S.R. (now Russia), France, Britain, and China. The Security Council was supposed to be the world's policeman. If a war broke out somewhere, it would authorize or order the rest of the world to intervene. But this is not what happened for the simple reason that states disagree too much to act collectively on important security matters.

Some people argue that the UN Security Council was unsuccessful because of the cold war. During the cold war, the UN Security Council was able to agree to authorize the use of force only in the Korean War, and only because the Soviet Union walked out for unrelated reasons and the People's Republic of China was not seated at the time. Otherwise, it was able to authorize a small number of minor peacekeeping operations, but it was unable to act to prevent numerous major wars between sovereign states. These people think that with the end of the cold war, the Security Council will become more important. And, indeed, the Security Council has been more active since 1991. It authorized the first Gulf War, and it has authorized many more peacekeeping operations. But it still cannot prevent states from going to war when they believe that war serves their interest; nor can it rally other states to oppose wars. We have seen this in Yugoslavia and Iraq.

As China and India rise, as Russia recovers, as American power declines relative to that of the rest of the world, I expect that the UN Security Council will

become less rather than more effective. The farcical efforts to reform the Security Council already show what will happen. Everyone agrees that the five veto-holding permanent members are no longer the five sole great powers, and therefore there is no real justification for giving them more control over the Security Council than states like India, Germany, Brazil, Japan, and Nigeria. But the current permanent members will never give up the veto, and no one can agree on which new states, if any, should be given a veto. Japan has a huge economy; however, China hates Japan, and Chinese citizens riot whenever Japan's possible membership is mentioned. The United States is willing to support Japan but not the others. Italy objects to Germany. African nations want more seats for themselves. Even if some reform is agreed upon, deliberation and decision-making will be more, not less, difficult if the Security Council has a large number of members.

The Dilemmas of Prosecuting Holocaust Deniers: A Comparative Perspective
continued from page 3

reasoned public opinion. While most of these rulings come and go without comment–just as most common law trials are free of scandal–when the scandal does come it is intense, especially because the inquisitorial judge is most likely a lifelong representative of the state. Moreover, I argue that the American pattern of legal toleration of Holocaust deniers is no panacea. Instead, it is a clear trade-off. The absence of formal regulation of denial (and other forms of hate speech) makes it much harder for the society to regulate it informally. Here, as well, America is not the world.

References

Dershowitz, Alan M. *The Vanishing American Jew: In Search of Jewish Identity for the Next Century*. Boston: Little, Brown, 1997.

Lipstadt, Deborah E. *Denying the Holocaust: The Growing Assault on Truth and Memory.* New York: Free Press, 1993.

Judicial Power in Canada
continued from page 5

has not been hesitant to exclude evidence, even though the Charter's exclusionary rule (section 24(2)) stipulates that evidence shall be excluded only if its admission "would bring the administration of justice into disrepute."

It is clear that Canadian courts, particularly the Supreme Court, have become important policy actors under the Charter of Rights. Not surprisingly, this phenomenon has engendered spirited debate about its relative merits, which often mirror such debates in the United States. Critics on the left argue that the Charter enshrines individual rights and promotes rights discourse that undermines social democracy, judges and lawyers are part of the socio-economic elite and will be unsympathetic to social rights claims, and that legal mobilization by groups seeking progressive policy change is counter-productive (Hutchinson, 1995; Mandel, 1994). Critics on the right argue that the Supreme Court too frequently sides with "new left" interest groups, unelected judges are making what are essentially policy decisions (and often disagreeing with one another in doing so), the court lacks the institutional capacity to make complex policy choices, and that by monopolizing interpretation of the Charter and minimizing framers' intent, the court has created judicial supremacy in place of constitutional supremacy (Manfredi, 2001; Morton and Knopff, 2000). Conversely, defenders of a more activist court argue that democratically elected officials entrenched the Charter, the courts provide a forum for disadvantaged groups to advance their goals, and that the Charter should be read expansively to keep the document in tune with the times and to fulfill its objective of altering social power dynamics (Roach, 2001; Weinrib, 1999).

Some supporters of a more activist court also point out that there is always the section 33 override clause that can be used (judiciously) by governments to facilitate a "dialogue" between courts and legislatures (Roach, 2001). (Section 33 allows the federal Parliament or provincial legislatures to declare laws to operate notwithstanding Charter rights, except for democratic, language, and mobility rights, for up to five years). Realistically, however, section 33 is rarely invoked, especially since the Quebec government used it to uphold its French-only sign laws in 1988. Even Conservative politicians who have spoken out against judicial power have backed away from using the override clause, perhaps because public opinion polls show very high support for the Charter and for the judiciary to be the final arbiter over rights (Fletcher and Howe, 2000).

With section 33 becoming a constitutional dead letter, the debate over judicial power and the options available to elected officials in the face of judicial power will become even more similar to the United States. One difference that remains is that the selection process for Supreme Court judges is not as overtly politicized as in the United States, and nominees are not as identifiable by ideology as in the United States. However, in light of the power that Canadian Supreme Court judges wield, opposition parties have recently persuaded the government to make the appointments process more open to scrutiny. In August 2005 the Minister of Justice announced that an advisory committee consisting of representatives from Parliament, provincial attorneys-general, the legal community, and the public would be used to assist in choosing Supreme Court judges.

International Humanitarian Law and U.S. Policy

continued from page 7

argue, paradoxically, that the rules can be bent because terrorists earlier had bent the rules–a contradiction apparently lost on these advocates. Others observe that if the customary laws of war are consistently broken, then they are no longer customary and binding. Appeals to the Martens Clause of the 1907 Hague Convention, which might purport to resolve such legal ambiguities on the side of humanitarian principles or action over realist imperatives, are ignored when states claim that their survival is at stake. The dubious claim that necessity requires obviating the need for IHL is nothing new, as George Orwell observed in *Hommage to Catalonia* and in any of the major or minor wars since that Spanish Civil War of the 1930s.

It is too soon to assess the long-term impact of the Bush administration's resistance to IHL. The U.S. withdrawal from compulsory jurisdiction from the International Court of Justice during the 1986 *Nicaragua* case did not prove to be the death knell of that important court, even if it did introduce even more ambiguity in defining the norm of self-defense. IHL has evolved immensely since the mid-1990s from the statutes of the various international criminal tribunals and associated case law. Although not legally binding, the cases from the Hague and Arusha Tribunals and appellate court seem to have quickly been accepted by states as representing binding, customary international law. Dozens of convictions and arraignments of dozens more indicted war criminals have led to immense optimism at the Hague ad hoc tribunal, following much despondency in the first decade that indictees would not be arrested or when they were, as in the Milosevic trial, the proceedings would become too politicized. The case law has specified the application of the Hague and Geneva IHL rules, even if there remain hard cases, such as distinguishing avoidable and thus illegal collateral damage to protected property and persons. Although egregious atrocities can go unprosecuted because of the absence of witnesses and/or the political will, senior officials have been prosecuted for patterns of gross and systematic violations. Paradoxically, patterns of atrocities seem easier to prosecute than responsibility for individual crimes. Some wonder if there are not contradictory IHL principles, such as discrimination and proportionality.

Despite these long-standing realities, there are assertions that the Geneva Conventions are no longer valid, "quaint" in the words of then-White House Legal Counsel Alberto Gonzales, or that violations represent an open challenge to the legitimacy of IHL. The most visible signs of IHL violations, such as the veritable pornography in published photos of the torture and abuses at *Abu Ghraib* prison, have generated more publicity than clarity over IHL norm definition and implementation. To integrate any legitimate security concerns into IHL enforcement involves reconciling broad perceptions outside the international legal, human rights, and civil liberties communities that IHL standards interfere with national security.

Chief Justice Roberts and Foreign Courts

During the course of his Senate confirmation hearings to be chief justice, John Roberts was asked about his views of the role of court decisions from other countries on American courts and jurisprudence. Senator Jon Kyl (R-AZ) offered some skeptical comments on the use of decisions from foreign courts, noting that in *Roper v. Simmons* the U.S. Supreme Court had spent "perhaps 20 percent of its legal analysis discussing the laws of Great Britain, Saudi Arabia, Yemen, Iran, Pakistan, Nigeria, and China." Kyl went on to say that "It's an American Constitution, not a European or an African or an Asian one. And its meaning, it seems to me, by definition, cannot be determined by reference to foreign law." Kyl then asked Roberts, "What, if anything, is the proper role of foreign law in U.S. Supreme Court decisions?"

Roberts refused to comment directly on *Roper v. Simmons,* but he did express two concerns about the general approach of using foreign law as precedent. The first concern involved judicial accountability and democratic theory. Here, Roberts pointed out, "If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he's playing a role in shaping the law that binds the people in this country." The second concern involved the use of judicial discretion and its appropriate limits. Roberts stated, "Domestic precedent can confine and shape the discretion of the judges. Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever." Roberts went on to say that this selective use of foreign cases "actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent–because they're finding precedent in foreign law–and use that to determine the meaning of the Constitution. And I think that's a misuse of precedent."

Chief Justice Roberts' views on the subject contrast sharply not only with those of Justice Breyer but also with some other sitting justices. Indeed, perhaps the boldest statement on the subject may have been delivered by now-retired Justice Sandra Day O'Connor, who said in a 2002 keynote address before the American Society of International Law, "Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts."

Sources

American Society of International Law Proceedings, March 16, 2002, www.humanrightsfirst.org (search for "ASIL, 2002").

C-SPAN, "America & the Courts: Justices Antonin Scalia and Stephen Breyer," January 15, 2005, www.c-span.org (search for "Scalia Breyer").

Senate Committee on the Judiciary: S. Hrg. 109-158, September 12–15, 2005, www.gpoaccess.gov/congress/senate/judiciary/sh109-158/browse.html

BOOKS

In addition to the references cited in the authors' individual articles, recently published books also address the broader themes and topics of this issue.

Anaya, S. James. *Indigenous Peoples in International Law*, 2nd ed. New York: Oxford University Press, 2004.

Baderin, Mashood A. *International Human Rights and Islamic Law.* New York: Oxford University Press, 2003.

Badinter, Robert, and Stephen Breyer. *Judges in Contemporary Democracy: An International Conversation*. New York: New York University Press, 2004.

Chase, Oscar G. *Law, Culture and Ritual: Disputing Systems in Cross-Cultural Context.* New York: New York University Press, 2005.

Christol, Carl Q. *International Law and U.S. Foreign Policy.* Lanham, MD: University Press of America, 2004.

Drinan, Robert F. *Can God and Caesar Coexist?: Balancing Religious Freedom and International Law.* New Haven, Conn.: Yale University Press, 2004.

Duffy, Helen. *The 'War on Terror' and the Framework of International Law.* New York: Cambridge University Press, 2005.

Gray, Christine. *International Law and the Use of Force*, 2nd ed. New York: Oxford University Press, 2004.

Hall, Nathan. *Hate Crime*. Devon, UK: Willan Publishing, 2005.

Heymann, Philip B., and Juliette N. Kayyem. *Protecting Liberty in an Age of Terror.* Cambridge, Mass.: MIT Press, 2005.

Holmes, James R. *Theodore Roosevelt and World Order: Police Power in International Relations.* Dulles, Va.: Potomac Books, 2005.

Jacobsohn, Gary J. *The Wheel of Law: India's Secularism in Comparative Constitutional Context.* Princeton, N.J.: Princeton University Press, 2005.

Kahn, Maimul Ahsan. *Human Rights in the Muslim World: Constitutionalism, Fundamentalism, and International Politics*. Durham, N.C.: Carolina Academic Press, 2003.

Knop, Karen, ed. *Gender and Human Rights.* New York: Oxford University Press, 2004.

Lo, Ying-Jen. *Human Rights Litigation Promoting International Law in U.S. Courts.* New York: LFB Publishers, 2005.

Murphy, John F. *The United States and the Rule of Law in International Affairs.* New York: Cambridge University Press, 2004.

Pereira, Anthony. *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina.* Pittsburgh: University of Pittsburgh Press, 2005.

Rabkin, Jeremy. *Law Without Nations?: Why Constitutional Government Requires Sovereign States.* Princeton, N.J.: Princeton University Press, 2005.

Rochester, J. Martin. *Between Peril and Promise: The Politics of International Law.* Washington, D.C.: Congressional Quarterly Press, 2006.

DIVISION FOR PUBLIC EDUCATION
AMERICAN BAR ASSOCIATION

321 N. Clark Street, 20.2
Chicago, IL 60610-4714
312.988.5735

www.abanet.org/publiced

NONPROFIT ORG.
U.S. POSTAGE
PAID
AMERICAN BAR
ASSOCIATION

ADDRESS SERVICE REQUESTED