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STANDARDS AND THE HUMAN RIGHTS CRISIS

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Consortium Standards Bulletin is a free monthly electronic Journal sponsored by the Boston law firm of Gesmer Updegrove LLP. The current issue of the **CSB** and a subscription form may be found at www.consortiuminfo.org/bulletins. Questions or comments about these articles, the **CSB** or ConsortiumInfo.org may be directed to Andrew Updegrove at updegrove@consortiuminfo.org.

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EDITOR'S NOTE

STANDARDS AND HUMAN RIGHTS

The topic of human rights is very much in the news today, as the UN Security Counsel struggles with how to deal with the unfolding tragedy in Darfur, Arab states criticize Israel for its treatment of the Palestinians, the US criticizes Korea, Iran, and other governments for their treatment of their own citizens, and the same governments fault the US for its policies regarding captives taken in Afghanistan and Iraq. Each of the above governments, of course, defends its own conduct, claiming that it is in compliance with international law. And as I write these words, U.S. Senators are acrimoniously arguing over whether to grant the administration the power to define what constitutes "torture" – a debate that not long ago would have been difficult to imagine being held in the halls of Congress.

Clearly, there are problems here, not the least of which is the absence of an effective global system authorized and able to guarantee, and intervene to prevent, abuses of human rights when they occur. At times, the very goal of some day ensuring the dignity, livelihood and opportunity – or even the safety and freedom from starvation – of the billions of souls that are at risk today seems beyond any realistic hope of attainment.

Among the many issues that make this hope so challenging is one that is too often neglected, but which falls within the scope of this journal. That issue involves vitally important standards - the definitions of human rights themselves. Absent consensus on the identity and description of human rights, it is impossible to hold anyone accountable for violating them. And that is the subject of this month's ***Consortium Standards Bulletin***.

In my ***Editorial***, I recall that one of the principal pillars of belief upon which modern democracies were conceived in the late 18th century was "natural law," a conceptual framework under which every human being was deemed to be endowed at birth (in the words of the American Declaration of Independence) with certain "inalienable rights," among which were the rights to "Life, Liberty, and the Pursuit of Happiness."

Today, the moral conviction that every human being has inalienable – as compared to only situationally defined – rights seems to be weakening. Instead, we have rights of combatants, rights of citizens, and (some would contend) no rights at all for some souls unlucky enough to find themselves without a recognized treaty to protect them. I suggest that true progress in guaranteeing human rights can only be made if legalistic distinctions based on circumstance are discarded in favor of the Founding Fathers' profound belief in an individual's innate right to be secure in his or her basic human rights.

In this month's ***Feature Article***, I survey the complex and still growing infrastructure of global and regional declarations of rights, treaties, conventions, commissions and courts that has evolved since World War II to recognize and protect human rights, and the degree to which they can be effective in addressing human rights abuses today.

My ***Consider This*** essay for September asks why the nations of the world have succeeded in creating a quasi-governmental entity (the World Trade Organization) that nations go to great effort to join – even at the expense of subjecting themselves to economic sanctions if found to have violated WTO rules – but have largely refused to grant equivalent power to international courts to sanction violations of human rights. Sadly, it would appear that governments are more motivated to facilitate trade, and more willing to cede a degree of their sovereignty in that pursuit, than they are confident that they will respect the human rights of their own citizens.

The **Standards Blog** selection for this month departs from the human rights theme to provide a reflection occasioned by the fifth anniversary of the 9/11 tragedy, observing that the Twin Towers did not collapse because they failed to meet applicable standards, but because the applicable standards failed to support the Towers against the forces unleashed upon them. I also reflect on the as-yet unanswered question of whether we should adapt construction and other standards specifically to meet the potential dangers of the post - 9/11 world, and whether we are willing to pay the price to mandate their implementation.

Finally, there is a **Story Update** on one of the most important standards litigation stories of recent years, involving the conduct of the participants in the JEDEC SDRAM working group in general, and of Rambus, Inc. in particular. This is a saga that I have been following since [February of 2003](#), and in which I and my law firm have participated by filing a series of *pro bono* "friend of the court" briefs in an effort to support the integrity of the standards development process.

As always, I hope you enjoy this issue.

Andrew Updegrove
Editor and Publisher
2005 ANSI President's
Award for Journalism

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EDITORIAL

NATURAL LAW AND THE MODERN WORLD

Andrew Updegrave

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed, by their Creator, with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness...And for the support of this Declaration, with a firm Reliance on the Protection of the divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

The American Declaration of Independence (1776)

In contrast to 1776, the concept of human rights is today often addressed as a relative rather than an absolute concept. Despite the fact that the modern concept of democracy was in part based upon a belief that human beings possess "unalienable rights," even democratic governments today disagree on how such rights must be honored in the breach. As a result, only scattered, selective, and in some cases haphazard mechanisms exist to permit the global community to intervene (if so inclined) to protect the rights of the individual against the powers of the state.

This is not where humanity hoped it would be as it viewed the smoking wreckage of World War II, and world leaders embarked upon an effort to rebuild their shattered nations.

Granted, one reason for this failure is that the founders of the United Nations decided not to give the new institution the power to create and enforce its own laws. In consequence, the United Nations then, and still today, lacks the capability to determine that violations of human rights are occurring, and then to intervene with force or sanctions against the guilty party, except through the cumbersome, slow, and often unsuccessful means of open debate.

But in a fundamental sense, such powers would be useless absent agreement on a single set of standards for determining precisely what rights human beings innately possess. Much more impressive progress has been made in this pursuit, but perhaps the effort to stem human rights abuses is being undermined not by the absence of such definitions, but by the classic case of having too many standards, each ostensibly applicable to a different situation, time or place.

For example, while 141 nations have ratified the Universal Declaration of Human Rights (first approved by the United Nations in 1948), there are numerous other conventions in force that have relevance in certain situations (such as the Geneva Conventions, which address human rights in times of war), or with respect to certain practices (e.g., the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), or within a specified geographical area (such as the European Convention on Human rights, which binds only EU nations).

The unfortunate result is that in a given context, the rights of the individual can become muddled and indistinct, and perhaps lost entirely in a fog of disputed interpretation. Is a given individual an enemy combatant, or a "terrorist?" Does that individual's rights differ with geography, and if so, can the rules change if the individual is moved? For example, if one set of rules applies at the time of capture on the battlefield, do those rules change if the individual is transferred to the U.S. facility in Guantanamo Bay, and again if transferred to the United States itself, and yet again if he is finally subjected to rendition to a country that does not observe international conventions against torture? Can it be contended that a terrorist has no rights at all, by simply contending that terrorists are not covered by any identified convention?

Today, we seem to be in danger of countenancing a retreat from the 18th century concept of "inalienable rights" in favor of a purely legalistic approach that looks only to the applicability of identifiable rules to specific situations. The logical result of referring only to rules of selective applicability is that if a place, or a category (or both) can be found where those rules do not apply, then the individual is left totally at the mercy of the state. Certainly this is inconsistent with the concept of innate human rights and the values upon which this country was founded.

It would seem that the only way to avoid such a result is to restore the concept of some baseline set of inalienable rights, rights that are unabridgeable under any circumstance, by any authority, at any time, as originally conceived by John Locke, Thomas Paine, and, indeed, the draftsmen of the American Declaration of Independence.

Only by agreeing upon such a base standard of human dignity can the individual be protected against the temptations of those in power to justify abridgement of human rights by the exigencies of the moment. Hopefully, this is one area of Constitutional interpretation upon which liberals and strict constructionists alike, upon reflection, can find common ground.

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FEATURE ARTICLE

HUMAN RIGHTS AND THE STRUCTURES THAT SEEK TO PROTECT THEM

Andrew Updegrove

Abstract: *Since the Second World War, an increasingly precisely defined and extensive list of individual, and in some cases group, entitlements has been codified that are referred to as "human rights." Under a variety of global and regional treaties and conventions, the governments of signatory nations accept a duty to observe and protect these same rights, as well as the proposition that some degree of international oversight and action is appropriate to safeguard their own citizens from abuse of these rights, and to protect the citizens of other nations from signatory actions. That oversight is provided under an expanding multi-layered, overlapping infrastructure of global and regional commissions, institutions and courts that are still largely supplemental to, rather than empowered to supersede the domestic laws and legal structures of member states. A variety of non-governmental organizations also play an important "watchdog," role by exposing human rights abuses, and applying public pressure upon governments capable of curtailing such abuses. This article provides an overview of the types of human rights that are internationally recognized today, the treaties and conventions that acknowledge them, and the structures that are evolving to protect them.*

Introduction: As the world struggled to recover from the impact of two world wars waged over a brief thirty-year period, the urgent need to remake international law to prevent future conflicts was evident as never before. Numerous initiatives were launched in consequence that were intended to make the world a better and safer place in which to live for all of its peoples. Initially, most of these initiatives were launched under the auspices of the new United Nations, which was chartered in 1945.

Intrinsic in much of the work of the United Nations was the recognition that its broad goals could not be attained without first achieving consensus on the parameters of basic human rights, and then codifying and protecting those rights. Absent such a foundation to inform more specific efforts, the likelihood of creating a better world might be doomed from the start.

Seventy-one years after the last shots of World War II were fired, the record and results of these high-minded initiatives are at best mixed. Rarely has there been a year when one or more wars have not been in progress, and invariably there have been ongoing, and too-often egregious, violations of human rights in multiple countries around the globe. While collective action has sometimes led to the imposition of sanctions or direct intervention to stem or halt such human rights abuses, these efforts have never been

consistently applied across equally compelling circumstances, and when action has been taken, it has typically commenced only after a long and protracted effort to reach consensus on the right to act and the method to employ, and to gather a sufficient number of nations willing to participate in order to make the effort effective.

As a result, human rights violations have been continuous, and even horrific episodes of genocide have been all too frequent. The worst abuses have often occurred in Africa, but Europe, where memories of the events of World War II remain fresh, witnessed the disintegration of the former Yugoslavia and the occurrence of human rights abuses that Europeans hoped would never be seen on that continent again. Millions have died around the world in consequence, and many more continue to lead blighted lives of poverty, fear and disease, particularly where corrupt elites are in power.

Nor have allegations of human rights violations been made only against third world nations or rogue Balkan leaders. Western nations still accuse China of violating the human rights of its citizens, and the United States has been accused not only by foreign critics, but by its own concerned citizens as well, of violating the human rights of captives taken in Afghanistan and Iraq.

It would be easy to conclude that the challenge of achieving a worldwide guarantee of human rights is simply the classic one of national sovereignty refusing to cede any real power to collective action. And in fact this is part of the problem, as the United Nations was not created with the power to make laws that it can directly enforce against its own member states.

Notwithstanding the fact that initial post-war hopes have not been fully realized, substantial (if inconsistent) progress has been made in the effort to secure human rights. Today, there is much to point to that gives hope for the future, including the ratification of numerous treaties recognizing and protecting human rights of all types, the formation of regional bodies able to protect human rights, a growing body of international law to support the efforts of individuals as well as intervening nations in the defense of human rights, and perhaps most importantly, an increasingly consistent global consensus regarding the nature and description of specific human rights - in effect, the standards by which human rights can be recognized, and thereby uniformly protected.

While not strictly speaking "standards" in the usual sense, human rights are nonetheless very similar in concept and creation to other useful products of voluntary, consensus processes: they are abstractions that have useful meaning only when a community of interest agrees to define them and apply them; they become more powerful and useful when uniformly adopted internationally; such adoption is voluntary; they achieve important societal goals; and they are maintained by institutions created specifically for that purpose. As a result of these similarities, it can be instructive to view human rights in the context of standards generally, particularly as regards what may be learned from the successes (and failures) of those active in the development, promotion and use of each type of consensus-based end product, and how the experiences of one discipline may benefit the other.

This article will survey the types of rights that are recognized today, the treaties and authorities under which they exist, and the principal means by which they are protected. In closing, it will reflect on the adequacy of this infrastructure to achieve its intended purpose.

I. Recognized Human Rights

The primary role of any government is (or should be) to protect the security and welfare of its citizens. Unfortunately, that role has rarely, if ever, been perfectly achieved by real-world governments.¹ This evident and ongoing failure gives rise to a need for international agreement on the identity and description of those rights that every government may be expected to respect, in order to provide a standard against which a government's actual behavior may be measured.

¹ In the opinion of Amnesty International, among 155 nations surveyed, only the Netherlands, Norway, Denmark, Iceland and Costa Rica did not significantly violate human rights in 2003. The report [may be accessed](http://web.amnesty.org/report2004/index-eng/) at < <http://web.amnesty.org/report2004/index-eng/>> Unless otherwise noted, all Webpages to which links are supplied in this article were accessed on September 27-29, 2006.

Human rights categories: Human rights are comparatively easy to agree upon at the original natural law level of abstraction.² Concepts such as the right to be "free" and "secure in one's person" are hard to contest, and are otherwise consistent with democratic values and the general understanding of the obligations of a government to protect its citizens. But in the first instance, what does "free" mean? And in the second, are their situations in which infringements should be permitted to even such a basic human right?

For example, does "free" mean both physically as well as politically free? If both, then is incarceration consistent with the concept of human rights, and if so, to what extent? At what point does duration of incarceration for a given crime become excessive, and what obligations does the state have to protect the prisoner from abuse once under the control of his jailers?

Distinguishing rights from honorable aspirations is also challenging. Is equal employment opportunity an elective concept that a given country is free to enshrine in law, or a basic human liberty that every country should guarantee? Perhaps surprisingly, general agreement on almost all currently identified categories of human rights (if not consensus on each specific right) was achieved and codified in the Universal Declaration. Those categories can be generally identified as follows:³

- **Security rights:** These are the rights that respect the right of the individual to be secure against physical abuse, and address dangers such as murder, torture and rape. Unlike many of the rights that follow, these rights have been addressed by laws from ancient times.
- **Due process rights:** These rights protect the individual from the abuse of the powers of the state, and prohibit practices such as secret trials, imprisonment without being charged, and unreasonable punishment.
- **Liberty rights:** These rights acknowledge freedoms of movement, speech, association, religious belief, and the like.
- **Political rights:** These address the right of the individual to meaningfully participate in the political process by voting, advocating and assembling, and to run for elective office.
- **Equality rights:** These are the rights that recognize equality before the law, nondiscrimination, and similar freedoms.
- **Social (or "welfare") rights:** These rights do not protect the individual from the state, but recognize duties of the state to its citizens to ameliorate suffering from (for example) extreme poverty and hunger.
- **Group rights:** This conceptual category is not represented directly in the Universal Declaration, but is achieving attention today. Group rights address abuses that may be directed at ethnic or religious groups (e.g., genocide), and the rights of countries to be protected from foreign exploitation of their resources.

Individual human rights: Individual human rights present their own challenges of definition and reasonability of expectation. One challenge resulting from recognizing so many different desirable goals

² Because human rights are now recognized legally in many forms and venues, this article does not address the philosophical bases upon which the recognition of something called "human rights" was based. These foundations remain of more than theoretical significance, however, because they continue to inform (consciously or otherwise) how we decide what particular rights to recognize, the relative values to be placed on each, and the degree to which infringements, if any, of such rights should be tolerated under exceptional circumstances.

³ The specific formulation of categories above is derived from the excellent and very lengthy entry on Human Rights to be found in the Stanford Encyclopedia of Philosophy, which [can be found](http://plato.stanford.edu/entries/rights-human/) at <http://plato.stanford.edu/entries/rights-human/>. I am indebted to the authors of this summary for much of the information contained in this article. Betsy Lamm, Thomas Pogge, M.B.E. Smith and Douglas Sylvester are identified as the most recent authors and editors of the material contained in this entry.

as actual rights is the evident impossibility of guaranteeing equal access to all of them. For example, few nations in Africa (or, perhaps, anywhere) today could guarantee full social rights to their citizens, if this would require a government to feed, clothe, employ, educate and provide modern health care to everyone of its people. In contrast, it would be reasonable, and indeed imperative, to expect every nation, regardless of economic situation, to ensure almost all of the other rights referred to above.

Achieving uniformity of definition and application of human rights at the national level can also be problematic: some rights necessarily include subjective elements (how much punishment for a given crime, and of what type, is consistent with human rights?), and others may have local cultural or religious connotations (must all punishments provided for under *Sharia* law – such as amputation of the hand or foot of an incorrigible thief - by definition be consistent with human rights? If not, does this imply that international law has the right to overrule the laws laid down by the Prophet?).

Variations (justifiable or otherwise) can be addressed through the establishment of regional rights bodies, and others through the adoption of human rights treaties by individual national governments with "reservations" (i.e., the reserved right to take exception to specific provisions of the treaty that would otherwise be binding). Variations are also guaranteed by the fact that parties to treaties are usually required to make their internal laws consistent with treaties, rather than to adopt the type of specific, mandatory language that could provide more uniform protection of human rights on a global basis.

Even where there is little difference of opinion over the importance of given rights, situations may justifiably (or expediently) permit the playing off of one right against another, as when martial law is imposed by a government under claim of protecting the security of the people. Such an action ostensibly honors the obligation of the state to protect the physical well being of its citizens, but may do so at the expense of political and other valuable rights.

Notwithstanding such questions of rights interpretation and relativity, treaties sometimes recognize that some types of rights are more fundamental than others, and therefore must be more strictly protected. For example, the International Covenant on Civil and Political Rights allows certain rights to be suspended under extreme circumstances (during a time "of public emergency which threatens the life of the nation" (article 4)). However, this right of suspension does not permit taking life, engaging in torture, imposing slavery, conviction under laws adopted after the fact, or the suspension of freedom of religion or thought.⁴

II. The Human Rights Infrastructure

International

Although the global divisiveness brought about by the Cold War temporarily slowed human rights progress, the infrastructure of human rights recognition and enforcement has nonetheless grown substantially from its post-war beginnings. This ongoing process involves the continuing adoption of new treaties, increasing recognition of the authority of rights recognized under older treaties, and the creation of new authorities and organizations charged with protecting human rights. Today, there is a complex and growing global infrastructure that seeks to identify, legislate, and protect human rights, comprising courts, commissions, regional rights organizations, non-governmental watchdogs, and more. While the failures of this infrastructure are all too evident in a given case, the forward march of progress becomes more meaningful and encouraging when the long view is taken.

The United Nations:⁵ The fundamental role of human rights in the mission of the United Nations is recognized in its Preamble, which directs it "... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...." Although it cannot create and enforce laws as such, the United Nations does serve as the venue within which treaties and conventions are negotiated that, when ratified by any given member state, usually

⁴ This example is taken from Human Rights, Stanford Encyclopedia of Philosophy, *supra*.

⁵ The United Nations was not the first global body to address human rights issues. The short-lived League of Nations sought to address minority populations through protective treaties, and the first Geneva Conventions, *infra*, were adopted more than eighty years before.

obligate that state to pass and enforce internal laws that are consistent with that treaty. The United Nations also supports commissions and committees, among other activities that support the effectiveness of these treaties once they have entered into force.⁶

Treaties and conventions: Many of the most important human rights treaties in force today have been developed within the United Nations structure, and these treaties also often act as the reference points for regionally adopted treaties as well. They include the following:

- [Convention on the Prevention and Punishment of the Crime of Genocide](#) (1948): Not surprisingly, the Genocide Convention was the earliest human rights treaty finalized after the Second World War. It was approved one day before the Universal Declaration was itself adopted.
- [Universal Declaration of Human Rights](#) (1948): Although not itself binding on all nations, most of the standards recommended by the Universal Declaration, most of the rights and principles codified in the Universal Declaration were subsequently incorporated into other treaties that were ratified by large numbers of member states. These treaties in turn require signatory nations to enact legislation that brings their internal laws into compliance with these individual treaties. The conventions and treaties that accomplish this result include those listed below.
- [International Convention on the Elimination of All forms of Racial Discrimination](#) (1965/1969)⁷
- [International Convention on the Elimination of All forms of Discrimination Against women](#) (1979/1981)
- [Convention on the Rights of the Child](#) (1989/1990)
- [International Covenant on Civil and Political Rights](#) (1966/1976)
- [International Covenant on Economic, Social and Cultural Rights](#) (1966/1976)
- [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (1984/1987)⁸: Under Article 1 of this treaty, torture is defined as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Several other provisions are relevant to the current debate in the United States Congress, including the following:

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

⁶ The United Nations has a detailed and information section of its Website dedicated to the subject of human rights and its activities in that area, with the following [home page](http://www.un.org/rights/): < <http://www.un.org/rights/>>.

⁷ Dates in parentheses indicate (Date of adoption by the United Nations or other relevant body/Date of entry into force, upon acquiring the required number of ratifications)

⁸ As of this writing, 141 nations have ratified this treaty, some with reservations. A list of these nations and an enumeration of all reservations may be found at [<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp#N2>](http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp#N2)

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 16

1. Each State Party shall 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 I, 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. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

A [Committee Against Torture](#) was chartered by the United Nations, with the mission of monitoring and investigating compliance by signatory nations. The Committee may also initiate investigations and issue complaints against individual nations or groups of nations.

Signatory nations are required to report on a regular basis on their compliance with applicable provisions under many of the treaties described above.⁹

Administration: The human rights activities of the United Nations and the treaties and conventions approved by it in this area are supported by a variety of distinct groups of various types.

Commissions and Committees: There are two human-rights related commissions (the [Commission on Human Rights](#) (1946) and the [Subcommission on the Promotion and Protection of Human Rights](#) (1946)) and seven standing committees ([Committee against Torture](#), [Committee on Economic, Social and Cultural Rights](#), [Committee on the Elimination of Discrimination against Women](#), [Committee on the Elimination of Racial Discrimination](#), [Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), [Committee on the Rights of the Child](#), [Human Rights Committee](#)).¹⁰

It is important to note the distinction between United Nations Commissions and Committees. The former derive their authority from the Charter of the United Nations itself, and therefore address all member states. The standing committees in contrast have been formed to address the subjects of the specific treaties to which they relate, and the authority of a committee therefore extends only to the member states that have ratified the treaty or convention in question. As a result, actions relating to commissions are subject to full United Nations member voting, while each of the latter are controlled by the consensus of the relevant signatory nations.

⁹ Additional United Nations sponsored (and other) treaties relating to human rights [may be found](#) at <<http://fletcher.tufts.edu/multi/humanRights.html>>

¹⁰ The Human Rights Research Guide section of the United Nations site provides brief descriptions of each of its human rights commissions and committees, links to the independent Webpage of each committee, and to many other relevant UN resources and topics: [Human Rights Research Guide](#) at <<http://www.un.org/Depts/dhl/resguide/spechr.htm>> (English text)

Agencies and Courts: In addition to the two treaty-independent human rights commissions, the United Nations also supports a number of agencies and courts that concern themselves with human rights issues and abuses. They include:

- [United Nations High Commissioner for Human Rights](#) (1993): This post was created to provide a full-time advocate of human rights issues within the United Nations itself. The Commissioner also coordinates all activities under existing and contemplated human rights treaties.
- [Human Rights Council](#) (2006): This Council succeeded to the work of the former Human Rights Commission in dealing with egregious violations of human rights. The new 47 member council is structured and subject to rules that are intended to make it less political than its predecessor, and less likely to include representatives of states with poor human rights records.
- [Security Council](#): Ultimately, the Security Council can, and sometimes does, act to address human rights situations and crises by authorizing extraordinary actions, such as sanctions, the organization of peacekeeping missions, and on occasion, military intervention.

International Criminal Court: The [International Criminal Court](#) came into existence as a result of an initiative that came to fruition at the [United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court](#). At that conference, the [Rome Statute of the International Criminal Court](#) was approved, calling for the establishment of the International Criminal Court as a permanent international tribunal, modeled on the several tribunals that had been created in the past to address specific egregious human rights abuses (the Nuremberg Tribunal, International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda). The Court came into being in 2002 upon ratification of the Rome Statute by the requisite sixty nations, and was installed at The Hague. As of January, 2006, [100 nations](#) have ratified the Rome Statute.¹¹

Like its predecessor tribunals, the International Criminal Court is authorized to address the crimes of genocide, war crimes, and crimes against humanity. Under the Rome Statute, it is also nominally authorized to address the crime of waging war illegally ("aggression against another state"), but only after that crime has been defined and related conditions are formalized and approved. The Court operates under two adopted documents: the [Rules of Procedure and Evidence](#) and the [Elements of Crimes](#), each of which was adopted by the [Assembly of States Parties](#), which oversees the Court. A third document, the [Regulations of the Court](#), was adopted by the judges of the court, completing the authority for the jurisdiction, function and structure of the Court.

The International Criminal Court is supplementary to, rather than senior to, the courts of its signatory states, in that it is unable to intervene if the nation in question has a valid judicial procedure in process to address the same alleged abuse.

Under the Statute, an Office of the Prosecutor was established, empowered to receive complaints, investigate and prosecute. With the establishment of this permanent tribunal, the threat of possible consequences for egregious actions taken under authority of a state, with the complicity of a state, or that might otherwise be ignored by the government of a state, became more credible.

Geneva Conventions: The Geneva Conventions comprise four treaties and three amendment protocols with a venerable heritage that precedes the foundation of the United Nations by more than eighty years. The first Geneva Convention was adopted in 1864 by sixteen European nations at a conference convened by the Geneva Society for Public Welfare (which later became the International Committee of the Red Cross), and the last was adopted in 1949. The two substantive protocols (the third relates to the adoption of an emblem) were both approved in 1977.

¹¹ The United States is notable for its absence as a Party to the Rome Statute. The United States remains theoretically subject to action by the Security Council of the United Nations with respect to actions that might otherwise fall under the jurisdiction of the International Criminal Court, but as a permanent member of that Council could veto any resolution intended to address any crimes that it was alleged to have committed.

The [first](#) of the four Geneva conventions addresses the rights and needs of sick and wounded combatants on the field, and the [second](#) of the sick and wounded at sea; the [third](#) addresses the humane treatment of [prisoners of war](#); and the [last](#) the protection of civilians "in Times of War." The [first](#) and [second](#) of the two substantive protocols relate to the protection of victims of armed international conflicts and of non-international conflicts, respectively. The four conventions had been ratified by 194 of the world's 200 countries as of June 27, 2006.

Other conventions and treaties: There are a variety of other conventions and treaties that could be included under the general heading of human rights. These agreements address additional areas of concern, such as the rights of refugees, the outlawing of [landmines](#), and other concerns.

International Law

A growing body of law is emerging as a result of the various treaties, conventions, complaints, interventions and other activities taken in support of human rights. As this body of law grows, it becomes more persuasive, influential and useful by all of those active in the protection of human rights.

Various efforts are in process to support the compilation and institutionalization of international law. One such effort that focuses on human rights is the [International Humanitarian Law Research Initiative](#), which advances the so-called "Alabama Process" (named after the room in the City of Geneva in which the first Geneva Convention was adopted in 1864).

Regional

The United Nations (and particularly its Universal Declaration of Human Rights) remains in many respects the fountainhead of the modern human rights infrastructure. However, it is neither the only, nor, in a given case, necessarily the most effective body to secure a given goal. At times, a regional authority has led, rather than followed, the United Nations in its recognition and protection of human rights, and the nations of Europe are notable for the degree of authority that they have ceded to their regional human rights institutions.

There are currently three principal regional authorities that address human rights issues, each of which has adopted its own declarations, rules, and sometimes courts to address human rights issues.¹²

Europe: The initial treaty respecting human rights adopted in Europe is the [Convention for the Protection of Human Rights](#) (1950), a significant document in that it was the first agreement under which signatory states consented to enforcement of domestic human rights by an external body. With the expansion of the European Union, the number of states that are members of this convention has rapidly expanded. As of this writing, 45 Western, Central and Eastern European states are members. Social rights are covered under a separate treaty, the [European Social Charter](#) (1961).

Under the Convention, member states consent to a significant degree of external authority, including subjecting themselves to the jurisdiction of a standing (since 1998) human rights court: the European Court of Human Rights, which presides in Strasbourg, France. Individuals, and less frequently nations, bring complaints to this court, which first attempts to mediate a resolution. Failing such a resolution, the court has the authority to issue a judgment and require appropriate remedies.

Pan-America: The Organization of American States came into being with the execution of the [OAS Charter](#) in 1948 by 21 original member states; 35 countries in the western hemisphere are now members. All members are signatory to two relevant documents: the [American Declaration of the Rights and Duties of Man](#) (1948) and the [American Convention on Human Rights](#). Although this declaration was adopted prior to the Universal Declaration, the Convention, which legally enabled the rights and duties identified in the declaration, was not adopted until 1969, and did not take effect until 1978. Unlike the Universal Declaration, the American Convention recognizes duties (such as the duties to work and pay taxes) of individuals as well as rights. A third treaty, the [Protocol of San Salvador](#) (1988), address social rights.

¹² The League of Arab States adopted the [Arab Charter of Human Rights](#) in 1994. However, this Charter has not yet been ratified by the member states of the League, and therefore has not entered into force.

The rights recognized under these two documents are addressed by two permanent bodies:

- [Inter-American Commission on Human Rights](#) (1959): the Commission is empowered to investigate and report on human rights abuses, but is not authorized to apply sanctions or remedies. However, the Commission has been extremely active in investigating many hundreds of cases alleging individual violations of human rights.
- [Inter-American Court of Human Rights](#) (1979): The Court was established under authority of the Statute of the Inter-American Court of Human Rights, has authority to hear cases submitted by the Inter-American Commission on Human Rights and by member states, and is empowered to apply the provisions of the American Convention on Human Rights to the facts presented.

Africa: The [African Union](#) replaced the Organization of African Unity in 2000. The underlying [African Charter of Human and Peoples' Rights](#) (1981) had been ratified by 53 nations as of 2006. Like the American Declaration, the African Charter recognizes duties of individuals. It also recognizes group rights, including some of particular historical significance, such as the right to be free of foreign political domination, and the right to protect domestic natural resources from foreign exploitation. An [African Court of Human and Peoples' Rights](#) was established under a protocol adopted in 1998 which took effect in 2004 upon its approval by 15 member states. However, as of this writing, the court has not yet been established.¹³

Individual Government Action

Individual countries from time to time include the curtailment of international human rights abuses in their foreign policy goals. Since such activities are self-determined rather than obligatory under treaties, however, such goals may change over time (and particularly as administrations change), may focus on some human rights over others, and the country in question remains free to turn a blind eye to the abuses of particular countries that would be diplomatically inconvenient to offend at any particular point in time.

International human rights practices can also be incorporated into legislation, thereby seeking to regularize such practices. For example, in the United States, sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (FAA), as amended, and section 504 of the Trade Act of 1974, as amended require the Secretary of State to supply to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, by February 25 in each year:

[A] full and complete report regarding the status of internationally recognized human rights, within the meaning of subsection (A) in countries that receive assistance under this part, and (B) in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act.¹⁴

Non-Governmental Organizations

National, global and regional Non-governmental organizations (often referred to simply as "NGOs") play an important "watchdog" function, providing multiple points of contact for individuals and groups that have suffered from human rights abuses. These organizations investigate and raise public awareness of such conditions, and the more powerful NGOs that focus on human rights issues can bring significant public pressure on governments by bringing failures to act, as well as actual abuses, to world attention.

The breadth of approach and scope of NGOs concerned with human rights issues is suggested by the following brief summaries of a few well-known NGOs:

- [Oxfam International](#): Oxfam's mission currently focuses on six areas of human rights and advancement. It has given simple names to these rights that in effect constitute Oxfam's own high-level Declaration of Human Rights, as in, "Every individual has the right to be [secure](#) [have access to adequate resources], [skilled](#) [have access to educational opportunity], [equal](#) [including

¹³ [Project on International Courts and Tribunals](#), at <<http://www.pict-pcti.org/courts/ACHPR.html>>.

¹⁴ The most recent such [report](#) (for 2005) may be found at:
<<http://www.state.gov/g/drl/rls/hrrpt/2005/index.htm>>

with reference to gender, disability and culture], [healthy](#), [heard](#) [to have effective political representation], and [safe](#). Oxfam undertakes a broad variety of local actions in each of these areas to ameliorate the quality of life of those affected, seeking to directly aid those affected. It also focuses international attention on human rights needs.¹⁵

- [Amnesty International](#) (AI): AI describes itself as "a worldwide movement of people who campaign for internationally recognized human rights." AI uses the Universal Declaration and other treaties as its reference points, and focuses on "preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights." As of this writing, AI counts more than 1.8 million members, supporters and subscribers in over 150 countries and territories in every region of the world. AI is self-described as "a democratic, self-governing movement," which places significant policy decisions before an International Council, which representatives from its national sections are attend.¹⁶
- [Human Rights Watch](#) (HRW): HRW currently has 150 employees (lawyers, journalists, academics, and country experts) and many volunteers, and describes its approach to human rights issues as follows: "Human Rights Watch believes that international standards of human rights apply to all people equally, and that sharp vigilance and timely protest can prevent the tragedies of the twentieth century from recurring." HRW researches and publishes the results of its investigations with the outright goal of generating publicity intended to "embarrass abusive governments in the eyes of their citizens and the world....In extreme circumstances, Human Rights Watch presses for the withdrawal of military and economic support from governments that egregiously violate the rights of their people." HRW also takes to the field during human rights crises, delivering real-time accounts of abuses in process in order to raise awareness and bring international attention, and hopefully action, to bear.¹⁷

III. Summary

Since the end of the Second World War an increasingly comprehensive infrastructure for the identification and protection of human rights has developed around the world, comprising overlapping global, regional, national, and private means for protecting the rights of not only individuals, but to classes and groups of people identified by criteria such as ethnicity, disability and gender.

Today, this infrastructure is still largely lacks sufficient power and authority to intervene in the domestic affairs of individual nations. However, there is a trend that is flowing in this direction, as evidenced by the establishment of standing courts and tribunals specifically created to address the most severe of human rights abuses, consensus on the identification and description of specific human rights, and a growing body of international law based upon the actions of the various treaty groups and other bodies addressing human rights. Nonetheless, this infrastructure is still almost entirely supplemental, rather than senior to, the sovereign rights of nations.

It remains to be seen whether the further evolution of this infrastructure will slow and stall at the boundary of states rights, or will serve as the foundation upon which a more powerful, global legal system focused on realizing the goals of the Universal Declaration of Human Rights is built. Today, there does not appear to be sufficient momentum or global outcry to compel the nations of the world to surrender the degree of domestic control needed to achieve the latter.

Hopefully, if this impasse is some day broken, it will not be as a result of human rights abuses that are even more extreme and horrific than those that have occurred so recently in Kosovo, Rwanda, Uganda, Liberia, Darfur, and elsewhere.

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¹⁵ [Oxfam Website](http://www.oxfam.org.uk/about_us/thisisoxfam/index.htm), at < http://www.oxfam.org.uk/about_us/thisisoxfam/index.htm>

¹⁶ [Amnesty International Website](http://web.amnesty.org/pages/aboutai-index-eng), at < <http://web.amnesty.org/pages/aboutai-index-eng>>

¹⁷ [Human Rights Watch Website](http://www.hrw.org/about/whoweare.html), at < <http://www.hrw.org/about/whoweare.html>>

CONSIDER THIS

‡ ‡ ‡ September 29, 2006

#42 Sovereignty, World Trade and Human Rights

In 1948, the newly formed United Nations announced a great event with appropriate fanfare: the unveiling of the [Universal Declaration of Human Rights](#). The dream was that through this and other international efforts, many of the horrors of the first half of the 20th Century could be left behind by a world that had much that it wished to forget.

With time, 141 nations signed and duly ratified the Declaration. But sad to say, despite the fact that the Declaration is now acknowledged to be the global consensus agreement defining human rights, its provisions have been violated on a daily basis in many parts of the world from then until today. Over time, the offenses visited by corrupt regimes, violent dictators, and ethnic majorities seem to be becoming more, rather than less violent and horrific. Today, each disaster that goes unpunished is speedily followed by the next. To recite but a few: Rwanda, Congo, Darfur, Kosovo, Liberia...the litany of horrors seems endless.

In part, this is due to the degree of difficulty involved in agreeing upon and engaging in collective action through the United Nations. Only rarely does the international community achieve the degree of consensus required to successfully navigate the bureaucracy, veto rights and process necessary to achieve such a result. Even the new International Criminal Court, established as a standing tribunal in 2002, is only designed to address abuses after the fact. Even then, it only possesses the authority to act with respect to crimes involving the nationals of signatory nations and such other countries as might consent to its jurisdiction.

In consequence, while the actions being taken today on many fronts to secure human rights are many and honorable, from pressure applied by individual or allied nations against abusive regimes to the significant activities and initiatives of a myriad of non-governmental organizations (NGOs), the ability of a government to abuse its citizens remains today largely unchecked.

At the heart of the matter lies the conundrum that has handicapped most post-war efforts to make the world a better place through collective action: the reticence of many nations to allow any external force to place any limits on what it can do, either externally, or (more emotionally) internally. After 71 years of only partial progress in the face of ongoing and terrible abuses, the cause of human rights can seem hopeless.

Must this be so? Perhaps not, if one considers this:

On January 1, 1995, the World Trade Organization (WTO) replaced the General Treaty on Tariffs and Trade (GATT). GATT was another international post-war initiative launched in an attempt to build a more peaceful and rational world. Today the WTO is not only strong and successful, but nations (such as China) willingly undergo long, strenuous and difficult transformations of their entire economies to accede to WTO membership.

One example of efforts undertaken under the auspices of the WTO that is familiar to readers of this journal is the [Act on Technical Barriers to Trade](#) (ATBT), which (among other goals) seeks to prevent the use of standards and conformance testing to unfairly benefit domestic commerce at the expense of international trade. As with many other restrictions imposed under the WTO, member states give up numerous rights at home in order to enjoy a more level playing field for their own goods and services in the marketplaces of the world.

The WTO/ATBT system, while hardly perfect, does provide a set of rules within which the standards created through the voluntary consensus process may be given greater force through quasi-governmental authority. In practice, the WTO operates as a forum within which the rules of international trade are set, but not one that has the authority to bring actions to enforce those rules. Instead, it provides a venue (the Dispute Settlement Body) within which individual members may bring charges against other members,

and resolve their disputes with the threat of WTO-approved sanctions to back up the rulings of WTO arbiters.

Under the due process provisions of the WTO/ATBT, complaints can be brought confidentially, permitting investigation prior to publicity, and decisions can be appealed. If the dispute resolution process fails to resolve issues, the WTO can impose meaningful sanctions against the guilty party, and in favor of the country or countries that brought the original complaint to the attention of the WTO.

While this process has its clear weaknesses (for example, a sanction that favors a large importer/exporter hits the guilty party far harder than one that benefits a small country, meaning that sanctions that favor a small country can easily be ignored by a large one), it nonetheless represents a remarkable achievement of international resolve and cooperation. In the less than eleven years of the WTO's existence, about [300 disputes](#) have been brought to its Dispute Settlement Body. Most of these disputes have been resolved, resulting in a more orderly and fully functional international marketplace.

Why is it that the nations of the world assembled in congress can reach agreement on the rules of international trade and go to great lengths to subject themselves to the WTO's authority, but have not set themselves the goal of providing an equally effective means of protecting elementary human rights?

The answers are not immediately obvious. After all, the rules endorsed by the WTO are humanistic as well as commercial, including (for example) the principle of providing greater flexibility to evolving economies than developed ones. Similarly, allowing an international body to control domestic trade in important respects is arguably as great, or greater, a concession to national sovereignty than agreeing to basic principles of human dignity.

Similarly, the United Nations does succeed on occasion in achieving consensus around the condemnation of human rights violations, and even on intervention by UN-authorized peacekeeping forces, despite the hurdles that stand in the way of such a result. What is needed is a standing commission with respected, neutral arbiters with the power to act, rather than a difficult and time-consuming ad hoc process.

Why then does the WTO have powers that the United Nations does not? It seems both tragic and comic that a system exists that can provide meaningful sanctions for trade abuses involving music in bars, pet food and solid urea, while the United Nations can only dither while children starve in Darfur.

The reasons, sadly, are several. Among them are that commercial forces have traditionally been more politically influential than humanitarian ones, and that repressive regimes traditionally have more to fear from their poor than from their commercial upper classes.

Still, the WTO experience demonstrates that the goal of achieving consensus around enforceable constraints, and even socially informed rules, can be achieved. It's long overdue for the same dedication that has been directed at achieving fair trade to be focused on protecting human dignity as well.

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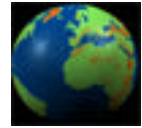
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STANDARDS AND THE LESSONS OF 9/11

Andrew Updegrove

Monday, September 11, 2006 @ 8:13 AM EDT

Nova aired an excellent program last night called [Building on Ground Zero](#), and it has what may be a long-term page set up [here](#), with a variety of stories, slideshows and interviews on the same topic. The show was memorable for many reasons, one of which was its focus on both the importance as well as the economic calculus of standards. Another was the degree to which the US is lagging in the upgrading of crucial standards identified in the wake of the 9/11 catastrophe, although a number of Asian nations have apparently taken to heart the lessons learned five years ago today.



It's rare that standards are featured so prominently in a documentary, and even more unusual for them to be dealt with so clearly and intelligently. The WGBH team behind the *Nova* program derived much of its data from the detailed investigation performed by the National Institute of Science and Technology (NIST) and the final recommendations of that agency. The 30 detailed [recommendations](#) offered by NIST cover a broad range of topics, including upgrading of materials, reexamining existing safety margins, improving communications, providing for more effective evacuation capabilities, and much more. *Nova* reports that implementing all of the engineering-related recommendations, if I recall correctly, would add a total of about 5% to total building costs.

Tellingly, the experts interviewed on the program conclude that the Twin Towers were not only adequately designed, but indeed had been engineered with a degree of ingenuity that permitted them to withstand the infernos that raged within them quite well before the towers ultimately collapsed. What failed, therefore, was not the design – but many of the standards to which the design was built.

Many of the standards evaluated by NIST involved matters as simple as the width of emergency stairways (44 inches), which may have been adequate decades ago at a time of narrower Americans, but which on 9/11 led to far fewer people walking side by side than might have been the case had the stairs simply been required to be wider. And had communications standards enable more effective communications, more fireman would have known after the first tower collapsed to turn and head downwards with the flow, rather than to continue upwards to their deaths against it, thereby also slowing the escape of those inside.

Other standards that could be changed and implemented without the development of new processes or materials relate to fireproofing materials. Current standards still allow the type of spray-on foam that is presumed to have been extensively dislodged by the impact of the jets that struck the towers. *Nova* reports that there are existing processes and materials that adhere far more tenaciously, but which are more expensive. Will they be required in the future? *Should* they be?

That last question may seem surprising, in light of the horrors of 9/11. But, as one engineer bluntly stated during the program "I want good value for my standards." His point was that to engineer every building to withstand the impact of a terrorist-piloted plane would flunk a cost/benefit analysis. And clearly, he is right – the likelihood, or even the possibility – that such a plane would hit a tall building that does not stand high above those that surround it is almost nil. That being so, why spend the extra 5%?

The question, then, is partly one of assumptions. Prior to 9/11, the assumption was that sprinkler systems and other design features would contain a fire in a tall building, limiting its effects to one or at most a few floors, and that full evacuation of the building would not even be necessary as a strict matter of safety. As *Nova* reports, that assumption has historically been borne out by facts, with c. 53,000 people per year dying in residential fires, but only hundreds in total perishing in all large building catastrophes that occurred prior to 9/11.

So how much should the standards change? NIST concludes that the standards applicable to all buildings should prevent the type of failure and loss of life that occurred on 9/11. *Nova* does not seek to answer that question, but does an honest job of presenting it, as well as reporting on those buildings that are being constructed today that are electively adopting some of the same NIST recommendations.

Clearly, of course, the matter need not be one of all or nothing. Wider and more greatly dispersed stairwells, redundant standpipes serving sprinkler systems and other design elements that might have the greatest impact and could be implemented using existing technology, as well as reexamination of the types of fire resistant materials available and their virtues, deserve consideration, at least for those buildings that are demonstrably at risk.

More troubling is the fact that in five years not all of the needed communications standards have been developed and deployed, despite the myriad initiatives launched, and the billions of dollars of government funding that have already been spent upgrading communications equipment. It seems incredible that this should be the case, and there can be no question that enabling the effective communication of first responders is a matter of daily, rather than only exceptional need.

Sadly, it seems that in standards, as in so many other areas, the lessons of 9/11 have been strangely difficult to agree and act upon. One would have hoped that five years on we would have managed to make better progress, given the starkness of the wake up call.

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FEATURED MEETING

ANSI 2006 ANNUAL CONFERENCE STANDARDIZATION AND INNOVATION Wednesday, October 11, 2006

**Ronald Reagan Building and International Trade Center
1300 Pennsylvania Avenue, NW
Washington, DC 20004**

If innovation were a footrace, would it be viewed as a marathon, a relay, or a sprint? Business icons, experts and scholars from Bill Gates to Thomas Friedman are questioning whether the U.S. is positioned today to compete successfully on the global scene tomorrow. How is innovation affecting national health and safety, the acceleration of emerging technologies, or development of trade strategies? What is the impact of innovation on organizations that are engaged in standards setting and conformity assessment activities?

The American National Standards Institute (ANSI) will present an examination of these questions during the 2006 ANSI Annual Conference: Standardization and Innovation, on Wednesday, October 11, at the Ronald Reagan Building and International Trade Center in Washington, DC. Speakers and panelists from government, business, industry and academia will describe the impact of innovation on business planning and global trade. Case studies will highlight how the future is being changed in business and trade practices, healthcare, nanotechnology and more.

*The agenda and registration materials may be found [here](#).
The full schedule for World Standards Week may be found [here](#).*

STORY UPDATE

FTC REVERSES ITSELF, FINDING THAT RAMBUS CREATED AN UNLAWFUL MONOPOLY

Andrew Updegrove

In what can only be called a stunning development in a high profile standards case, the U.S. Federal Trade Commission (FTC) announced last month that it had [unanimously reversed](#) the earlier decision of one of its own Administrative Law Judges, ruling now that semiconductor technology company Rambus, Inc. had "unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory," or DRAM.

The FTC is now in the process of deciding what penalties should be levied against Rambus. In support of that process, it may hold additional hearings at which Rambus and the FTC prosecuting attorney may present arguments on that issue. The FTC also announced that it would welcome industry advice on the penalties, setting a deadline of September 18 for presentation of *amicus curiae* (friend of the court) briefs, four of which were filed (including one filed by Gesmer Updegrove LLP and myself on a *pro bono* basis, the fourth such brief we have filed in relation to this case). The *amicus* briefs, together with the briefs on the penalty question filed by the FTC and Rambus, may be found at the FTC [Rambus docket page](#).

The most recent decision by the FTC is only the latest in the series of dramatic reversals that has typified the course of the web of lawsuits that have been filed by Rambus against four DRAM manufacturers (Infineon Technologies, Hynix Semiconductor, Samsung Electronics, and Micron Technologies); by the same manufacturers against Rambus; by antitrust regulators against Rambus; and by the same regulators against the same DRAM manufacturers, charging them with a price fixing conspiracy against Rambus relating to the same technology.

The decision by the FTC represents a vitally important ratification by the FTC of the need to enforce rules of trust in standard setting, and follows on a series of early victories by Rambus that threatened to undermine the credibility of the standard setting process. In response to those victories, scores of standard setting organizations reexamined and amended their intellectual property rights policies, in an effort to make it more difficult for those with ill intent to "game" their processes.

While a detailed review of the complete, tangled history of the Rambus litigation would require many thousands of words, the following describes the principal events to date.

All of the litigation and investigations arose from the conduct of the same participants in the same standard setting effort within the Joint Electron Device Engineering Council (JEDEC) in the 1990s. The standards under development in that effort would dictate the designs of hundreds of millions of DRAM chips worth billions of dollars in revenues – and even billions of dollars in royalties to anyone owning patents essential to those designs.

Rambus, it was alleged, dropped out of the standard setting process prior to the time when it would have been required to disclose any patents that would be infringed by the implementation of the standards being developed. After the standard was approved and widely adopted (or, in the words of antitrust law, after the market had become "locked in"), it began to contact the chip vendors that were implementing the standards, and demanding royalties from them – in short, surfacing and threatening to fire the torpedoes after setting a classic "submarine patent" trap.

The four vendors referred to above refused to pay up, and all were sued by Rambus. The case that advanced most quickly was the suit brought against Infineon Technologies, a German semiconductor company. At trial, Rambus's conduct came to light – as did the fact that it had destroyed large numbers of documents, presumably in an effort to avoid the disclosure of its actions. The judge presiding in the Virginia federal district court in which the document destruction was revealed was greatly angered, and as

a result refused to honor the attorney-client privilege between Rambus and its counsel, allowing other written evidence to reach the jury.

Those materials included notes from Rambus's own counsel, advising Rambus that it was violating JEDEC's rules by not disclosing its patents. Not surprisingly, the jury found for Infineon, and the judge directed Rambus to reimburse Infineon for millions of dollars in attorney's fees, in addition to other monetary damages.

The standard setting world heaved a sigh of relief when the decision was announced, because the standard setting process is built primarily on trust. After all, if one can gain more by cheating than by obeying the rules, then there are only two ways to react – either by cheating as well, or by refusing to adopt standards at all.

But the relief was short lived. Rambus appealed the trial court decision to the Federal Circuit, which hears all patent-related appeals. Most observers expected the same judgment in that venue, and were therefore shocked when the first reversal occurred: a three-judge panel found in favor of Rambus in a two to one split decision (the third judge filed a strong dissent in favor of Infineon). One basis for the panel's decision was a finding that the JEDEC process was not sufficiently clear to hold Rambus accountable – even though the opinion also acknowledged that Rambus found the JEDEC policy clear enough to conclude that it was violating those same rules at the time.

Infineon then appealed the decision to the whole bench of the Federal Circuit. A number of "friend of the court" briefs were filed in support of Infineon. But the full court declined to re-hear the case.

Infineon next sought review by the US Supreme Court, and again supporting briefs were filed on behalf of standard setting organizations, industry participants, and others. Many State Attorneys General also wrote and filed their own brief as well. But the Supreme Court, which accepts only a very small percentage of all cases that seek their attention, also declined to hear the case.

Then the next reversal occurred: the Federal Circuit had remanded the case (i.e., sent it back) to Judge Payne, the Virginia Federal Court judge who had originally found in favor of Infineon – and Judge Payne proceeded to throw the case out of court, citing Rambus's document destruction, and leaving Rambus with no choice but to either begin the appeal process all over again, or to settle with Infineon. Rambus chose to cut its losses at this point and entered into a settlement with Infineon that was widely viewed by its stockholders as a disappointment: Infineon would pay its damages over time, and would receive favorable licensing terms on other Rambus technology. However, there were three more defendants to which Rambus could now turn its now undivided attention, which it proceeded to do.

Rambus was by this time also asserting additional claims against these vendors in addition to those relating to their refusal to pay royalties. In these new claims, Rambus alleged that the four vendors had entered into a price fixing scheme against Rambus relating to the same patented technology. The antitrust regulators then brought a suit against the vendors, eventually extracting some of the largest antitrust penalties ever collected in connection with the settlements agreed to by these companies.

In the third major litigation thread, the FTC brought an investigation against Rambus in June of 2002 in connection with Rambus's behavior in JEDEC. As noted above, an Administrative Law Judge (ALJ) found in Rambus's favor on every count in February of 2004. Like the Federal Circuit judges, the ALJ based his opinion in part on what he found to be defects in the JEDEC process.

The FTC complaint counsel appealed that decision to the Commissioners of the FTC, and once again supporting briefs were filed. The Commissioners both heard testimony as well as reviewed the complete trial record of the earlier trial, and as further disclosures were made in the concurrent private litigation, delayed issuing an opinion to permit further investigation. Close to two years elapsed, until the release of the Commission's opinion in August.

Certainly, the Rambus disputes represent one of the most convoluted and contradictory cases of standards-related litigation in recent technology history. In effect, it is as if two separate bands of

criminals arrived at the same time, to rob the same bank, with each thinking that they had successfully raided the vault. Only later, when each side began suing the other, and when each was charged by antitrust regulators in turn, did each side learn that it was as much a victim as a victor.

Over the course of these events, Rambus became a day trader's darling, as its stock experienced huge swings over the years, depending on its fortunes in court (Rambus sells no products – it only develops and licenses technology). The situation in many ways was similar to the contemporaneous claims made by SCO, also a small company, in the Linux market, where SCO continues to assert claims (unsuccessfully) against IBM and others, resulting in active speculation in SCO's stock. Not surprisingly, one quarter of Rambus's market capitalization disappeared on the day that the FTC announced its decision.

Of course, the saga is still not complete. In Rambus's suit against Hynix, the judge has stayed further action, pending the results of the FTC's decisions on penalties. Meanwhile, multiple class action suits have been filed against Rambus, seeking damages for the incremental increase in SDRAM prices over the past many years during which some vendors were passing along Rambus royalties to their customers. And Rambus will be waiting to see what penalties the FTC decides to impose, before deciding whether to appeal or settle – a decision complicated by the effect that one decision or another will have on the hundreds of millions of dollars in royalties that it may (or may not) receive as a result in relation to its suits and settlements with the four semiconductor vendors.

For now, the standard setting world may feel more secure, knowing that the FTC has supported the standard setting process, sending a clear message to the industry that the antitrust regulators will punish those that take actions intended to manipulate that process in pursuit of anticompetitive goals.

A copy of the amicus brief filed the author and Gesmer Updegrave LLP with the FTC on the determination of damages may be found [here](#).

The following are excerpts from the FTC's announcement of its decision.

**FTC Finds Rambus Unlawfully Obtained Monopoly Power
Deceptive Conduct Fostered "Hold-Up" of Computer Memory Industry**

By a unanimous vote, the Federal Trade Commission has determined that computer technology developer Rambus, Inc. unlawfully monopolized the markets for four computer memory technologies that have been incorporated into industry standards for dynamic random access memory - DRAM chips. DRAMs are widely used in personal computers, servers, printers, and cameras.

In an opinion by Commissioner Pamela Jones Harbour, the Commission found that, through a course of deceptive conduct, Rambus was able to distort a critical standard-setting process and engage in an anticompetitive "hold up" of the computer memory industry. The Commission held that Rambus's acts of deception constituted exclusionary conduct under Section 2 of the Sherman Act and contributed significantly to Rambus's acquisition of monopoly power in the four relevant markets. The Commission has ordered additional briefings to determine the appropriate remedy for "the substantial competitive harm that Rambus's course of deceptive conduct has inflicted."...

"We find that Rambus's course of conduct constituted deception under Section 5 of the FTC Act. Rambus's conduct was calculated to mislead JEDEC members by fostering the belief that Rambus neither had, nor was seeking, relevant patents that would be enforced against JEDEC-compliant products. . . . Under the circumstances, JEDEC members acted reasonably when they relied on Rambus's actions and omissions and adopted the SDRAM and DDR SDRAM standards."

"Rambus withheld information that would have been highly material to the standard-setting process within JEDEC," the opinion continues. "JEDEC expressly sought information about patents to enable its members to make informed decisions about which technologies to adopt, and JEDEC members viewed early knowledge of potential patent consequences as vital for avoiding patent hold-up. Rambus

understood that knowledge of its evolving patent position would be material to JEDEC's choices, and avoided disclosure for that very reason."

"Through its successful strategy, Rambus was able to conceal its patents and patent applications until after the standards were adopted and the market was locked in," states the opinion. "Only then did Rambus reveal its patents - through patent infringement lawsuits against JEDEC members who practiced the standard."

Analyzing Rambus's conduct under the standards of Section 2 of the Sherman Act, the Commission found that "Rambus engaged in exclusionary conduct that significantly contributed to its acquisition of monopoly power in four related markets. By hiding the potential that Rambus would be able to impose royalty obligations of its own choosing, and by silently using JEDEC to assemble a patent portfolio to cover the SDRAM and DDR SDRAM standards, Rambus's conduct significantly contributed to JEDEC's choice of Rambus's technologies for incorporation in the JEDEC DRAM standards and to JEDEC's failure to secure assurances regarding future royalty rates - which, in turn, significantly contributed to Rambus's acquisition of monopoly power."

"Rambus claims that the superiority of its patented technologies was responsible for their inclusion in JEDEC's DRAM standards," the opinion states. "These claims are not established by the record. Nor does the record support Rambus's argument that, even after two JEDEC standards were adopted and substantial switching costs had accrued, JEDEC and its participants were not locked into the standards. Rambus now claims that we can and should blind ourselves to the link between its conduct and JEDEC's adoption of the SDRAM and DDR SDRAM standards, as well as to the link between JEDEC's standard-setting process and Rambus's acquisition of monopoly power. These claims fail, both as a matter of fact and as a matter of law. To hold otherwise would be to allow Rambus to exercise monopoly power gained through exclusionary conduct. We cannot abide that result, given the substantial competitive harm that Rambus's course of deceptive conduct has inflicted."

"Questions remain regarding how the Commission can best determine the appropriate remedy," the opinion states. "Now that the Commission has found, and determined the scope of liability, the Commission believes it would exercise its broad remedial powers most responsibly after additional briefings and, if necessary, oral argument devoted specifically to remedial issues."

In a separate concurring statement, Commissioner Jon Leibowitz wrote, "Rambus's abuse of JEDEC's standard-setting process was intentional, inappropriate, and injurious to competition and consumers alike." He adds that Rambus's conduct not only ran afoul of the antitrust laws, but also constitutes an unfair method of competition in violation of the broader reach of the FTC Act.

The Commission vote to issue the opinion and order was 5-0....

Copies of the complete opinion and order are available from the FTC's Web site at <http://www.ftc.gov> and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, DC 20580.