FASPE

Fellowships at Auschwitz for the Study of Professional Ethics

2017 JOURNAL

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FASPE 2017 Medical and Seminary Fellows on the grounds of the House of the Wannsee Conference in Berlin. **KATIE ZONI / FASPE**

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TABLE OF CONTENTS

TABLE OF CONTENTS

INTRODUCTION

Introduction

What does Germany from 1933 to 1945 have to do with today? Wasn't the Holocaust a singular act of malevolence perpetrated by a group of evil and deranged madmen?

What do professionals and the professions have to do with mass murder and genocide?

What do contemporary ethics have to do with Adolf Hitler?

These are the questions that underlie the FASPE mission.

In fact, it *was* the professionals in Germany and portions of occupied Europe who designed and enabled the actions that led to genocide. It *was* the professionals who executed the laws and policies that they designed. Lawyers wrote and enforced the Nuremberg Laws. Doctors designed and carried out the first murders of the handicapped and the opposition. Journalists became propagandists. Business executives used slave labor and entered into contracts with the Nazi regime to produce the weapons of genocide. Pastors and priests too often collaborated and condoned, even promoted, Nazi policies. And, to be sure, their actions were *voluntary*, not carried out at gunpoint.

FASPE begins by studying the *perpetrators*, the professionals who looked like, were educated in the same fashion as, and played the same leadership roles in their society as, today's professionals. How and why did *they* make the transition from ordinary professionals to becoming accessories to or enablers of mass murder? The answer is that it happened day by day, decision by decision, often in the service of ambition and prestige and not ideology.

In FASPE's focus on contemporary ethics in the professions, we do not seek analogies or equivalencies to Nazi Germany. Instead, we seek to display the importance of ethical behavior — even on the "little issues" — and to highlight the leadership role that professionals must play in their communities. We want our professionals to identify ethical issues and to develop tactics to address them.

We hope that the essays in this year's journal display the seriousness with which FASPE Fellows accept their responsibilities. Our Fellows give us reason for optimism as they become ethical leaders in their professions.

On behalf of FASPE, I congratulate the 2017 class of FASPE Fellows and welcome them to our community of over 430 alumni Fellows. We look forward to your leadership.

David Goldman
Chairman

FASPE

FASPE operates fellowship programs for graduate students in professional schools — business, journalism, law, medical and seminary — and early stage practitioners in those professions, which challenge its Fellows to become acutely aware of their responsibilities as respected professionals in their communities and to act in an ethical fashion.

FASPE fellowships are comprised of intense two-week study trips to Germany and Poland where Fellows study the actions and choices of their professional counterparts between 1933 and 1945. Through this examination of the ethical failures of the professions in what was a progressive, modern society, Fellows learn about the critical role that professionals play in society and the consequences of their actions — positive or negative — on the world around them.

FASPE offers a contemporary approach to the study of the Holocaust by focusing on the actions of the perpetrators rather than on the victims. Drawing on the powers of place, the study of history and a rich contextual education, FASPE creates a uniquely effective means for studying professional ethics — well beyond what is achieved by the rules-based approach often seen in the traditional university classroom.

Originally piloted in 2009 and launched in 2010, FASPE marked its eighth year of operation in 2017. A highly competitive program, FASPE accepts only 65 Fellows (12 - 15 in each of the five professions) from nearly 1,000 applications per year. Its faculty is drawn from international Holocaust historians, practicing professionals and leading academics.

FASPE seminars engage Fellows in thinking across several themes, including: defining professionalism; considering a professional's responsibility to the larger society; and the tactics of enacting an ethical decision. Seminars also focus on topics that are discipline specific, such as:

- **Business:** Are there products that simply should not be sold to particular consumers? What are the responsibilities of the C-Suite, or of the corporation, beyond formalistic legal compliance? What are appropriate penalties for corporate wrongdoing?

- **Journalism:** How do journalists balance the costs and benefits of access? What ethical issues arise in political reporting? What challenges arise in fact-checking a victim's story? Does advocacy fit into journalism?

- **Law:** How do attorneys manage duties of candor and confidentiality? What control do lawyers have over decisions that impact a client? Does the duty to a client supersede all other responsibilities?

- **Medical:** What are the ethical issues involved in medical research on human subjects? Should physicians participate in assisted suicide? How should doctors deal with resource limitations in making healthcare decisions?

- **Seminary:** What is the role of religious leaders as ethical, and not just religious, educators? When and how should they address political issues with a congregation? What are the challenges of pastoral care during times of crisis?

FASPE has far-reaching goals. On an individual basis, it seeks to instill participants with a sense of personal responsibility for the ethical and moral choices they make. By extension, it also seeks to have an impact on the professions at large, improving the practices of all business executives, clergy, doctors, journalists and lawyers.

LAW PAPERS

Introduction to Selected Law Papers

The 2017 Law program was taught by Eric Muller, the Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics at the University of North Carolina School of Law, and Susan Carle, a Professor of Law at American University's Washington College of Law, and included 12 Law Fellows from nine different law schools. This was an intelligent and dedicated group of Fellows who engaged in rich discussions about the ethical challenges they will face as lawyers.

Over the course of the two-week trip, this group discussed both the large-scale issues facing the legal profession and the smaller day-to-day dilemmas faced by individual practicing attorneys. Perhaps as important, talk often turned from how to make an ethical decision to how to enact a decision once it has been made, particularly as a young attorney working within the hierarchy of a law firm or government office.

After the trip, the 2017 Law Fellows were asked to submit final papers that explored a contemporary legal ethics issue. The two papers that follow are examples of these final papers and provide a sense of what the Law Fellows took from the discussions that they had on the trip.

In the first paper, Kristin Marshall turns her attention to the American legal system and explores the implications of comments made about Donald Trump by United States Supreme Court Justice Ruth Bader Ginsberg during the 2016 Presidential election. In particular, Kristin focuses on the question of whether Justice Ginsberg should recuse herself from any case involving President Trump's travel ban, given her statements criticizing then candidate Trump. Kristin concludes by examining what types of situations might lead a Supreme Court Justice to recuse him or herself.

In the second paper, Duncan Pickard addresses the ethical challenges faced by lawyers working in international law. As Duncan points out, the fact that international tribunals cannot haul unwilling defendants into court pushes lawyers into the role of diplomats and forces them to confront the fact that winning a case may not necessarily be the best way to solve a dispute. Duncan offers four examples that offer different perspectives on the limitations of the international legal system and asks the reader to consider that sometimes it is more important for a lawyer be a good negotiator than a good litigator.

Together, these papers provide a glimpse into some of the discussions from the FASPE Law trip and also demonstrate how these Fellows build connections between the history of their profession during the Third Reich and the issues facing attorneys today.

My heartfelt thanks and commendation, not only to these authors, but also to the entire FASPE Law group.

Thorin Tritter
Executive Director

Justice Ginsburg and the Ethics of Recusing

BY KRISTIN MARSHALL

"Imagine a prominent federal judge gives a media interview in which the judge disparages a potential litigant. Imagine further that the judge expresses a clear preference for a given practical outcome in potential litigation. Imagine further that these opinions are expressed in strong terms and made repeatedly, over the course of several interviews, and that such comments continue even after the judge receives criticism for the initial remarks. Is there any question that the judge would be obligated to recuse if the anticipated litigation comes to that judge's court? And if that judge failed to recuse, would not that be grounds to criticize the judge's conduct and question that jurist's judgment?"[1]

To some, this is not a hypothetical scenario. United States Supreme Court Justice Ruth Bader Ginsburg's comments leading up to the 2016 presidential election regarding Donald Trump's fitness for office shocked many Americans, lawyers and legal ethicists — on both sides of the aisle. This paper will detail Justice Ginsburg's comments, their potential impact on a prominent case before the United States Supreme Court and the ethical considerations around a possible recusal.

Justice Ginsburg's Comments

By most accounts, Ginsburg made extraordinary — some would say, shocking — comments in the lead up to the 2016 presidential election. Contrary to decades of well-accepted practice, Ginsburg aired her political opinions during this recent election cycle.[2]

In a July 7, 2016 interview with the Associated Press, Ginsburg responded to an inquiry about what she would do if Trump won the presidency as follows: "I don't want to think about that possibility, but if it should be, then everything is up for grabs." The next day, in

[1] Jonathan H. Adler, "Justice Ginsburg Fails an Important Test of Judicial Ethics," *The Washington Post,* November 7, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/07/justice-ginsburg-fails-an-important-test-of-judicial-ethics/?utm_term=.2e696023375b.
[2] David E. Weisberg, "Opinion: Ginsburg Should Recuse Herself from Trump Travel Ban Case," *The Hill,* June 5, 2017, http://thehill.com/blogs/pundits-blog/the-judiciary/336364-more-opinions-more-problems-why-the-notorious-rbg-must.

an interview with *The New York Times,* Ginsburg said that she couldn't "imagine what this place would be — I can't imagine what the country would be — with Donald Trump as our president. For the country, it could be four years. For the court, it could be — I don't even want to contemplate that." She then referred to something she thought her late husband would have said, "Now it's time for us to move to New Zealand." Three days after *The New York Times* interview, Ginsburg told CNN that then-presidential candidate Trump was "a faker. He has no consistency about him. He says whatever comes into his head at the moment. He really has an ego. ... How has he gotten away with not turning over his tax returns? The press seems to be very gentle with him on that." She said that she thought it funny at first, but "[t]o think there's a possibility that he could be president." She also weighed in on the issue of Trump disclosing his income tax returns.[3]

The criticism and backlash from these comments was nearly immediate. As *The Guardian* reporter Megan Carpentier noted, "Even Dahlia Lithwick, the senior legal correspondent at Slate, expressed surprise that Ginsburg would weigh in on a Trump presidency in 2016. 'With an election pending? Wow.'"[4] Presumably, as Carpentier implies, Lithwick would have otherwise agreed with Ginsburg on the substance of her views.

Trump called for Ginsburg's resignation via Twitter. Even *The New York Times,* known during the campaign for being openly critical of Trump, expressed its views that Ginsburg had gone too far.

As a result of the criticism she faced, Ginsburg pulled back on her earlier statements. "On reflection, my recent remarks in response to press inquiries were ill-advised, and I regret making them," she said, "Judges should avoid commenting on a candidate for public office. In the future I will be more circumspect." Shortly thereafter, she described her comments as "incautious." When asked if she had made a mistake by expressing these opinions, Ginsburg remarked: "I did something I should not have done. It's over and done with, and I don't want to discuss it anymore."[5]

But Ginsburg continued to face criticism when she opted not to attend President Trump's February 2017 Address to the Joint Session of Congress — an address made by a newly elected president, equivalent to the State of the Union address made annually after the first year in office. Ginsburg had attended all of President Obama's State of the Union addresses. Many critics noted that her decision to forgo attending President Trump's speech was "deliberate," intending to send a message as to her political disagreement with the President. A month later, Ginsburg told *The Washington Times* that the US was not

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[3] Charlie Dunlap, "Why Justice Ginsburg Should Recuse Herself from the Travel Ban, and Why Ban Supporters Might Not Want Her (Updated)," *Lawfire,* June 26, 2017, https://sites.duke.edu/lawfire/2017/06/26/why-justice-ginsburg-should-recuse-herself-from-the-travel-ban-cases-and-why-ban-supporters-might-not-want-her-to.
[4] Megan Carpentier, "Was Ruth Bader Ginsburg Wrong to Weigh in on Trump?" *The Guardian,* July 12, 2016, https://www.theguardian.com/law/2016/jul/12/ruth-bader-ginsburg-donald-trump-election-ethics.
[5] Dunlap, "Why Justice Ginsburg Should Recuse Herself."

"experiencing the best of times" under President Trump. She also said "[s]ome terrible things have happened in the United States but one can only hope that we learn from those bad things."[6]

The Current Case

Shortly after taking office, President Trump issued an executive order that temporarily banned visitors to the US from Iraq, Iran, Syria, Yemen, Libya, Sudan and Somalia. The administration claimed that this 90-day stay would allow it to review and strengthen immigration vetting procedures. Many opponents to the ban believed, however, that it amounted to one based on religion and that it was a fulfillment of Trump's campaign promise to ban all Muslims from immigrating to the United States. There was a strong backlash to the ban, both in the US and abroad. Multiple lawsuits were filed, and several federal district courts put the travel ban on hold. The Trump administration then issued a "watered down" version of the travel ban, which the US Supreme Court permitted to take effect, subject to certain limitations.[7]

On June 26, 2017, the Supreme Court also announced that it would hear oral arguments on the travel ban.[8] That same day, 58 Republican members of the US House of Representatives called for Ginsburg to recuse herself from the case. The letter stated, "[t]here is no doubt that your impartiality can be reasonably questioned; indeed, it would be unreasonable not to question your impartiality. Failure to recuse yourself from any such case would violate the law and undermine the credibility of the Supreme Court of the United States."[9] Fifty-seven men and one woman signed the letter.[10]

It is unlikely that Ginsburg will recuse herself from this case. She took part in the Court's decision to hear arguments on the case while permitting part of the ban to take effect in the meantime. "I would take that as a signal that she is not going to recuse," Michael Moreland, a law professor at Villanova University told *The Washington Post*, "The [C]ourt issued an unsigned *per curiam* opinion, so Justice Ginsburg didn't reveal her personal leanings, but her participation signals she's not likely to step aside." Supreme Court justices feel an obligation to hear a case due to the small number of justices on the Court.

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[6] Dunlap, "Why Justice Ginsburg Should Recuse Herself."
[7] Melania Zanona, "How Trump's Travel Ban Evolved," *The Hill,* July 4, 2017, http://thehill.com/policy/transportation/340559-how-trumps-travel-ban-evolved.
[8] Zanona, "How Trump's Travel Ban Evolved."
[9] Jack O'Brien, "Republican Lawmakers Want Ruth Bader Ginsburg to Recuse Herself from Trump Cases," *Washington Examiner,* June 26, 2017, http://www.washingtonexaminer.com/republican-lawmakers-want-ruth-bader-ginsburg-to-recuse-herself-from-trump-cases/article/2627090.
[10] William Vogeler, "Is RBG 'Bound by Law' to Recuse Herself on Travel Ban Case?" *FindLaw,* June 30, 2017, http://blogs.findlaw.com/supreme_court/2017/06/is-rbg-bound-by-law-to-recuse-herself-on-travel-ban-case.html.

Unlike at lower levels of the court system, at the Supreme Court, there is not a ready replacement to step into the shoes of a recused justice.[11]

Ethical Considerations

US law requires any "justice, judge or magistrate judge of the United States" to disqualify himself when, *inter alia*, the judge's "impartiality might reasonably be questioned" or when the judge has a "personal bias or prejudice concerning a party."[12] But, it is unclear whether this statute or even the general ethics code governing most US judges binds US Supreme Court justices. In 2011, Chief Justice John Roberts wrote that while the justices do consult the ethical code, "the limits of Congress's power to require recusal have never been tested ... [T]he individual Justices decide for themselves whether recusal is warranted." He continued to state that he had "complete confidence in the capability of [his] colleagues to determine when recusal is warranted" but admitted that there is "no higher court to review a Justice's decision not to recuse in a particular case." He went on to say that, "the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case." Short of impeachment, there are no other restraints on Ginsburg. Of course, Congress may act. In fact, some members of Congress have introduced legislation that would bind Supreme Court justices to the judicial code of ethics.[13]

While the debate as to whether Ginsburg should recuse herself will likely continue beyond the Court's issuance of an opinion in the case, most everyone agrees that Ginsburg herself will have to make the decision as to whether to recuse herself. Voluntary recusals are not rare. But, motions for recusal are unusual. Here, however, a party to the case did not make the recusal request. There is no rule prohibiting interested groups from requesting recusal, but, as Charles Geyh, a professor at Indiana University Maurer School of Law–Bloomington, commented when interviewed for an article on the website FindLaw "the [C]ourt is understandably loath to permit the disqualification process to be hijacked as a tool for interest groups to target disfavored judges."[14]

Ultimately, this is a question for legal ethicists. Some say that Ginsburg should recuse herself given the hostile nature of her statements regarding the Trump administration. Some say, specific aspects of the arguments under the Court's review indicate that she should recuse herself. Still others argue that there would be a stronger case for recusal if President Trump were a named party. The last camp of commentators does not see a problem with Ginsburg weighing in on the case. Of course, the ultimate question is

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[11] Alex Swayer, "House Republicans Demand Ginsburg's Recusal from Trump Travel Ban Case," *The Washington Times*, June 28, 2017, http://www.washingtontimes.com/news/2017/jun/28/ruth-bader-ginsburgs-recusal-from-donald-trump-tra/.
[12] Disqualification of Justice, Judge or Magistrate, 28 U.S.C. § 455 (2012).
[13] Dunlap, "Why Justice Ginsburg Should Recuse Herself."
[14] Vogeler, "Is RBG 'Bound by Law' to Recuse Herself on Travel Ban Case?

whether Ginsburg can, as Robert Tuttle, a law professor at George Washington University, asks, "give the president's policy a fair hearing . . . [put another way], whether it effectively makes [her] incapable of judging the case independently."[15]

The first group of commentators argues that it is impossible for her to be impartial. Since she has expressed her clear opposition to the election of Donald Trump, any "vote to strike down a Trump policy would be under a cloud."[16] In response, some argue that only Ginsburg, or any other similarly situated judge, can determine whether he or she is capable of impartiality.[17]

Some argue that the nature of the arguments at the Court of Appeals should disqualify Ginsburg from the case. The Supreme Court will be reviewing the Fourth Circuit's opinion to strike down the travel ban. In its majority opinion, the Fourth Circuit found that Trump's reason for issuing the travel ban was "provided in bad faith, as a pretext for its religious purpose." The Fourth Circuit noted that, while President Trump stated he was acting to protect the public, in fact, the ban was to punish Muslims. This conclusion was based on Trump's campaign speech — the same speech that Ginsburg criticized in 2016. Recall that, during the election, Ginsburg labeled Trump a "faker" who "says whatever comes into his head at the moment." As one commentator stated, "[w]ith that history, no rational person could have a shred of confidence that she will be an impartial judge of whether Pres[ident] Trump acted in good or bad faith in stating his reason for the ban."[18]

Others assert that the argument for recusal would be stronger if Trump himself was a named party since Ginsburg has not publicly commented on the travel ban itself.[19] In 2004, then-US Vice President Dick Cheney was involved in a suit before the Court regarding the transparency of an energy advisory committee he led. The suit, *Cheney v. United States District Court*, named Dick Cheney as a party. The Sierra Club, a party to the suit, requested Justice Antonin Scalia's recusal because the two were hunting buddies. But, Scalia refused, stating that while "friendship is a ground for recusal of a justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally not been a ground for recusal where official action is at issue, no matter how important the official action was to the ambitions or the reputation of the government officer."[20] "If that is the precedent, Ginsburg's comments, which don't go nearly as far as going hunting with

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[15] Swayer, "House Republicans Demand Ginsburg's Recusal from Trump Travel Ban Case."
[16] Adler, "Justice Ginsburg Fails an Important Test of Judicial Ethics."
[17] Swayer, "House Republicans Demand Ginsburg's Recusal from Trump Travel Ban Case."
[18] Weisberg, "Opinion: Ginsburg Should Recuse Herself from Trump Travel Ban Case."
[19] "While it seems clear Ginsburg won't invite Trump to her retirement party, she hasn't said anything about his travel ban — yet. Hofstra University law professor James Sample told the National Law Journal that Ginsburg's comments did not specifically address the travel ban, 'Were a case to come before the court that more directly involved President Trump as an individual party, the arguments for Justice Ginsburg's recusal would be stronger than they are here.'" Tony Mauro, "Should Ginsburg Recuse in SCOTUS Travel Ban Case?" *National Law Journal,* June 28, 2017, http://www.law.com/sites/almstaff/2017/06/28/should-ginsburg-recuse-in-scotus-travel-ban-case/?slreturn=20170726165546.
[20] Tony Mauro, "Should Ginsburg Recuse in SCOTUS Travel Ban Case?"

the person who is the named party, would seem to be less" of a ground for refusal, commented Lumen Mulligan, associate dean at the University of Kansas School of Law. It is important to note that Scalia did recuse himself from a different case after he publically criticized a lower court's decision.[21]

Some believe that Ginsburg's comments are not problematic. There are two strains of arguments to support this point. First, several commentators argue that it is no secret that Justices have political leanings and affiliations. "Did anybody think she'd be a Trump supporter? ... I don't think we need to pretend that judges are apolitical for them to be effective," says Scott Lemieux, a professor of political science at the University of Washington, "If no Supreme Court justice is allowed to have a political opinion, then no one should have ruled on Bush v. Gore."[22] Further, other justices have been more overtly political in the past without recusing themselves from particular cases. In 2000, then-Justice Sandra Day O'Connor was criticized after she reportedly said, "this is terrible" at an election-night watch party after Florida was prematurely called for Al Gore, but she did not recuse herself from *Bush v. Gore*.[23] Before joining the Supreme Court in 1965, Justice Abe Fortas had served as a political advisor to then-President Lyndon B. Johnson. Many judges who preceded Fortas were much more politically active than even he was. Charles Evans Hughes, Chief Justice of the Court in the 1930s, for example, had run for president in 1916. And several other justices had sought the vice-presidential nomination during the early-to-mid 1900s prior to being appointed to the Supreme Court.[24]

Conclusion

Under our modern understanding of separation of powers, Ginsburg's comments have caused serious concerns about her ability to impartially judge the actions of the executive branch. The situation raises many interesting legal considerations, but ultimately, absent Congressional action, the decision as to whether to recuse will be up to Ginsburg herself. Assuming that there will be more cases challenging actions of the current administration, it will be interesting to see how the ethical calculus changes depending on the legal issue before the Court.

Kristin Marshall *currently clerks for the Honorable Stephen R. Bough of the Western District of Missouri. She graduated from the University of Virginia School of Law in 2017.*

[21] Swayer, "House Republicans Demand Ginsburg's Recusal from Trump Travel Ban Case."
[22] Carpentier, "Was Ruth Bader Ginsburg Wrong to Weigh in on Trump?"
[23] Aaron Blake, "In Bashing Donald Trump, Some Say Ruth Bader Ginsburg Just Crossed a Very Fine Line," *The Washington Post*, July 11, 2016, https://www.washingtonpost.com/news/the-fix/wp/2016/07/11/in-bashing-donald-trump-some-say-ruth-bader-ginsburg-just-crossed-a-very-important-line/?utm_term=.be3956e42009.
[24] Carpentier, "Was Ruth Bader Ginsburg Wrong to Weigh in on Trump?"

Lawyers as Diplomats

BY DUNCAN PICKARD

Hersch Lauterpacht, the renowned Polish-British lawyer and judge, famously described international law as an "immature" legal system. Lauterpacht made this observation in the context of his pioneering postwar work to promote individuals as subjects of international law and, therefore, capable of protection under the emerging field of human rights.[1] In this brief paper, I hope to call attention to some ethical considerations that international lawyers face when working in such a system.

At the core of the contemporary argument for the immaturity of international law is that it lacks an enforcement mechanism, which has led some philosophers to question whether, without one, international law is really even law. The international lawyer's classic response is that a state's violation of law is penalized through "countermeasures," or proportionate responses by other states acting on their own or collectively, such as economic sanctions or the use of force. It is not hard to see, as many scholars have pointed out from the right and the left, how this definition of international law can be circular, or how it privileges the interests of powerful states over weaker ones.[2] If international law cannot be enforced except by strong states and only when it is in their interest to do so, the argument goes, then perhaps it does more harm than good.

Notwithstanding the important critique of the uneven application of international law, I believe that concerns about the lack of enforcement mechanisms miss the point about what international law is trying to achieve. In my view, the law that governs the relations between states should aspire to maintain peace and solve transnational collective-action problems, such as climate change, nuclear proliferation or management of the oceans (even consider links between them). International law, then, must be tailored to adopt the correct institutional design for the problem it is trying to solve, to marry form and function.[3] If states do not comply with the legal regime, the problem could be in the institutional design, or it could be that a state calculates that the benefits of non-

[1] Philippe Sands's outstanding new book describes Lauterpacht's efforts and those of his contemporaries. Philippe Sands, *East West Street: On the Origins of 'Genocide' and 'Crimes Against Humanity'* (New York: Alfred A. Knopf, 2016).
[2] *See,* e.g., Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).
[3] *See* David D. Caron, "International Courts and Tribunals: Their Roles Amidst a World of Courts," *ICSID Review: Foreign Investment Law Journal,* 26 (Fall 2011): 1-13.

compliance outweigh the costs. In an iterative game of transnational collective-action problems, describing a state's conduct as legal or illegal raises the cost of non-compliance. In this way, there is a critical element of diplomacy in the work of international lawyers — in planning their litigation strategy, they have to consider not only how they can win a judgment but how they can get the other side to comply if they do.

What are the ethical responsibilities of a lawyer in such an international system? More specifically, should lawyers consider the effect of bringing a case on the international legal system as a whole, even if they calculate a decent chance of winning before an international court? What should lawyers do, for example, when they are sure that they will win but that their adversary will not comply? In physics, an observer effect is the impact that simply looking at an experiment has on its outcome, such as by casting light waves on extremely sensitive particles, which is at once the only way to see them and a sure way to knock them off course.[4] In the delicate world of international affairs, simply calling attention to even a manifest violation of international law can distort the underlying politics with ripple effects on the conflict itself and international dispute resolution as a whole, as I will try to show in the examples below.

I will discuss several cases that involve interstate negotiations over how to settle a dispute. Because international courts cannot haul unwilling defendants into court, states must negotiate their consent to the jurisdiction of a court or tribunal before they can present the merits of their case. The process of negotiating jurisdictional clauses can have a profound impact on the underlying disputes and the ability of states to resolve them. Furthermore, the problems that states confront under international law are often quite complex, even if the question they agree to present to the tribunal is narrow; resolving only the narrow question while leaving the others unsettled can destabilize the situation. The stories below highlight the diplomatic roles that lawyers play in negotiating jurisdiction and compliance. I describe four conflicts, two of which were resolved through negotiating the states' consent to jurisdiction, and two in which disputes around jurisdiction deepened the conflict. I conclude with some lessons from these cases about the ethics of lawyering and diplomacy in interstate disputes.[5]

Resolving Conflict? The Iran–United States Claims Tribunal and the Taba Arbitration

Extensive negotiations *before* a case is filed have resolved countless international disputes. This section discusses two ways in which such negotiations over jurisdiction

[4] *See* Laurence H. Tribe, "The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics," *Harvard Law Review*, 103 (November, 1989): 1-39.
[5] The fascinating ethical challenges of state representation — starting with the law professor's favorite brain teaser, "who is the client?" — intersect with my framing of lawyers as diplomats, but for the sake of space I will largely leave these issues aside.

have helped to resolve the underlying conflict, allowing lawyer-diplomats to preempt the question of how to ensure that parties will comply with a later judgment.

First, negotiations over jurisdiction can lead to the resolution of a broader dispute between rivals. The Algiers Accords, which established the Iran–United States Claims Tribunal (IUSCT), is an example. The IUSCT was created in 1981 to settle claims arising out of the 1979 Iranian revolution. Before the revolution, the United States had signed hundreds of contracts with Iran, then an ally, to sell it military equipment. When the hostile Islamist regime took power in Iran, the military sales relationship collapsed. This left hundreds of millions of dollars of outstanding claims between the two countries and their citizens: claims both by US companies for breached contracts and expropriated properties, and Iranian demands for the delivery of equipment that Iran had already paid for but not received and the return of its assets — not to mention the issue of the 52 Americans that Iran then held hostage. The United States and Iran had severed diplomatic relations, leaving no forum in which to settle these disputes. The countries worked through Algerian intermediaries to negotiate the Algiers Accords, in which Iran agreed to release the hostages in exchange for the United States' unfreezing of Iranian assets. The agreement also established the IUSCT to settle the outstanding disputes, including many claims for which American companies had already filed lawsuits in US courts. Iran made the release of the hostages contingent upon the transfer of the pending claims to the IUSCT.[6] Negotiations over the Algiers Accords settled a broad dispute by finding diplomatic solutions to deeply vexing problems and referring the narrow issues that remained (about military sales contracts) to the IUSCT.

The success of these negotiations, and the subsequent establishment of the IUSCT, stand in contrast to the judgment against Iran that the United States won before the International Court of Justice. While participating in the Algiers Accords, the United States brought a parallel case against Iran to the ICJ — decided in 1980 — alleging violations of the Vienna Convention on Consular Relations (VCCR) sustained through Iran's attack on the US Embassy and its continued detention of American diplomats.[7] Iran refused to participate in the merits phase of the proceeding and did not comply with the judgment against it, which had ordered that it pay reparations and that it release the hostages. It took the negotiations around the Algiers Accords to resolve the dispute in full.

Second, negotiations of international disputes can provide a platform in which rivals can agree to settle their dispute amicably on agreed-upon terms. The 1988 Taba arbitration,

[6] Soon after taking office as president, Ronald Reagan issued an executive order to suspend these claims in US courts, a move which the Supreme Court upheld in *Dames & Moore v. Regan,* 453 U.S. 654 (1981). In a testament to the urgency of the case, the court issued its decision a mere eight days after it heard oral arguments. Then-Justice William Rehnquist described the need for the president to respond with flexibility to "international crises."

[7] See *United States of America v. Iran* (United States Diplomatic and Consular Staff in Tehran), 1980 ICJ Rep 1.

which concerned a border dispute between Israel and Egypt, serves as an example of this.[8] Egypt disputed Israel's claim to Taba, a small resort town on the Red Sea, and in particular to the hotel that an Israeli company continued to operate there. The dispute arose in the context of the negotiations leading up to the 1979 peace treaty between the two countries, which ended the Yom Kippur War. Abraham Sofaer, then the State Department's Legal Adviser, encouraged the two parties to submit the dispute to arbitration. The three states worked for over two years to develop the consent to jurisdiction, or *compromis*. These negotiations provided a forum in which the three states could then discuss the larger matter of the implementation of the 1979 treaty, and, according to Sofaer, the arbitration "helped the parties prevent the issue from causing a deterioration of their relations."[9] The well-constructed *compromis* contributed to its swift implementation: Israel returned Taba following the ruling against it in 1989, and the parties have retained diplomatic ties ever since.

Deepening Conflict? *Philippines v. China* and *Nicaragua v. United States*

The cases discussed above demonstrate the effective use of negotiations and well-crafted arbitration agreements to provide for comprehensive settlements to international disputes. By contrast, arbitrations that fail to provide comprehensive or sustainable agreements can deepen conflict. The lesson here is that lawyers should consider how different approaches to conflict resolution, including arbitration and litigation, can make a lasting settlement more or less likely.

Take the recent example of the arbitration between the Philippines and China over disputed territory in the South China Sea. The arbitration, administered by the Permanent Court of Arbitration in The Hague, hinged on the interpretation of historical treaties between the two countries and interpretations of the word "rock" under international law. But the case was *really* about environmental degradation, military superiority and control of one of the world's most important shipping lanes.[10] China lodged a perfectly reasonable challenge to the tribunal's jurisdiction and refused to take part in any phase of the arbitration.[11] China, then, had no say in the constitution of the tribunal. The eminent

[8] "Case Concerning the Location of Boundary Markers in Taba Between Egypt and Israel," *Reports of International Arbitral Awards, Volume XX* (United Nations, 1988): 1.
[9] *See* Abraham D. Sofaer, "Adjudication in the International Court of Justice: Progress Through Realism," *Records of the Association of the Bar of the City of New York*, 44 (1989): 462, 466; *see also* Abraham D. Sofaer, "The Role of Arbitration in Political Settlement: Taba and the Egypt/Israel Treaty of Peace, *Houston Journal of International Law*, 39 (Spring 2017): 263.
[10] For background on the case, see "China's Maritime Disputes: A CFR InfoGuide Presentation," *Council on Foreign Relations*, https://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#!
[11] A position paper that China published online, but did not formally submit in the arbitration, argued that the case involved questions of national security which did not fall under the scope of the UN Convention on the Law of the Sea.

experts on the tribunal turned to, among other sources, the *Oxford English Dictionary* to solve a case with global implications on national security and trade. The mismatch was striking.[12] China unsurprisingly has refused to comply with the decision, and Rodrigo Duterte, who was elected president of the Philippines after the decision was handed down, has distanced himself from it.[13]

The approach of the Philippines in the South China Sea case stands in contrast to the approach of the three parties in the Taba case. Boundary disputes are the paradigmatic case of a legally narrow question with tremendous consequences. In the Taba case, the parties worked for two years to drill down the precise question at issue and to resolve the surrounding questions that would not have been appropriate for presentation to a tribunal; in the South China Sea case, the Philippines pursued litigation even when the other party signaled from the beginning that it would not appear before the tribunal.

Paul Reichler, the lawyer who represented the Philippines in the South China Sea case, has, according to *The New York Times*, made a career out of "defending David against the world's Goliaths in international court."[14] He got his start by representing Nicaragua in a case against the United States before the ICJ in which the Court ordered that the United States pay Nicaragua reparations for its support of the *contras* during the rebellion against the Sandinista government.[15] The United States at first agreed to participate in the tribunal to contest the case on jurisdictional grounds, but after the ICJ agreed to hear the case, the United States refused to participate and has, to this day, not paid the judgment ordered against it. Even worse, the United States subsequently withdrew its assent to the general jurisdiction of the ICJ over all future cases, meaning that states that wish to bring a case against the United States must first obtain consent from the United States.

On the other side of the ledger, *Nicaragua v. United States* represented a significant moment for the ICJ: for the first time, it rendered a judgment in favor of a small state against a large one. The case bolstered the credibility of the court as a forum in which states can seek neutral justice, an important quality for the advancement of international law. Furthermore, the judgments against the United States in the Nicaragua case and

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[12] The tribunal proceeded through an extremely close analysis of "several textual elements [in Article 121(3)] that merit consideration, including the terms (a) 'rocks', (b) 'cannot', (c) 'sustain', (d) 'human habitation', (e) 'or', and (f) 'economic life of their own.'" See *The Republic of Philippines v. The People's Republic of China* (The South China Sea Arbitration) 2016 Permanent Court of Arbitration, 205. The tribunal turned to ask whether Article 121(3) was "intended to apply only to features that are composed of solid rock or that are otherwise rock-like in nature." Citing the *Oxford English Dictionary*, it concluded that the "dictionary meaning of 'rock' does not confine the term so strictly" as to limit it to features composed of solid rock, and that "rocks may 'consist of aggregates of minerals ... and occasionally also organic matter ... They vary in hardness, and include soft materials such as clays.'"

[13] *See* Abraham D. Sofaer, "The Philippine Law of the Sea Action Against China: Relearning the Limits of International Adjudication," *Chinese Journal of International Law*, 15 (2016): 393.

[14] Jane Perlez, "Defending David Against the World's Goliaths in International Court," *The New York Times*, July 16, 2016.

[15] *Nicaragua v. United States of America* (Military and Paramilitary Activities in and Against Nicaragua), 1986 ICJ Rep 1.

China in the South China Sea case place these states' conduct in a legal framework and allow the international community to talk about state actions as being in violation of international law. International law thus provides a normative framework for discussing state behavior within a diplomatic context. The table is now set for a debate (which I will defer to a later time) about whether the benefits of judgments against non-compliant states like the United States and China outweigh the costs of their non-compliance on the specific conflicts to which they are party and to the integrity of international law as a whole.

Conclusion: An International Lawyer's Ethical Duties

The complexity of securing compliance with international law — even with judgments by its highest courts — highlights the role of lawyers as diplomats as well as litigators. Lawyers cannot rely on the power of international courts to enforce judgments that they have won, even unquestionably, on the merits of the case alone. Negotiating the consent to jurisdiction therefore is crucial and, as discussed above, can even help resolve underlying disputes.

More importantly for our purposes, the genuine limits of international law — or, rather, the conditions required to make international law effective — raise questions about the appropriate role of lawyers in helping to resolve these disputes. As seen in the South China Sea arbitration, lawyers should be aware of the challenges of enforcing even a sweeping victory for their clients and of the impact that a particular case can have on the ability of the international system to ensure compliance with international law in the future. There are no easy answers to these questions, and perhaps, like Zhou Enlai's (perhaps mistranslated) view in 1968 on the success of the 1789 French Revolution, it might be "too soon to say" what effect these important cases have on the international legal system as a whole.

Fundamentally, these questions are the same that Lauterpacht struggled with throughout his career: how to promote justice in an incomplete legal system. In approaching this enduring difficulty, I draw inspiration from his commitment to changing the international legal system for the better, principally by recalling that all forms of law should exist to promote the wellbeing of individuals.

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