

International Practice News



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Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos

Nicole Barrett

32 Columbia Human Rights Law Review, 429 (Spring 2001) Summary provided by Anthony Cotton (3L) Marquette University Law School

In arguing that individual leaders can and should be held accountable for violations of customary international law, Ms. Barrett addresses the U.S. bombing of Cambodia and Laos during the Vietnam War. Ms. Barrett's professed purpose in writing this article is to "dispel the myth that only leaders of non-democratic states commit wide-scale violations of customary international law." In order to dispel this myth, Ms. Barrett focuses specifically on the United States' bombing of Cambodia and Laos during the Vietnam War. As noted in her article, the intense bombing these countries endured resulted in over 600,000 civilians perishing in Cambodia and over 350,000 in Laos. Although much of this article focuses on former National Security Advisor Henry Kissinger's alleged culpability in these attacks, the broader point is Ms. Barrett's analysis of the feasibility of using international law to punish leaders who violate basic tenets of customary international law.

In focusing on the bombardments of Cambodia and Laos, Ms. Barrett posits the question of whether these attacks constitute violations of international law. While there are regrettably a dearth of multilateral treaties regulating air warfare, the author notes that there are customary legal restraints which commanders and leaders are bound to respect. In order for a certain behavior to become prohibited by customary international law, two prerequisites must

be met. First, there must be an identifiable state practice. Second, the state practice must occur out of a sense of legal obligation or, *opinion juris*. In order to demonstrate that the bombing of Cambodia and Laos was a violation of customary international law, Ms. Barrett offers a historical examination of *jus in bello*, the law of war. In so doing, the author concludes that "by the time of the U.S. bombings in Cambodia and Laos in the late 1960s, a rule requiring that attempts be made to spare civilians was firmly entrenched as a norm of customary international law, and thus, binding on all nations."

After describing the U.S. bombardment of Cambodia and Laos, Ms. Barrett then addresses hurdles that might be faced in attempting to prosecute individuals for such attacks. The author notes that most major international treaties do not establish a statute of limitations for war crimes. Because she concludes that there are no applicable statutes of limitations, the author proceeds to note that Article 146 of the Geneva Conventions requires states to pass legislation granting universal jurisdiction over any perpetrator living within the country's borders. Because of this requirement, Ms. Barrett surmises that perpetrators of grave breaches, or war crimes, must be prosecuted at all times and in all places, and states are responsible for ensuring that this is done.

The article ends with the author's

conclusion that, because of the unrivaled economic and military might of the United States, few countries (including Cambodia) would dare indict or attempt to prosecute U.S. leaders for war crimes violations. Ms. Barrett notes however, that the international community is moving increasingly in the direction of holding leaders accountable for their actions. Ms. Barrett points to the prosecutions of Pinochet and Habré (the former dictator of Chad) as well as the International Criminal Tribunals for Yugoslavia and Rwanda and the rapid development of the ICC as evidence of this shift.

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Daniel D. Bradlow, *Developmental Decision-Making and the Content of International Development Law*, 27 B.C. INT'L & COMP. L. REV. 195 (2004).

Summary by Chad E. Novak (2L)

Marquette University School of Law.

“International development law (IDL) is the branch of international law dealing with the rights and responsibilities of states and other actors in the development process.” IDL began its development following World War II as formerly colonized nations in Africa, Asia and Latin America found themselves suddenly independent and severely lacking in economic equity vis-à-vis their former masters and the rest of the developed world. The central purposes of IDL are assisting developing nations with the establishment of international trade relations, encouraging foreign investment in developing nations, and promoting international legal equity for developing nations.

Two schools of thought have developed within the framework of IDL: traditional and modern. While the basic goals of both schools are the same, they have vastly differing outcomes.

The traditional view of international development focuses primarily on the economic process of development and specific economic policies. It results in a top-down type of management approach and is typically concerned with individual investment projects, such as factories, utilities, and infrastructure. Traditionalists view decision-making as a two-step process: first, determine the policy issues and decide where the need for economic investment lies, and second, be sure specific projects will result in economic and financial benefits outweighing the costs and will provide the desired rate of return. If both of these requirements are met, the project is approved. The traditionalist school maintains state sovereignty by leaving all decisions outside of the scope of a project to the government and society and treating them as externalities.

The modern view recognizes that economic development “cannot be separated from its social, political, environmental, and cultural aspects.”

Whereas traditionalists focus almost solely on the project at hand, modernists look beyond simply the economic impact of any single development project when making their considerations. Modernists, in response to ever-growing social and environmental sensitivities worldwide consider the full impact of any economic development plan. Rather than a top-down management approach, this school takes a more scattered approach, placing responsibility for projects in diverse hands, each one responsible for assessing impact of development over a specific aspect of a nation. While modern IDL is certainly a slower, more tedious process, it results in arguably greater benefits to developing nations as a whole. However, the modern approach comes with a cost: state sovereignty is compromised as the government is only one of many consultants in a development project. Furthermore, modern IDL

projects tend to follow international law and practices whenever possible, which often exceed national laws and policies. This heightened scrutiny, while seemingly more beneficial to the nation as a whole, slows the development process and serves to limit the scope of projects.

While there are strengths and weaknesses inherent in both approaches, the modern IDL school has in recent years moved to the forefront. Globalization, environmental issues and rapid development in communications have all resulted in favoring the modern IDL approach. Most notably, traditional IDL looks to states as both beneficiaries of and targets for aid, while modern IDL takes a more progressive approach and looks to communities as beneficiaries of aid, and “relatively powerful states, corporations, and international organizations as the targets” for aid.

Dear Member, International Practice Section:

Robert Misesy, Chair



Welcome to this issue of the International Practice Section's newsletter. Your section has been very active this past year. On October 25 we will have a luncheon program in Appleton entitled “What Can be Done to Protect Your Intellectual Property in China.” The featured guest speaker will be Congressman Mark Green. If you would like to attend this special program and earn some continuing legal education credits, please register by calling the State Bar's

Customer Service staff at (800) 728-7788.

We have recently held three special events. In the spring, we held our first annual social night at the Stachner Cabaret. At the State Bar Annual Convention, we held a seminar for United States businesses going to Canada. This Summer, we hosted a barbeque for attendees of the University of Wisconsin's visiting lawyers program.

This year the newsletter will include summaries of law journal articles that deal with international issues. We hope you like the new format.

As the chairperson of your section, I am receptive to any new ideas and suggestions you may have. Please feel free to either call me at (414) 298-8135 or email me at rmisesy@reinhardt.com.

Summary of: Timothy Caulfield, *Special Issue Globalization and the law: Article: gene Patens, Human Clones, and Biotechnology Policy: The Challenges Created by Globalization*, 41 ALBERTA L. REV. 713 (2003).

Summary provided by Lina Montén (3L)
Marquette University Law School

Biotechnology is an area “clouded by moral ambiguity, regulatory uncertainty, and rapid scientific advances.” As a result, policy-making in this field is complex, though globalization suggests that countries should try to coordinate regulatory policies. Nonetheless, the current uncertainty with respect to human cloning laws and gene patent policy on a domestic level is only magnified on an international level. Therefore, although a comprehensive solution is not near, an appreciation for the complexity of the situation is a step in the right direction.

Human gene patents demonstrate the interplay between global and national policies in the area of biotechnology. The 1980 U.S. Supreme court decision in *Diamond v. Chakrabarty*, started a trend according to which certain naturally occurring substances, including human DNA, may be deemed patentable. Consequently, a large number of DNA patents have been granted. Even though gene patents may be commercially necessary, many also couple them with ethical, legal, and social concerns. One specific such concern is questions about the health care system, especially in areas with public health care systems where gene patents are seen as potentially increasing the cost of the system as a whole, and has led to calls for changes in the patent system. In Canada, for instance, there have been calls for such patent reforms. Still, globalization makes such reforms difficult. First, international trade agreements, such as the Trade-Related Aspects of Intellectual Property Rights agreement, which calls for uniform intellectual property standards and to which Canada is a signatory with the U.S., can be a barrier to changes in established patent rules. Second, the close connection between economic development and intellectual property

means that reforms that may negatively impact the economic values of patents will likely be opposed by those who favor economic growth. Third, global patent policy is hugely influenced by the U.S. pro-patent approach. The U.S. being Canada’s largest trading partner also indicates that if Canada were to lessen its patent protection, it would stand in sharp contrast to the U.S. This leads to a policy tension between social goals, such as health care, and commercialization. Such differences between countries mean that some flexibility is needed, though the current trend is the U.S. direction of stronger uniform protection of intellectual property. As a result, countries with less economic influence, such as Canada, can either: go through with patent reform and accept the repercussion from the global economy; seek to make only small changes to their patent laws; or work with the rest of the world to create an international patent policy. Current pressure to globalize, however, makes the last option the most difficult.

Globalization has caused certain technologies to have a greater need for international cooperation. Cloning and stem cell technologies are examples of morally sensitive areas of research in which there are both national and international attempts to regulate. However,

obstacles, such as cultural, religious and political differences, that are apparent even on a national level, make an international solution less likely. This difficulty is demonstrated by the failed U.N. attempt to come up with a treaty on reproductive cloning. Essentially, this amounts to a policy problem where globalization necessitates greater global cooperation and where an international approach to cloning simultaneously means undermining the different positions on key moral issues. International agreements are typically based on compromises, but stem cell research and human cloning are areas either not open to compromise or remain disputed, so the odds of an agreement developing within these areas are not good. This leads to the conclusion that maintaining national variation in policies is necessary.

In conclusion, globalization has created numerous regulatory challenges in biotechnology, among them the regulation of controversial innovations, such as gene patents and human cloning. Because a substantial international solution seems unlikely due to differing moral and socio-economic positions, appreciating the challenges these areas face is essential in the policy-making process.

Yan Chen, *An Examination on Regulating the Employment of Foreign Skilled Workers in the United States*, 6 U. PA. J. LAB. & EMP. L. 179 (2003)

Summary provided by Natalia A. Sokolova (2L)
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This article describes and analyzes the current regulatory scheme governing the employment of foreign workers in the United States. It focuses on the status of foreign skilled workers and identifies the most serious problems with the employment immigration system by explaining its adverse impact on the individual rights of foreign workers and on the domestic labor and employment market. The article

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ends with some suggested courses of action to correct the existing problems.

The author begins with an overview of the H-1B temporary admission visa program that is used by most foreign skilled workers. In order to be eligible for the H-1B category visa, a foreign worker must have received a bachelor's degree or higher in a specialty that is related to the job position for which he or she is applying. The application process for obtaining an H-1B visa is very cumbersome and consists of three steps. First, a foreign worker is offered a job by a U.S. employer. Second, the employer files a Labor Condition Application (LCA) with the Department of Labor (DOL), showing, among various other things, that the employment of an H-1B worker will not adversely affect the working conditions of the U.S. workers similarly employed. Third, the employer files a nonimmigrant employment status petition with the Department of Homeland Security (the INS at the time the article was written), showing that the alien has the necessary qualifications for the position. Obtaining H-1B status allows a foreign worker to work only temporarily, for three years, with the possible extension of up to six years, and only for the specific employer.

Obtaining permanent employment status is an even lengthier, costlier, and more complicated process. There are caps on how many skilled foreign employees, no matter how qualified, can achieve an H-1B status or a permanent employment status. These caps are pre-determined by Congress several years in advance and have nothing to do with current economic conditions and the demand for such skilled foreign employees.

Next, the author argues that the H-1B program suffers from certain flaws. It imposes unwarranted restrictions on the status of foreign workers and their rights. In addition, the program irrationally departs from the contemporary market reality characterized by an increasing demand for skilled foreign workforce. The article calls for adopting either a human capital-oriented permanent employment immigration system or a flexible market-driven temporary employment program. Each of the proposed systems will serve the two goals -- empowering foreign skilled workers and eliminating the legal obstacles that unnecessarily burden the market facing skilled labor shortages -- better than the current H-1B system or permanent employment system.

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