

2015

Denis Mukwege

Recipient, 2014 Inamori Ethics Prize

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Message from the Editor

Shannon E. French

Inamori Professor in Ethics and Director,
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Here at the Inamori International Center for Ethics and Excellence, we are committed to providing a variety of open and respectful forums, bringing diverse voices and perspectives to the table to explore the most urgent questions in ethics, from how to end conflicts to the nature and source of rights to the responsible development of new technology to the just distribution of society's goods. We also teach and discuss topics in ethics to and with a broad range of audiences and conduct abstract and empirical research on ethics and ethical leadership in both its practical and theoretical aspects. This *International Journal of Ethical Leadership* is an essential part of our efforts to contribute to the advancement of ethical leadership, locally and globally.

The Inamori Center was founded in 2006 at Case Western Reserve University through a generous gift from Dr. Kazuo Inamori and the Inamori Foundation of Kyoto, Japan. Since 1985, the Inamori Foundation has presented the prestigious Kyoto Prize—Japan's highest private award for “those who have contributed significantly to the scientific, cultural, and spiritual betterment of humankind,” in the categories of Basic Sciences, Advanced Technology, and Arts and Philosophy. Inspired by this example, the Inamori Center at Case Western Reserve University has, since 2008, presented the annual Inamori Ethics Prize, which recognizes an individual who has demonstrated exemplary ethical leadership on the global stage, making lasting contributions while trying to improve the condition of humankind.

These are the first eight recipients of the Inamori Ethics Prize:

- Dr. Francis Collins, leader of the Human Genome Project and current Director of the United States National Institutes of Health (2008)
- The Honorable Mary Robinson, former (and first female) President of Ireland, former U.N. High Commissioner for Human Rights, and founder of the Mary Robinson Foundation for Climate Justice (2009)

- Mr. Stan Brock, conservationist and founder of the health care nonprofit Remote Area Medical (2010)
- Advocate Beatrice Mtetwa, Zimbabwean human rights lawyer and defender of social justice (2011)
- Dr. David Suzuki, Canadian environmentalist, author, award-winning broadcaster and documentarian (2012)
- Mr. Yvon Chouinard, American entrepreneur, leader in Corporate Social Responsibility (CSR) and founder of Patagonia, an outdoor clothing and gear company committed to ethical and sustainable practices (2013)
- Dr. Denis Mukwege, physician and women's health and rights advocate in the Democratic Republic of Congo and international activist against sexual violence (2014)
- Prof. Martha C. Nussbaum, renowned Philosophy scholar and global expert on ethics, human rights, moral and political theory, education, social equality, emotions, feminism, and ancient Greek and Roman philosophy (2015)

This issue of our journal includes transcripts from the 2013 Inamori Ethics Prize events, as well as insightful essays from scholars, students, and practitioners of ethical leadership from all around the world. You will also find a case study in global corporate ethics, originally published in the *Harvard Deusto Business Review*, describing the inspiring philosophy-based turnaround of Japan Airlines led by Dr. Kazuo Inamori. We are also pleased again to present transcripts of the public radio program *Talking Foreign Policy*, which airs on the NPR affiliate WCPN in Cleveland, Ohio and is hosted by Case Western Reserve University Professor and School of Law co-Dean Michael Scharf. This program features a roundtable of experts examining the ethical, legal, and social issues associated with current international events and the implications for world leaders shaping foreign policy.

As Dr. Kazuo Inamori reminds us, “human beings have no higher calling than to serve the greater good of humankind and society.” To answer this calling, we must attempt to discern what the greater good is and how we can best serve humankind and society. This is no easy task. Thank you for taking the time to join us in the struggle to grasp what ethics demands of each of us in whatever endeavors we choose to engage.

The Responsible Economy

Yvon Chouinard

Transcript of 2013 Inamori Ethics Prize Speech

Well, on behalf of my partner and wife, Linda, and fifteen hundred employees of Patagonia, I gratefully accept this award.

I gave a talk at the Ryman Auditorium at the Grand Ole Opry one time—that is nowhere near as elegant as this!

I am going to try to take you through a little odyssey of where Patagonia has been and where it is going in the future. I was making clothes for about twenty years before I really learned how to make clothing. It started one day when we opened the store in Boston and we put in all the clothing in the springtime, and a lot of it was sportswear, and within three days the employees were complaining they were getting headaches, and so we closed the store down, brought in a chemical engineer. He said, “Oh, you’re poisoning your employees.” He said, “The problem is, your ventilation system is recycling the same air,” and I said, “Oh, okay.” If I was a normal businessman, I’d say, “Don’t tell me about the poison, just fix the ventilation system.” But I said, “Well what’s the poison?” And he said, “Well, it’s formaldehyde, and it’s on all your cotton clothing.” I said “What?” He said, “Yeah, all your stay-press, wrinkle-free cotton clothes have got this chemical on it called formaldehyde. In biology class, you’ve got dead lizards preserved in there and stuff,” I said, “Oh my God, I had no idea.”

And that’s when I realized I had no idea how to make clothing; all I did was call a fabric supplier. He would come by with books on fabrics, and I’d say oh, I like this shirting; give me 10,000 yards of that—never questioning what went into making that product. And you know, formaldehyde I found out, is one of the eighty thousand chemicals used in America, of which only three hundred have been tested to see whether they are toxic or not, and this one finally, last year the FDA admitted that it causes cancer. And it is still being used in hair salons to straighten hair, so I thought, you know, I don’t want to be in business if I’m doing stuff like this, and so that led us to ask a lot of questions.

And we questioned what fibers are safe to use, what are we doing? And so we started educating ourselves and we found out that industrially grown cotton is probably the worst product to be making clothing [with] because it uses 25 or 23 percent of the world's pesticides, even though it only uses 3 percent of the world's farmland. It uses chemicals similar to Agent Orange that we sprayed on Vietnam in order to defoliate the plant[s]. The story goes on and on and on how bad it is.

So I took all our employees, every single one, and we went to Central Valley in California where they grow a lot of this stuff, and it was a dead zone. In fact, we got sprayed by crop dusters. There was nothing alive there, and I thought oh my God, you know, I don't want to ever make a cotton product if we have to do this, and thankfully there was an alternative, although it did not exist at the time, which is organically grown cotton.

So we had to convince farmers to grow it, in some cases we had to cosign their bank loans because the banks wouldn't give them a loan if they grew organically. So anyway, we had to start this whole thing out, and that one question led to another question.

How about dyes? Are dyes toxic? We didn't know, we just bought dyed goods. So then we had to find out whether dyes are toxic. There are polyester dyes, there are nylon dyes, there are cotton dyes. Some are toxic; some are not. So, you know, by educating ourselves we were able to make more responsible decisions. And you know, in some cases we were using nontoxic dyes, but some colors were still toxic, so we did not use those colors. And this whole examination of our supply chain has gone on for years and years. You can look it up on our website, and it'll give you a good idea how far we have gone with that. It goes all the way to calculating how much water is used to make a T-shirt. I forgot the number, but it's astronomical. And water isn't just water; you have to keep digging deeper because it makes a difference whether that cotton was grown in an area that has rainfall or in an desert area where they dammed up some rivers and irrigate, or an area that they pump water out of fossil water that is million years old and will never be replenished, and so by educating yourself you are left with information that you can use and that's what we have been doing.

We pretty much cleaned up as much of our supply chain as we possibly can now, except we still are buying supplies from gigantic fiber companies and things like that, which we cannot really change their behavior, we are way too small, but we are trying to get together with other like-minded

companies to change the way they do business. But we still have a long ways to go with that.

So our mission statement is to make the best product, cause no unnecessary harm, and we are well on our way to doing the best we can there.

The third part of our mission statement is to use business to inspire and implement solutions to the environmental crisis. Well, we discovered that we cannot save this planet by ourselves. And so we sort of came out of the closet and we started talking about the things that we are doing so that we can influence other companies and, as it turns out, we have. My book, *Let My People Go Surfing*, has now been published in twenty languages, including Bulgarian, in case there are some Bulgarians out there. The latest one is Russian. And so it has really influenced a lot of companies to the point where my friend Rick Ridegeway, who is head of our environmental department, was at a big conference of Fortune 500 companies, I mean these are the Unilevers, these are the largest companies in the world, and there were all the environmental directors, so-called sustainability directors of these companies, all talking about how they are greening their supply chain, how they are doing all these fantastic things to make their companies more responsible. And it sounded great except my friend leaned over to the guy from Google, and he said, “Hey, if all of these companies are doing all this great stuff, how come we are still destroying the planet?” The guy from Google said, “It’s growth. It’s the elephant in the room that nobody wants to talk about.”

I just read a book about energy written by an Englishman, and he was talking about the energy use in England and he said, okay you guys, you want to substitute fossil fuel with all green energy. Here’s what that means: okay, we’ll take 10 percent of England and we’ll put in wind turbines. We’ll take 20 percent of the total country and we’ll put in solar panels. We’ll take five thousand kilometers of the coastline and we’re going to put in tidal power and wave power, and we’re going to dam every river and we’ll have hydropower and we’re going to put in nuclear reactors. At the end, there will hardly be room for people, we still will not be able to replace fossil fuels. So what does that mean? Just continue with fossil fuels? For me, it means we have to use less. And you know, if we’re using up the resources of one and a half planets right now, worldwide, Americans by the way are using up seven times, and by 2050 when my granddaughter is going to be thirty years old, thirty-five or something, whatever the math is, I’m not very good at math, we’ll be

using up the resources of being three and a half and five planets. I just got the latest World Watch Institute book, which keeps track of where we are in this world right now, and they said we're on track to have a temperature rise of 4 degrees Celsius by the end of the century, which is complete disaster for not only nature but humankind. If we started today, they say, and that book was published awhile ago, there is a slim chance that we could keep it down to 2 degrees Celsius, and this is grim stuff, really grim. And so we started the dialog within our catalogs of what would an economy look like that doesn't destroy the planet, and we're asking some smart people to write essays and stuff, and I can't help but think that it starts with a few words; one is simplicity, one is responsibility, one is restraint, one is better technology.

I know of a company that is the most sustainable I've ever heard of. It's a little company in Japan that sells plums. You know, the Japanese eat a lot of pickled plums and plums in every conceivable way, and this little shop only sells plums. And they don't do mail order, they don't do Internet sales, and they probably even when you buy something, they probably total it up on an abacus, which is a really cool calculator. But you know what? They have been in business for seven hundred years. That is sustainability.

And so I thought, well, our next stage of our company is we have to do something about this endless consuming and discarding. That is really destroying the planet. So we have to engage our own customers into thinking twice about whether they need to be buying Patagonia or not. In fact, we came out with some ads in the *New York Times* on Black Friday that said: "Don't buy this jacket unless you need it. Think twice. And if you do buy it, thank you for buying from us than from somebody else, and here's what we promise. We promise that if it breaks, we'll repair it; if you outgrow it, get tired of the color or your kid has outgrown it or whatever, you've gotten too fat, we'll help you sell it to somebody else, and when it's finally completely worn out and you can't do anything with it, give it back to us and we'll recycle it into more clothing." So it forces my company to make things out of fibers that can be recycled. It forces us to make a zipper on a polyester jacket that is a polyester zipper, so that the whole thing can be recycled, and also I don't want to see the stuff coming back, so it forces us to make our clothing so it doesn't wear out.

And in fact, it is pretty cool. I live in Jackson Hole in the summer and these teenage kids are saying, you know the coolest thing in school right now is to wear your parents' old, old Patagonia stuff. The older, the cooler it is. And that's what I want to see. I don't want to see the stuff end up in the

junkyard and Salvation Army store; I want to see it worn. And we're going to help you in repairing your product, we're coming out with a sewing kit, just a little sewing kit you can take with you. It has an awl that you can even sew through leather with and instructions on how to sew buttons and how to use it. We're going to be producing videos on how to repair your own stuff and we're going to help you to kind of be better consumers. I want to do an ad that shows a model with a pair of brand new distressed jeans with holes all over them and slash marks on the photograph, and then next to it is a model with a pair of jeans with patches all over them.

You know, the consumer society is what the problem is. And that's who we are. We're not citizens anymore; we're consumers. The stock market goes up and down according to our level of confidence. All the economic indicators are based on us consuming. Remember after 9/11, W came out and said, "Get out there and shop. We have got to help the economy." That's wrong. We used to say in the 1970s, "He who dies with the most toys wins." Not! Thoreau said, "The more you know, the less you need."

You know the definition of consumer is he who uses up, who destroys, and that's what we are. We can talk about ethical corporations all day long or nonethical [ones]. Corporations make what we tell them to make. We're the start of all of this. And I can tell you that if we have to go back to living in a house of 950 square feet like the average house was in the 1950s, is that going to be horrible lifestyle? I mean, I was raised in a house of that size, a family of six. What I did is I went out, me and my father converted the chicken coup into a bedroom, I had a straw mattress, and that's where I lived, and that was the coolest place for a teenager to live you can imagine.

I know in sports, when you get really good at your sport you simplify everything. And you know the climbs I did on El Capitan that took ten days are now being soloed by guys in their high school gym shorts and they're back before lunch. That's the way sports should go. Not more and more technology. I mean, look at the hunter. He wants to shoot a deer. He buys a high-powered rifle with a big telescope on it and an ATV and he cruises the back roads until he sees a deer, lays the gun on the handle bars and shoots the deer from three hundred yards away. Big deal. Then he graduates, he gets a compound bow and he goes and shoots his deer. And then he goes even further, and he makes his own bow out of wood and knaps his own flint arrowheads and I even know a guy who spears an elk every year. Just like our caveman ancestors, he dresses himself up like an elk, walks into a herd, and pokes it.

So, I mean, my message is I don't think we have to have an impoverished society because we simplify our lives. I don't have the courage, I don't have the gumption to quit flying. I need somebody to tell me, "No, you can't go to Russia next year to go fly-fishing. You have to stay home." That's what has to happen, you know. We can't all sit down and belly up to a sixteen-ounce T-bone anymore. And is that going to be an impoverished life? I don't think so. There was a professor at University of Montana, Professor Powers, who wrote a book and he said, "We only need to spend 10 percent on food to be healthy. We only need to spend 10 percent on clothing to be well-dressed, 10 percent on your house."

We're so over-the-top in excess. I was using the example this afternoon of a banana cutter, which is one of those things you can get in *Sky Mall* magazine. It's a little thing that has wires, you lay a banana on there and you do this, and it cuts it perfect. Well, it replaces a perfectly adequate tool called a knife. But don't stop there: eliminate the knife, just eat the banana.

We all know that government has to do a lot more. Government is probably going to okay the Keystone Pipeline, the world's dirtiest oil, world's biggest environmental disaster, and we're going to run it through our refineries in Louisiana. We should just leave that stuff in the ground. We shouldn't be part of that. If you own stock in General Electric, guess what? Your company—you're an owner—didn't pay any taxes last year. If you own stock in a tobacco company, you're guilty. You're killing people with your product. In fact, you're saying on your package that it's going to kill you.

Right now we have the government we deserve. If we want to have the government that we really need, we're going to have to change the corporations because the government is just a pawn of the corporations. But you know what the Zen master would say? Don't focus on changing the government, don't focus on changing corporations, focus on changing ourselves. We're the addicts. We're addicted to consuming and until we can get up and admit that I am the problem, nothing happens. After *Inconvenient Truth* came out, I asked my close environmentalist friends, what did you think of that? "Oh my God, that was such a heavy film." "I had no idea how far along we are with this global warming." And I said, "Well, did you change your light bulbs?" "No."

Until we can point at ourselves and say, "I am an addict," we are not going to change. And if we can change ourselves, corporations will change, and so government will follow.

2013 Academic Symposium Transcript

Participants: Bud Baeslack, Shannon E. French, Yvon Chouinard, Patrick Conway, Michele Hunt, and Chris Laszlo

BAESLACK: Ladies and gentlemen, good afternoon. I'm Bud Baeslack, Provost and Executive Vice President at Case Western Reserve University. It is my pleasure to welcome you this afternoon to the 2013 Inamori Ethics Prize Academic Symposium. Joining me on stage today are Shannon French, Director of the Inamori International Center for Ethics and Excellence, Yvon Chouinard, the recipient of the 2013 Inamori Ethics Prize, and our distinguished panelists, Chris Laszlo, Michele Hunt, and Pat Conway. Please join me in welcoming our panelists.

Today we mark the sixth presentation of the Inamori Ethics Prize. We are here because of the vision and generosity of Dr. Kazuo Inamori and the Inamori Foundation, whose generous endowment created the Inamori International Center for Ethics and Excellence at CWRU and the annual Inamori Ethics prize. We are delighted that Mr. Toyomi Inamori, the Senior Managing Director of the Inamori Foundation, could travel from Kyoto, Japan, to join us this afternoon. Traveling from Japan with Mr. Inamori are key representatives from the Inamori Foundation and the Kyocera Corporation. We are very grateful to have you here to share this academic symposium with us.

I would also like to acknowledge our title sponsor, the Callahan Foundation, along with all of the other generous sponsors and community partners. You will find a complete list of these benefactors in your program. Their investment in the Inamori Ethics Prize Ceremony and the Center is attributed to our shared values and speaks to the importance of ethical leadership across our community.

In addition, we are delighted to have with us today students from several local high schools including Montessori High School in Shaker Heights, Cleveland Heights, Laurel, Hawken, University Center, and others, as well as members of our own global ethical leadership society called GELS. Thank you for being a part of today's events.

This symposium will be a panel discussion to explore ethical issues related to the work of this year's Inamori Ethics Prize recipient, Mr. Yvon Chouinard. Let me introduce our panelists to you, beginning with our 2013 Inamori Ethics Prize Honoree.

Yvon Chouinard has built a hugely successful outdoor clothing and gear company that is a model of ethical business. Business journalist Crystal Lutz describes Chouinard as the pioneer in corporate social responsibility. A dedicated climber, Mr. Chouinard taught himself blacksmithing so he could create the gear he needed and start a business, Chouinard Equipment, which became the largest supplier of climbing hardware. However, when he realized that the use of his products was harming the environment, he introduced new aluminum shocks that would not harm the rock. This was the first major business decision he made on behalf of the environment. It revolutionized rock climbing and led to the further success of the company. Chouinard founded Patagonia, Inc. in 1972. With Patagonia, he has been innovative in the quest to protect the environment, even when it hurt the company's bottom line, consistently shutting off profitable products for the sake of the environment. His goal is to create the best quality with the least impact, and Patagonia has become a leader for the industry to emulate. For example, Chouinard committed Patagonia to the use of pesticide-free cotton, spurring the creation of the organic cotton industry in California. Chouinard instituted the Earth Tax, giving 1 percent of Patagonia sales to grassroots environmental organizations, totaling millions of dollars, and cofounded 1% for the Planet in a conservation alliance. Chouinard is also committed to employee wellness, making Patagonia an outstanding place to work. The company provides healthy food, on-site daycare, flexible work schedules, and financial incentives for employees to work on local environmental projects. Distinguished journalist and author Tom Brokaw said of Yvon Chouinard, "He walks the walk more than anyone else I know in American business."

Joining Mr. Chouinard on our panel today is Patrick Conway. Mr. Conway is co-owner and founder of Great Lakes Brewing Company, a flourishing Cleveland business that has been an example of strong sustainable design for a quarter of a century. Along with his brother Dan, Pat has been a leader in the industry by establishing sustainable operations that support efficiency and profitability. Great Lakes Brewing Company, established in 1998 as the first brewpub and microbrewery in Ohio, employs smart green strategies, including the use of organic ingredients, biofuel vehicles,

energy-efficient design, and waste of food models that have set an example both locally and globally. Raised by Irish immigrant parents, Pat received his undergraduate degree from Loyola University and earned his master's degree from the University of Chicago.

We are also joined by Michele Hunt of DreamMakers, who is an internationally known catalyst and thinking partner to leaders of organizations and communities on leadership development, organizational transformation, and organizational effectiveness. Michele works with leaders and their teams to help transform their organizations to higher levels of participation, teamwork, and performance. Her work is rooted in the principles of shared vision, values, alignment, and continuous learning. Michele launched her firm in 1995. Her clients have included the leadership teams of IBM, Motorola, the Bright China Management Institute, BHP of Australia, the U.S. Veterans' Administration, [the] Food and Drug Administration, the National Parks Service, and many other major US and international organizations.

And rounding our panel today is our own expert in sustainable business and flourishing enterprises, Dr. Chris Laszlo. Chris is an associate professor, teaching sustainability, strategy, and organizational behavior at the Weatherhead School of Management here at Case Western Reserve University, where he is also the faculty research director of the Fowler Center for Sustainable Value. He is the coauthor of *Embedded Sustainability: The Next Big Competitive Advantage*. His earlier books include *Sustainable Value*, and *The Sustainable Company*. His work over the past decade has helped launch mainstream management approaches to sustainability for value and profit. Chris is also the managing partner of Sustainable Value Partners, a sustainable strategy consulting firm he cofounded in 2002. In 2012, he was selected a top 100 thought leader in trustworthy business behavior by Trust Across America. His forthcoming book in 2014 is titled *Flourishing Enterprise: The New Spirit in Business*.

We are pleased that you all have joined us today and hope you will take this opportunity to listen and engage our panelists on issues of business ethics and corporate social responsibility that concern and affect us all.

At this time, I turn the program over to Dr. Shannon E. French, the Inamori Professor in Ethics, who will moderate today's panel discussion. Thank you.

FRENCH: Thank you so much Provost Baeslack. Now I'm going to take the moderator's privilege of beginning the conversation with a set of questions of my own. However, I hope you notice that there are—in

the aisles—microphones. This is meant to be an interactive event, and so after we have gotten the conversation up and rolling for a little bit, I will be inviting you to queue up behind these microphones and we will also entertain questions from you until we run out of time. And by the end you will all hate me for calling time on everything.

So, to begin us in an interesting direction, just for fun, let's start off with a challenge to the entire idea of corporate ethics. In 1970, the late economist Milton Friedman wrote, "The social responsibility of business is to increase its profit," in which he argued that not only are corporations not required to take on social causes and responsibilities, but it's actually inappropriate for them to do so. Part of his argument was that corporations are immensely powerful but unelected entities and they can, therefore, exert undue influence to push their own agendas.

Yvon, we heard in the provost's introduction that you have been called a pioneer in corporate social responsibility. How do you respond to Friedman's charge that it's a misguided idea for corporations to focus on anything other than the financial bottom line? Oh no, I stumped him with my first question.

CHOUINARD: Well, first of all, I'm not a public corporation so I can do anything I want. I don't have stockholders other than ourselves. Friedman would say that you shouldn't be giving any money away from the corporation to nonprofits or to the symphony or whatever. You wait until the stockholders get a dividend and then it's up to them to give it away. I don't believe that's true because I make clothing, I'm a polluter; I am using up non-renewable resources. I encourage our customers to consume and I feel guilty about it. And I feel like part of what we should be doing is giving money back [as] penance, basically. And so I look at our 1 percent that we give away every year not as philanthropy but as a cost of doing business.

FRENCH: Would any of the rest of you on the panel like to follow up on that? I think that's a powerful idea, the idea of penance, that corporations owe something back because they are some of the ones doing the damage.

CONWAY: Well, at Great Lakes Brewing Company, we also adopted the 1% for the Planet. We have a real strong ethic toward taking care of our people and our planet. Our triple bottom line is our social, environmental, and financial bottom line, and I think that what's good about that is that we are trying to ameliorate any environmental damage that making beer might do, but we also are doing actually what our staff asked us to do. We

had a summit, [an] Appreciative Inquiry Summit, three or four years ago and we, since then, [have] it every year. And we asked our staff where have we been, where are we now, and where do we want to go as a company. Dishwashers, brewmasters, sales people, finance people, collectively we all said we need a stronger environmental position, we need to give back more as a philanthropic initiative and so that's what we have done.

When we hire, we hire for attitude and train for skills, so when we are hiring people we are looking for people who share the ethics and share the values, and therefore when you go to manifest your initiatives it's a much easier thing to do because the people you are hiring believe in what you believe.

FRENCH: Michele, I was going to ask you to jump in here because I think you have something to add to that.

HUNT: I served on the leadership team of Herman Miller for thirteen years. I was the Corporate Vice President for People.

FRENCH: Say that again, say that title. That's a unique title.

HUNT: Corporate Vice President for People. But regarding the question, at Herman Miller we were vision-led and values-based and we found it made good business sense to give back to the community. We hired from the community so people would look at our company as a responsible company. Also, communities would come after us to locate our facilities in their cities because of our corporate responsibility policies and decisions. So in the long run, it made good business sense to us. We could hire people, thousands of people were always applying for our jobs, just like you do, Yvon, and we got tax abatements, all sorts of benefits from participating in the community.

FRENCH: Chris, has some of this got to do with how we even understand success in any company?

CONWAY: Yes, I was just thinking that a lot has changed since Milton Friedman wrote that in 1970—in how companies compete.

FRENCH: I was born that year, by the way. So a lot has changed for me.

CONWAY: Well, how companies compete and create value has changed an enormous amount, as well. Back then we didn't have this amount of transparency that exists today, so companies could do things that were harmful to the environment and to society. And it was more difficult for consumers and employees and communities to uncover it if the company was intent on hiding it. But also what has changed a lot is that there really

has been an expectation on the part of consumers and employees and investors that companies are going to have a mission for good; that they are going to be not only not doing harm but that they are part of being a good corporate citizen, and this is important for consumers. We see it in consumer movements in various ways that [have] been measured, and we see it in employees and employee surveys that employees want to work for a company that is seen as being a good corporate citizen. So I think today I would say that companies that do not just focus narrowly on shareholder value as Milton Friedman was saying, but actually do focus on creating good, are finding ways that they can reduce costs. They can differentiate their products, they can attract better employees, motivate those employees more, their reputations become enhanced, and the intangible value of reputation is now much bigger than it was in 1970 across all sectors. So I think there are a lot of good business arguments for why companies that do good do well.

FRENCH: Yvon, let me ask you, do you have any skepticism that some of what companies do that appears to be doing good is for show [and] is to attract that consumer who cares, but it doesn't run enough levels deep? I'm just interested in your perspective on that.

CHOUINARD: Yes, there is a lot of that happening, kind of greenwashing stuff. Chevron gives an environmental prize of \$5,000 to some high school kid back in California and they send the corporate jet out to pick him up [to] take him back to the headquarters. They spend a million dollars advertising the idea of giving a \$5,000 prize. That's kind of greenwashing. We don't do the 1 percent for that reason; in fact, we didn't say anything about it for years, but then we realized that we weren't fulfilling our mission statement. The third part of our mission statement is to use business to implement solutions to the environmental crisis. So in other words, we want to encourage other companies to do similar things to what we are doing, and by being quiet about it, we weren't doing a very good job. So now, we talk about our 1 percent to encourage other companies to join in. And now we started an organization, 1% for the Planet, and it has twelve hundred or fourteen hundred companies, which all of us together contribute like \$100 million a year to environmental causes, something like that.

FRENCH: I'm interested; you use the language of environmental crisis, and last year in this very venue we had Dr. David Suzuki, our 2012 recipient of the same prize, making the same case that we are at a point of crisis. And I

was reminded of the fact that in Dr. Kazuo Inamori's philosophy he speaks of the importance of that feeling of urgency, that important recognition of emergency, and I'm interested to hear how do you keep that in the forefront of your mind? I'd actually like Pat, if you could weigh in on this. I know at Great Lakes Brewing Company you do a lot of efforts that are for the planet, that are aimed toward trying to address what is an urgent concern environmentally. Can you explain to us, for example, what is zero waste?

CONWAY: Well, the old paradigm of take, make waste is antiquated and not very commonsensical, so we adopted a plan and, first and foremost, I have to say that it all really does start, though, with making award-winning lagers and ales. Really, if we didn't make good beer then all the other things are probably of secondary importance. And last week was our twenty-fifth anniversary and we had a whole gala affair out in front of the brewery on Market Avenue, so for those that were there, thanks for your support, and to those who weren't there, I drank your portion.

The whole idea of zero waste was to say there must be a home for just about everything in your complex. So all the office paper, all the cardboard, all the plastic, food scraps, everything finds a home whether it is in a recycling plant or the food is composted. The barley, traditionally breweries give barley to dairy cow operations, which we do, but we also give [it to] Zoss Bakery. I see Barb over here from Zoss Bakery, and they bake all our gourmet pretzels and breads for our restaurant by using the spent grain. We [also] feed it to worms. We actually spread it out on fields both at Hale Farm, at our farm down the street from the brewery, and it's used as compost. We stew the use of synthetic fertilizers, herbicides, pesticides when we grow food, which comes back to the restaurant. So that beautiful circle of recycling has benefitted our company in the sense that I think our dumpster bill last year for a \$40 million company was like twelve hundred dollars. But what it really has done is get our whole staff much more empowered and excited and inspired. I think our customers and our staff are looking for inspiration, and people want to love things that are true. Like Yvon was saying, it's got to be true. It can't be greenwashing.

FRENCH: To the authenticity, true.

CONWAY: Drawn to the authenticity, and so we do that in an attempt to get to zero waste, and we're not at zero waste, but one thing we're considering is a digest to take the barley and then have it be created into fuel to power the brewery, but we need space that we don't have—but

Mitchell's Ice Cream, we give our low fill beers to Mitchell's and they make a chocolate chip porter ice cream. So instead of sewerage the low fill beer, we found a home for that, and so there [are] probably another hundred initiatives that I could get into, but the whole concept of zero waste is a huge part of what the company's philosophy is. In fact, [at] the Indians games or Browns games or Cavs games, if you ever take our shuttle bus, the fuel is run by our spent restaurant grease from our deep fryers and the fumes smell like French fries.

FRENCH: Well now, Yvon, at Patagonia you actually have a plan now where if I have a Patagonia item that breaks, you'll fix it. Isn't that correct? To try to keep people from just throwing things out or add it to the waste.

CHOUINARD: Yes, we have kind of gone beyond cleaning up our supply chain. I feel like we have gone almost as far as we can go in making our product as responsibly as possible, all the way to knowing exactly how many gallons of water goes into making a T-shirt and knowing what kind of water goes into making that T-shirt. Does the water come from rain? Does it come from an aquifer that is fossil water that is never going to be replenished? Is it coming from a dam that caused a lot of problems? Is it irrigated? So we make the decision to try to grow that, or buy that cotton in places where it rains, which causes the least amount of damage. So I feel like we have gone as far as we can with that.

But in our catalogs we have asked a lot of smart people to do essays on what an economy would look like that doesn't destroy the planet. And basically, we are destroying the planet at a rate that is pretty frightening, and the problem is, no matter how clean we make our product, it is a product that a lot of people really don't need, and so we came out with an ad in the New York Times last Black Friday that said: "Don't buy our jacket unless you really need it." So we're asking our customers to think twice about buying something from us, and if they really need it—great, thank you for buying it from us than from somebody else. If it breaks down, we promise to repair it, and in fact we will help you to repair it. We are coming out with a little repair kit that you can even sew through thick leather with and instructions on how to sew buttons and all of that, to encourage our own customers to repair their stuff, and then when the product is [no longer useful to you], you gain a bunch of weight or your kid has outgrown the product, we will help you find another home for it. So we will be selling used Patagonia stuff online and in some of our stores, and then when the

product is finally completely finished, we will recycle it into more clothing. So we are about 80 percent there being able to do that, in other words, [we] have products made from recycled fibers and recycling all our clothing. So we're trying to close the circle on consuming and discarding.

FRENCH: Michele, I wonder if you could add a thought here about the responsibility of the consumers. Because we are talking about what some companies are doing to try to encourage this behavior, but where does the responsibility fall for consumers and what are the trends that you see there?

HUNT: I am an optimist because of young people.

FRENCH: Well, we have some in the audience. We brought some for you!

HUNT: I see the younger generation as getting it, to the degree that the model of success is no longer pervasively to become a senior vice president of a corporation and have a lot of money and work until you die. The model seems to be, "I want to do good and do well, or do well by doing good." Social businesses are on the rise, by the way. The entrepreneurship young people are pursuing instead of joining corporations—let's get together and create value ourselves and see if we can't make a difference. But also the conscious consumer, the growth of the conscious consumer, is occurring. There is a thing called Apps for Good, applications for good.

FRENCH: Smartphone apps?

HUNT: Smartphone apps where, there's one called Barco, where you can point at a product and it will give you a report card or score card on how they're doing on green issues, how they treat their employees, how much they are giving to the community, by almost any measure, and it's a very, very popular app.

FRENCH: It starts with caring; then there are these tools that allow people that want to be responsible.

HUNT: I believe there's a movement occurring already, and if we could find a way to spread that movement where the conscious consumer—it's up to us how we buy, what we buy, who we buy from—then corporations will change their behavior because they need to get their products sold.

FRENCH: Chris, I'd like to bring you in here because I think you have some language that can help tie together some of what we've been hearing. In your scholarship, you've introduced the groundbreaking concept of flourishing, which is a step beyond mere sustainability. Can you tell us

more about that and maybe how it connects to what you've been hearing so far from your fellow panelists?

LASZLO: Well, [sustainability is] an empty concept in many ways associated with continuity and meeting material needs. While flourishing is a much more aspiring notion, it's one that can inspire and engage people. One way you can think of it is if someone were to ask you how your marriage is going, and you were to say, "Oh, it's sustainable." That probably wouldn't be a very good thing. So, what you would probably like to be able to say is, "Well, it's flourishing, it's thriving." So, the distinction between sustainable and flourishing is the distinction between the world that we all want, which is a flourishing world, and the world in which we just get by in. And frankly, in the corporate universe you find that a lot of companies that are working under the umbrella of sustainability are doing incremental things that are aimed at doing less harm; things like energy conservation or cutting waste, which they should be doing anyway as part of operational excellence. Now, to get to flourishing, this is what I want to propose here as part of the recent work that we've been doing at Case. To get to flourishing, business needs to pay more attention to the well-being of employees or people, not just in material terms but also in emotional and spiritual terms. And in particular, I would like to cite Kyocera Corporation, founded by Dr. Kazuo Inamori, on the belief that commercial success and the spiritual fulfillment of their employees is inextricably linked to being a good corporate citizen. Then we have Great Lakes Brewery and Fairmount Minerals that are two strong regional players that have gone above and beyond what we usually associate with sustainability in terms of their investment in the local community and in terms of their emphasis on [the] well-being of their people and the health and well-being, and creating really a thriving culture. Now, what these companies are finding, and by the way, there are many, many other companies that are starting to go beyond sustainability and business as usual, you know, Google, Timberland, Unilever, big and small, public and private, so I think it's an encouraging thing to see. And what these companies are finding is that by emphasizing the well-being of people in a holistic sense, they are able to have people experience a greater sense of connectedness to purpose and connectedness to who they are, and to other people and to the world around them. And this produces two important things. One is people who feel the sense of connectedness to purpose and to the world around them are more likely to care for the world around them and for future generations. But secondly, if you are in a company that is taking care of you in this holistic

sense, and you feel the sense of connectedness, you are probably more likely to feel loyal to this company and work there in a way that is more authentic, more creative, and more collaboratively; so it's good for business as well.

FRENCH: Pat, I think you wanted to comment here.

CONWAY: Yes, Emerson once said that we should laugh often and love much, and we do that all the time at the brewery. In order to create a creative air about the business, you need to make it light and we laugh all the time, and we party all the time, we celebrate things at a moment's notice.

FRENCH: You're not a grim dreary beer company?

CONWAY: We go on picnics together down at Hale Farm, one to be out in the beautiful countryside outside of Cleveland, and secondly to bring, inculcate our staff more into the idea of the take/make/remake and see how we are using brewery waste to grow vegetables, and then we picnic there. We go to Browns games together, not that that's psychological health, the attempt was for that, but, we go to Indians games. We are going to be coming to the Cleveland Orchestra and the Cleveland Museum of Art because we help sponsor these entities. We want our staff to be closer, to see what these jewels are in their own backyard, but we also have a wellness center for smoking cessation, weight loss, and cardiovascular health. And we are always doing things to encourage our staff to be more of a team, the esprit de corps that comes from working together, but also having fun together. And I don't think enough people talk about having fun in the workplace. For so many people it's a drudgery to go to work, but I would say our staff, I see Mary Lavinia back there and Katie Simmons, I think that they enjoy coming to work every day because they seem to always have a big smile on their face, and I think that comes from letting people smile and do things as a group.

FRENCH: Well, I think this is the appropriate time to bring Yvon back in, because there is certainly a unique climate at your corporation, at Patagonia, and I think there are some parallels to what we were just hearing in Pat's description. Can you tell us more about what is it like to work at Patagonia?

CHOUNARD: You have to recognize that when Friedman gave that quote, times were different. I mean, there were some social clubs. After work you went to the pub, there was a lot more sense of community than there is now. Now people are very isolated in their lives and so a business has a responsibility to do something about that, just like Pat was saying.

And so I want my employees to come to work on the balls of their feet, running up the stairs, can hardly wait to go to work, instead of having that division between work and your family life and work and play. I want to blur all that distinction. And so I want our kids to be at work.

FRENCH: And didn't you innovate childcare on-site way back in the early 1980s when it wasn't being done?

CHOUINARD: Yes, we used to come to work and put our kids in cardboard boxes on the desk. And then one year we got a screamer. So my wife said, "I've had it. Let's start a childcare center." And when we did, we were only one of I think one hundred fifty on-site childcare centers in America, and now I look at those kids that come out of there as our best product because they were raised [by] the entire village. Instead of a kid being raised by a mother at home who is not working and plugs them into the television all day, and when you say hello to one of those kids they hide behind their mothers' skirts, our kids go up and shake your hand, and they're confident. When they do end up going to school, they're the best kids in school. I just got a new granddaughter.

FRENCH: Congratulations!

CHOUINARD: My daughter goes down and nurses her whenever she gets a little buzz from the childcare center and the kid, she's only ten months old, she's with other kids who are one year old and they're walking, and by God she's going to walk. And she's going to walk as soon as she possibly can. So it's a real difference in having people all working and living together than, you know, work is over there, families are over there, sport is over there. That's why, if you're a serious powder skier, when do you go powder skiing? When there is powder snow, right? You don't go next Tuesday at 2:00 p.m. And it's the same with surf, and that's why the title of my book, *Let My People Go Surfing*, is that. You can walk to the beach in Ventura where our headquarters is, and when the surf comes up the place cleans out. Everybody goes surfing. So what? I don't care when you work. All I care is that the work gets done and you do superior work.

FRENCH: So you believe the adage that it takes a village, and you built your own village.

CHOUINARD: That's exactly right. I think that's the responsibility of business these days.

AUDIENCE: My name's Abraham. I'm a business student here at Weatherhead, the business school here at Case. This is directed toward Yvon. You know, in my perspective, buying a Patagonia garment there is an incremental social and environmental benefit versus buying a conventional garment from another larger manufacturer. Patagonia also sells their garments at a premium and it makes sense for the technical apparel, for climbing, and that kind of stuff, but for a normal T-shirt I think, you know, there's that incremental benefit on the world. The people that made that garment got paid fair wages, and everything that the Patagonia has done to make that garment, they have tried to source as sustainable as possible. And I think, could Patagonia have more of an overall benefit to society if it was able to produce garments, you know, that were more obtainable, not sold at a premium? And I was just wondering your thoughts on that, if there was any kind of an initiative or some kind of consideration from Patagonia.

CHOUINARD: Well, we're confronted all the time with whether we should use a recycled fiber that isn't as good a quality as a virgin fiber in making our clothes, and in a situation like that we usually bend toward the quality. Because since I'm taking responsibility of those products forever, I don't ever want to see them again. So I'm going to make them as good as I possibly can, so that they can be handed down to the next generation in the kids' products. I know somebody got a hold of me recently that they've had four generations of kids wear that one product. In Jackson Hole where I live in the summertime, the hottest things with high school kids is to wear their parents' old, old Patagonia stuff. And in fact, in Japan there is a huge market for used Patagonia stuff, and I can tell you the price is like ten times the original price. That's what I want. It doesn't do any good to go out and buy a Prius and give your old beater to somebody else, because it does nothing for the environment.

FRENCH: Oops! He knows that because we talked about it at lunch!

CHOUINARD: Actually, the most responsible thing is to drive your beater until it's completely gone and then take it to the junkyard and make it into more product. So that's our philosophy. But in every case that we can, we are really trying to use recycled materials in making new clothes as much as we possibly can, and we're about 80 percent there I think.

FRENCH: Let's take this gentleman over here.

AUDIENCE: I'm Will from Hawkins School High School. All of you talked about individual ways that companies can choose to take responsibility and give back. Great Lakes and Patagonia weren't obligated to do the things that you did. At the same time, government can choose to implement policy that sort of forces companies to take community responsibility. Do you think government should be doing more, that government can sometimes inhibit companies to take action, or do you have any ideas about that?

CONWAY: I think Uncle Friedman would probably say hands off, but I think that there's nothing wrong with asking the government to help activate some of these initiatives, give dollars to help fund various enterprises. It's a tricky slope, because right now we do it partly for magnanimous reasons and partly because it makes good sense, business sense. In fact, right now, in my heart of hearts, I know our customer base supports our company well beyond just the award-winning beer. They like the fact that we do these things, and that younger customer base really embraces it. But I wasn't sure in what particular program you are thinking the government might want to push or initiate or whether it was just a general question.

AUDIENCE: Exactly, yes.

CHOUINARD: You know, I think it's government's job to create a level playing field. And we have never had to deal with—come up to government standards—on anything. We're so far beyond any of that. Right now, we're working with about sixty or eighty multinational corporations around the world to create a consumer-facing index for clothing and shoes and stuff, to where the consumer will have the information they need to make intelligent choices. You'll be able to zap, with whatever electronic gizmo you have in a few years, a pair of jeans and they'll tell you everything about that. And we're doing that as an industry, not through government. Because we feel if government does it, it'll be watered down. It's just like you have to constantly fight to keep the organic standards for food high because government is a pawn of corporations and the corporations are always trying to weaken those laws, so don't expect government to do that job.

FRENCH: Go ahead, Michele.

HUNT: I do believe there's a role for government because if you're talking about the planet, if a company does it here and a company does it here, but the company next door is not doing it, it's going to mitigate the effects of the good company. So I believe that the government ought to be setting

the standards by which we in the private sector have to adhere to, those macrostandards so that we can begin to do something collectively to impact this planet. One other role, as I talked earlier about, Herman Miller would get generous tax abatements to lure us into bringing our manufacturing plants into communities. Well, that's a win-win situation there. That's a role government can actively play in partnership with luring in and giving abatements to environmentally responsible companies, companies that do well by doing good.

AUDIENCE: Good afternoon! My name is Peter. I'm a senior at Shaker Heights High School. First I want to thank the panel for taking time out of their very busy schedules to come and speak with us. I appreciate it.

FRENCH: We appreciate that, too.

AUDIENCE: My question is, so in terms of manufacturing, the torch seems to have been passed from the US to China and now it's rapidly moving over to India. Is it possible to overcome cultural, linguistic, and bureaucratic difficulties inherent within the Indian state so that they may be quicker to recognize and address difficulties of large-scale sustainability?

FRENCH: Let me see if I've got this right, because I can amplify a bit more. What he was asking about is, with so much of manufacturing moving/shifting to other countries; particularly you were interested in India, correct?

AUDIENCE: Yes.

FRENCH: How do we address some of these issues across cultural differences?

AUDIENCE: The linguistic, different dialects, and the bureaucratic difficulties, corruption in India.

FRENCH: In a global market, how do we get some of these themes working, not just domestically but internationally?

CHOUNARD: Well, you know, some of the sewing factories that we work with in Vietnam, Bangladesh, China, you can eat off the floor. And they have showers just like we do so that you can run and go back to work, they have cafeterias with healthy foods. I mean, it's a village and it's not a sweatshop. And in return, we give them business, and steady business. It's not like every year we look for the cheapest factory that'll make our Polo shirt, and so [on].

FRENCH: You commit to a factory that has good practices in the first place.

CHOUINARD: Yes, we go in partnership with these factories. And it's pretty amazing. They're doing a really, really, really good job, and they're paying higher than average salaries. Our responsibility extends not only to not using toxic materials in our clothing, but also labor practices. And in fact, years back we had to start our own organization, along with Nike, and the Gap, and Levi's, in an organization that goes and polices these factories. And we send our own people to double check, because we don't want to get caught, you know, with our pants down like Nike did.

FRENCH: And you don't have any factories of your own, right?

CHOUINARD: No, we don't own any factories but we can have tremendous influence on the factories that we do use.

FRENCH: Would any of the rest of you care to comment on this? Alright, thank you very much. Over here, please.

AUDIENCE: I'm a concerned citizen is probably the best way to describe it. I have two smaller questions, I guess, if that's okay, one for Pat and then one for Yvon. The one for Pat is, "Do you think that we can use that recycled biomass that you've modeled your company on in a larger scale?" I know that one of the surrounding suburbs in our area, Cleveland Heights, now they have passed a law allowing for chickens in your backyard, which is a totally different concept that I don't think it used in many other cities. Do you think that recycled biomass and natural composting can be applied not only to business but also to civilians and larger areas?

CONWAY: Yes, in fact we do have small amounts of barley that are in fifty-five-gallon drums that do disappear into various neighborhoods throughout the city and, as the brewery keeps growing, we will be about 25 percent this year over last year, so that means many more thousands of tons of barley. So yes, reach out to us and I'm sure we'll be able to accommodate your request.

FRENCH: And Pat, did I gather from your earlier comments that your employees, in learning about the ambition for zero waste at Great Lakes, take that home with them, right?

CONWAY: They take it home and they are inspired by the effort. In fact, we have a beer garden that has a radiant heat floor and radiant heat fireplace and straw bale walls, and the idea behind the radiant fireplace is that the stones pick up the heat and radiate it into the space, and one of our staff found that when we shrink wrap beer, we have these cardboard tubes left

over, and when we make Christmas Ale we have tons of cinnamons sticks leftover. He said, “Well, why don’t we dry the cinnamon sticks, put them in the tubes, crimp the edges, and make logs out of them.” So he took two waste streams and made fuel, and that was such an element, [a] little example of somebody on staff thinking creatively about this.

FRENCH: I bet that smelled good, too.

CONWAY: Yes.

CITIZEN: My other question is for Yvon, and it comes after watching 180 Degrees South, which is movie that I guess was put out in cooperation with Patagonia, and my question is, after watching that, I notice how humble you were just in your general demeanor for being such an important player in outdoor equipment, and my question is do you think that that role in your life as a fly fisherman, as a climber, that those things added to and really are the basis of your company? Because you talked earlier about penance, but I think also that it’s possible that you were really just passionate about those things and that’s what led you, sort of the humbleness in the face of nature, to become so important.

CHOUINARD: I’ve been a student of Zen Buddhism all my life just as a philosophy. And basically, especially the idea of not focusing on the end result, like you know, if you focus on the profits so hard, then you compromise the process. And for me profits happen when you do everything right. If you ask me how much money we made last year, I have no idea. I’m not even concerned with that, or how much I’m going to make this year. I just know that everything is going right and there’ll be profits. And I learned that in climbing, especially like in Yosemite, which is a valley, that you’ll spend ten days climbing a wall and you get to the top and, guess what, there’s nothing there. There are no seventy-two virgins up there. It’s all about the process. And the other thing I learned from sport is simplicity. The more you know, the less you need. It used to be in the 70s that he who dies with the most toys wins. It’s the opposite of that. And, in fact, I think I’m going to talk about this tonight, I’ve gone back to fishing the way I originally started fishing, fly fishing. I start out by going to a hardware store and buying a big cane pole, putting a line on the end and a worm, and that’s how I started fishing. And I’ve gone back to that, except I use a fly now, but no reel, a twenty-foot line, and I’m catching more fish than I’ve ever caught in my life. In fact, I taught a class recently to twenty women and their daughters, and I used this method—it’s called Tenkara, it’s a Japanese

method of fishing. And the outstanding student was a nine-year-old girl who caught seventeen rainbow trout in a day and a half. It's a really good lesson because everyone thinks that if we have to simplify our lives, if we have to go back to living in nine-hundred-fifty-square foot homes like we did in the 1950s that it's going to be a God-awful thing. You know what? It's going to be really satisfying.

FRENCH: Professor Heuer.

AUDIENCE: Hi! I teach in the School of Engineering, and the National Academy of Engineering recently tried to formulate the twenty engineering challenges for the future. And I thought they missed the boat. I think one challenge that engineers can certainly participate in, but we don't have the answers [for], is how we get to a steady state economy. One of the things that I find the real conundrum is [the] growth of a corporation, or growth of any industry, is hailed as a hallmark of success. And in the whole capitalist society we live in, growth seems to be a very valuable attribute. My question is how do we get to a steady state economy and how much growth can the planet stand? I will let any of the panelists answer that.

FRENCH: Thank you very much. Chris, do you want to go first?

CONWAY: Did you want to say something?

CHOUINARD: Growth is the elephant in the room that nobody wants to talk about. And we're using up the resources of one and a half planets worldwide. No matter how green we make our products, it's not sustainable, and by 2050, not very long from now, we're slated to use up the resources of between three and a half and five planets. So we can talk about corporations being responsible all day long; the real problem is there are too many of us consuming too much stuff.

FRENCH: Is part of that that we don't recognize what is enough? Our idea of what makes us happy is not correct? Go ahead, Chris.

LASZLO: I have a little different view on this. First of all, we have to remember that people are usually buying products and services for an outcome that those products and services enable. And it's true that we're moving toward multiple planets that we don't have if we continue the growth trajectory we're on, but you really have to make a distinction between extensive growth and intensive growth. With the current technologies, where to get to the outcomes we want, you are consuming an amount of materials that is to some extent dictated by the technologies and business models that we

have in business today. So you can imagine a scenario in which you have growth continuing for the next fifty to one hundred years, but it's moving increasingly into a growth based on servicing and on meeting, for example, emotional and spiritual and well-being needs that don't require consuming nonrenewable resources at the same rate that we are consuming them. So I think we have to make a distinction. It's not growth itself, which is bad. You have to ask yourself the question, what kind of growth?

CHOUINARD: I would have to add that, yes, the jobs are all in the service industry these days. That's because robots are creating those products that we're still continuing to buy. Robots and technology [are] destroying jobs. We have known that since the industrial revolution. So we haven't let up in our consuming at all.

FRENCH: You know, I think it's interesting; everything old is new again. The very ancient Greek philosopher Aristotle spoke of flourishing and spoke of it in terms of leading a virtuous life, and he also made the point that people who are on the wrong path try to feed the gap, the emptiness inside them, with all the wrong things. So it's never enough, it's always, if I have two boats, I'll be happier, perhaps three boats I'll be happier. Instead of finding happiness somewhere else, and I think both of your points can be understood in a sense, too, of needing to rethink what happiness is, what flourishing is, what success is in a way that doesn't necessarily get more stuff everywhere. Interesting. . . . Over here, please.

AUDIENCE: Thank you very much. My name is Grant. I would like to thank the panel, also, for being so provocative. I really appreciate it. And I'd also like to thank the Inamori family as these have been outstanding programs. Thank you very much. My question, I had many, could have been about buyer diversity, wildness, could have been about living systems, my question is about resolving conflict. What role do you think businesses have in resolving conflict around the world? So much of it is around today. Thanks.

FRENCH: That's an excellent question. Chris, go ahead.

LASZLO: Well, you know, it's interesting you should ask. We have a PhD student at the Weatherhead School who will be defending his thesis in about two weeks on this issue of role of business in mitigating conflict and in contributing to peace, and one of the things he has looked at is using identity theory to show how groups that come from different identi-

ties that are in conflict, when business comes in and creates employment opportunities, groups that come from these different identities to work in the same business suddenly, because they're motivated by the need for employment, because this is about building their lives, their identities can become deconstructed and reconstructed around a shared mission. And so business does have a role for peace in the sense that where you do have business operating across conflict lines, you have this potential to bring people together because they're colleagues and because they're looking for meaningful work and they get to know each other. They get to know each other in dimensions other than the conflict that separated them when they were other, the other group.

FRENCH: Michele, you mentioned earlier about partnerships where, with government help or not, communities partner with corporations. Can that also lead to some conflict resolution in a more local scale, as opposed to the international conflict resolution that Chris is describing?

HUNT: I would build on what Chris is saying, but I would apply it locally. At Herman Miller, we had a shared vision for what we wanted to create together, and it was born out of and rooted in shared values that the employees identified, so we had a highly participative process by which we created a compelling vision of who we wanted to become and where we wanted to go. But it was rooted in deeply held shared values. We ended up engaging our suppliers in the same process so that we made sure that everyone across—it's a global company, at the time it was a Fortune 300 company—so it ended up being that we didn't just include our suppliers and the people inside, we ended up including our stakeholders so that they could be more patient with us by knowing our story and knowing where we wanted to go. When you have a shared vision that transcends nationalities, transcends cultures, and that is aspirational; it does exactly what Chris is saying. People start working toward that macro-shared vision and the conflicts tend to decrease. So I don't know if that's helpful. I would say I do believe business has a responsibility and we saw that play out in apartheid. We at Herman Miller participated in that, and I was a big part of that. We made some very tough decisions, economic decisions, where to do business and where not to.

FRENCH: Forgive the public service announcement, but I'll also add, for those of you who are interested in this topic of corporations and conflict, we actually had a panel conversation about only that in 2010 that is still

available on the website for the Inamori Center. We had some international experts looking at the role of corporations and international conflicts, and I invite you to look up that video of that panel to expand on that point, as well. Over here, please.

AUDIENCE: Hi! My name is Lisa. I'm the founder of Revive. We're a social enterprise based in Cleveland, and we retail fair trade, socially responsible products from around the world. I personally also source and develop product with twenty-eight artisan groups. For that past seven years, we have fought tooth and nail to keep our business open, particularly a brick and mortar retail store, and I am asking the entire panel, what advice would you give to social entrepreneur looking to take their business to the next level in order to get to that state of flourishing.

FRENCH: Who would like to go first? Yvon, do you have advice?

CHOUINARD: No, I don't. I just don't. I just take it one step at a time in my own life and I still don't know what I want to do when I grow up.

FRENCH: Pat, help us out.

CONWAY: We're behind what Patagonia is doing in terms of finding out with whom we do business, suppliers which now are offshore, and we're trying to get better about buying, but we have reached out to local communities to have products available in our store and it's not been a success. Either the product was something that someone didn't find useful or the colors didn't jive or the price didn't match their pocketbook. So I guess, you know, what kind of products are being made is probably the most important thing, I guess right off the bat, is what is it that people are coming to market with and is it viable?

AUDIENCE: Right, and that's where I spend a lot of my energy in the development and design process, so we sell apparel and jewelry, for example everything I have on today, so I feel that the products are very marketable, but I also feel that there is a little bit of a disconnect between consumers who really are dedicated to buying socially responsible and also are willing to pay retail regular price for that. Sometimes we even come across questions of why aren't we a nonprofit and I think what profit are you even talking about? So we come across a lot of hurdles in a lot of different arenas, but I agree that the key is finding the right product. But I think in addition to that, we have always had a lack of funding for branding and marketing that we really need to do to get that mainstream consumer who's willing to spend.

CONWAY: We haven't given up on it. In fact, Katie Simmons is sitting back there and I can see her mind turning around over what other products we should introduce in our store, but just because we had some failures doesn't mean we have given up on it.

FRENCH: Chris, you wanted to jump in I believe.

LASZLO: Just to say you know, of course you have to have the right products. You have to eyeball the business fundamentals, right, but I think in the kind of social venture that you're in, there's an interesting shift you might consider between marketing based on what and how, and instead marketing based on why, so that what people will come to you for is because they feel that they share the same beliefs that you share. There's, by the way, a very interesting YouTube video on this by a fellow called Simon Sinek. He speaks about this over just a very short amount of time. It's been seen by well over 2 million viewers, so I would suggest you have a look at that—Simon Sinek—and tapping into something different than commercial brands tap into, you know, you're not pushing a product, you're getting them to buy from you because they buy from you because they see you as having the same beliefs that they have.

FRENCH: Can we take our question over here now, and I'm going to say this for all of our remaining questioners, with apologies, we are starting to run down the clock, so make your question as quick and precise as you can so that we can try to get as many of you as we can. Go ahead. Thank you.

AUDIENCE: I'm assuming that your employees are all supporters of the corporate culture you have created, which is a very special one, and I'm wondering what qualities you value most in your employees and management team, and how you recognize or reward that, those qualities that you value most.

CHOUINARD: For every job opening we have, we have an average of nine hundred applications. So we can really pick from people. And the one thing I look for more than anything else is passion. And it doesn't matter what passion it is, it could be for playing the piano or whatever, especially we look for passion for protecting this planet and an outdoor passion because it's easier to teach a person like that business than it is to take a businessman and have them passionate about saving our natural world. And so that's the number one. The other thing is I look for very independent people, so independent that I've had a psychologist say, "Look, I looked at all your employees and

they're so independent they're really unemployable anywhere else because they're not team players." But I look for that independence because they're smart people and if you can build consensus with them, you can't order them around because they'll just do a passive-aggressive response, but you have to build consensus and then they all move in one direction. So I look for independence and that way I don't have to work; I just leave them alone.

FRENCH: There's some method to your madness there. I love it!

AUDIENCE: How is that rewarded? How do you recognize those qualities or measure them, and then, if you will, reward them?

FRENCH: Oh, how is that rewarded? How do you reward independence?

CHOUINARD: Well I try not to manage them. I'm a terrible manager. I don't like anybody telling me what to do and I don't like to tell anybody else what to do, and in fact the business is so complex that I have no idea what's going on there. So they have to be independent. They have to come up with finding what the problems are and coming up with the solutions themselves.

FRENCH: Thank you so much. Over here, please.

AUDIENCE: Hi! My name is Erica. I'm actually a sustainability graduate from Baldwin Wallace and I'm here on an extended lunch break professionally, because I have a real job now, so I'll make it quick. I'm bad at improv, so I wrote it down, but I was recently on the High Line in New York City and I took a picture of the New York City skyline and I caught a Patagonia ad in the background and it was the very same quote you left with us a couple of minutes ago, which is the more you know, the less you need, and I was wondering, because Patagonia is taking a really backward kind of route in marketing their products, do you do market research on whether or not your customers indeed take up those habits, how long do people keep their coats if you're a Patagonia customer, do you wear your clothes to rags, and so in other words, has Patagonia done research on how they are impacting consumer culture through their marketing.

FRENCH: So if you say, "Don't buy this jacket," did they buy it or not?

AUDIENCE: Yes, do they listen?

FRENCH: Back to you, Yvon.

CHOUINARD: Oh, we've had fifty thousand people sign a pledge that they're going to think twice before buying anything. They're going to

become a different kind of consumer. No, we don't do any market research; we just do it seat of the pants. You know, I would love to do a billboard that shows a model with prestressed brand new jeans you know, with holes all over them and stuff, with slash marks on it, and then next to it is another model with jeans with patches all over it. Fashion is an incredibly powerful force and, like I said, I've gone as far as I can, I feel, in cleaning up our supply chain. The third part of our mission statement, influencing other companies, we've done that. Now we have to influence consumers because, you know what, that is the problem.

AUDIENCE: I just want to say my boyfriend got me into Patagonia clothing, and he has a pair of Levi's that he's been wearing for five years and continuously patches them, and I can't help but wonder if the purchasing philosophy is influencing the way he now takes care of his clothes, because he has about five hundred patches on his jeans.

FRENCH: There you go! Now we just need to make that the height of fashion so that responsibility becomes fashionable.

AUDIENCE: People tell him they're very fashionable jeans.

FRENCH: Well I like that! Responsibility as fashionable. Over here, please.

AUDIENCE: Do public companies have a fundamental flaw in that they need to constantly increase their stock prices and does this really prevent them from maintaining social and environmental responsibility, and can this be fixed with the current system we have right now?

FRENCH: I think some of our panelists may disagree on this question, so let's see, Yvon and Michele, I think you have different views on public companies.

HUNT: I 100 percent agree with what you just said, and here's another role the government could take, because what you measure and how you are measured, they're measured on a quarterly basis and there could be a shift, a policy shift, that could impact that. Now, having said that, I did work at Herman Miller for thirteen years and we found ways around that, and we found ways around that by telling our story so passionately that the people in government and other places, and the stockholders believed in Herman Miller so they gave us more time. We would tell them we were going to build energy centers, so we're going to be up in our operating costs and down in our profits this quarter, but that's still very difficult to do in today's environment.

CHOUINARD: I think a company like Herman Miller is very unique. Your average corporation has to grow 15 percent every year because, first of all, they sold you stock at anywhere from fifteen to forty times earnings. You know what that means? It's kind of like buying a house and you're paying forty times more what it's worth because you're hoping it'll appreciate one of these days. And they're selling it to ordinary people who have no idea what's really going on in the company. I mean, I have a friend at Merrill Lynch, very high up in Merrill Lynch, he says, you know, when we recommend buying a stock, we have no idea what's going on in that company. Look how many people were duped by Enron, you know? So it's a basic flaw in the system and I'm completely against public companies. I agree with Robert that there's no way they can be totally responsible.

AUDIENCE: How would you propose companies get funded in the way that they would?

LASZLO: Well, before we move on and write off public companies completely, I think we should see that the market context for public companies has changed. So the radical transparency means that these shenanigans that you know are going on, either on the society side or on the shareholder side, you know, the meltdown that we had in 2007–08 with the banks was an example of shenanigans going on the shareholder's side, right? But we also have a lot of it on the society side. But it doesn't last very long because public companies are open to great scrutiny. Now, public companies are increasingly having to pay attention to environmental health and social factors because their customers want it, regulators want it, communities want it, employees want it, and so on. So I would just give you all one example, okay? There's a company in Minneapolis called Tenant Company. It's a publicly traded company on the New York Stock Exchange. It's almost a billion dollar sales company. And the way they decided to differentiate themselves from the competition and actually create more value than competitors, was to go from a chemical-based approach to a chemical-free approach. So they used innovation to come up with a cleaning technology that uses simple tap water that is oxygenated and then you run an electric current through it, and it provides great benefits to the customer, to the environment, and it's helped this company grow much faster than their competitors. So I think you're going to increasingly see in the future that even the public companies are going to find opportunities to solve global problems, that there's a demand for solving global problems, and that they're being held to account like never

before, and please don't leave here thinking that public companies are it—the wolf figure in our future. I think instead we need to look at new forums, B Corporation is one of them, there are host of standards, as well, that are holding public corporations to greater account.

CHOUINARD: I agree that the strongest force is market forces, and that comes from all of us here. The government is pretty slow in, you know, making us a level, responsible playing field. But when you're presented with five different pairs of jeans and one of them is a two on responsibility and one is a ten, you'll be able to make intelligent choices, and that's powerful, that's really, really powerful.

LASZLO: By the way, can I just add that the jeans world has been rated recently by one of these groups, GoodGuide. They rated 102 jean brands and Patagonia was at the very top, number one.

CHOUINARD: I didn't even know about that!

LASZLO: And just in case any of you might happen to have this brand, the very last of the 102 is Diesel Jeans.

AUDIENCE: I'm Jalen and we're from Citizens Leadership Academy. And we are wondering what is the advice that you want all of us to leave here today with?

FRENCH: Oh, what an excellent final question! What is the advice that you want all of us to leave here with? Is that correct?

AUDIENCE: Yes. To start a business or in general.

FRENCH: Oh, to start a business? That's an important part that I didn't hear.

AUDIENCE: To start a business or in general.

FRENCH: Either one, general advice or to start a business, what do you most want them to take away from this afternoon's conversation?

CHOUINARD: Well, I think if we're going to save the planet, a few words come to mind and the most important one for me is simplicity, try to lead a simple life. So you know, it's the most difficult thing there is to do. Everything in society forces you to become more and more complex until we snooker ourselves into a corner and we can't even move. But we don't have to do that. We can choose to say no to a lot of things like that, and I think as a consumer, instead of buying a banana cutter or buying

anything that you see in *Sky Mall* magazine in the airlines, you know, here's a banana cutter that has these wires and you put a banana in there and you do that, and it cuts it in perfect slices. It does what a knife does perfectly adequately, but don't stop there! Don't use a knife! Just eat the banana! So see how simple you can make your life and I can tell you that it feels pretty good to outwit the whole consumer society by embracing simplicity.

LASZLO: Drink beer!

CONWAY: I would add that maybe it's time to redefine drink beer? We've been here an hour and a half and you finally mentioned that? Maybe just understanding what the definition of success is, and I don't think after hearing the panel here today, I think it's well beyond just the financial bottom line, it's a social and environmental bottom line, and are your employees happy? Are you giving back to the planet? And I think that whole paradigm shift of what success is, is critical and it cannot come at a more perfect time because we are struggling as a planet.

HUNT: I would say, go into your heart and find out what your passion is, and then what gets you up in the morning? When are you most excited? And then create a dream of what you want to do with that passion. So, create a powerful vision that comes from your heart and your head of what you want to do, and hold it up there like a North Star, let it shine brilliantly, but also get very clear of what's important to you, meaning what do you value most? If you put those two things together, a powerful, compelling vision that's born out of your deeply held values, I'll bet you that it will be something. That business first will flourish, and I bet you it will be a business that does well by doing good because that's what resonates when you start with the heart.

FRENCH: Chris?

CHOUINARD: You know, I wish I would have said that!

FRENCH: Thank you so much for giving us such a perfect closing question, although I do again apologize for those of you who waited so patiently and didn't get to ask your question, what a wonderful discussion and I'm so grateful for the engagement that we had in this hall today on these important issues. Now I did want to tell you, as we conclude here, our panelists will be moving to the Business and Community Sustainability Showcase that is in Thwing Atrium and that will also give you some chance to sample some of the efforts around the community on some of these same topics, but also our panelists will be there and you may be able to ask a question

you didn't get a chance to, so that was my promise. And also, I invite all of you to return to Severance Hall at 6:00 p.m. this evening. We will be, at that time, actually presenting the Inamori Ethics Prize to Mr. Chouinard, and he will be delivering a lecture on the Responsible Economy. Now please join me in thanking our panelists one last time.

Denis Mukwege
Recipient of the 2014 Inamori Ethics Prize

Dr. Denis Mukwege was born in 1955, in the country known then as the Belgian Congo (now the Democratic Republic of the Congo). As a child, he often went with his father, a Pentecostal minister, to visit community members who were ill. Inspired to serve, he attended medical school in neighboring Burundi and trained as a gynecologist. He worked in hospitals in the South Kivu region of the DRC, including one destroyed by civil war.

In the late 1990s, Dr. Mukwege recognized a pattern of trauma and devastating injuries in his patients. Women and girls who were victims of vicious sexual assaults were injured in ways that required extreme methods of repair. The damage done extended far beyond the physical, affecting the survivor's family and community as well. Dr. Mukwege describes it as a destructive force, capable of ending any sense of ordinary life: "The perpetrators of these crimes destroy life at its entry point. The women can no longer have children. Often they get infected with AIDS and will spread the disease. Their men are humiliated. So the perpetrators destroy the entire social fabric of their enemies, their communities, their future generations, without even killing the woman. A line has been crossed here, which should have been an absolute taboo. But because those parts of the body are not usually visible, it is not as obvious as other forms of mutilation."

With international support, he founded the Panzi Hospital and the Panzi Foundation in Bukavu, two institutions devoted to healing and rebuilding the lives of women and girls injured by sexual violence.

Dr. Mukwege is recognized as the world's surgical authority in the repair of fistulas and other severe gynecological problems caused by gang rape. The hospital currently has four departments: obstetrics and gynecology, pediatrics, surgery, and internal medicine. Hospital staff are trained by Dr. Mukwege, in collaboration with Harvard Medical School and the Fistula Hospital in Addis Ababa, and he sees an average of twenty patients a day. As of 2013, Panzi hospital had 398 employees and an annual budget of 3.2 million US dollars. The hospital has 450 beds, of which 250 are reserved for victims of sexual violence. Patients who cannot afford the care are treated free of charge.

Panzi Hospital has treated more than forty thousand survivors of rape and the Panzi Foundation has supported many women and girls with psychological services, legal advice, job training, and community building.

In 2012, an assassination attempt on Dr. Mukwege led to the murder of his bodyguard and temporary exile for Dr. Mukwege. Despite the risks for his own safety, he returned to Bukavu and performs up to ten surgeries per day at the Panzi Hospital. In recognition of his devoted service to his community, Dr. Mukwege has been honored by many organizations and governments and his honors include the Sakharov Prize, the Chevalier de la Légion d'Honneur, the Right Livelihood Prize, the UN Human Rights Prize. He was the unanimous choice for the 2014 Inamori Ethics Prize.

Money and the Meaning of Life

Rabbi Richard A. Block

Temple-Tifereth Israel, Beachwood, Ohio

Jack Benny's most famous gag involved a confrontation with a man who accosted him, brandishing a gun, and threatened, "This is a stickup . . . Your money or your life." For two or three minutes, Benny—who often played a comical miser—fidgeted, but did not reply. Finally, the exasperated robber demanded, "Look, bud, I said, 'Your money or your life.'" To which Benny replied, "I'm thinking it over!"¹ In fact, Jack Benny, the son of Jewish immigrant parents, was one of the most generous, charitable people in Hollywood, but his renowned skit points to a deeper truth, that we sometimes cling to our material possessions as if they were as dear to us as life itself.

A prayer from the synagogue liturgy for Yom Kippur, the Day of Atonement, poignantly describes a seemingly insatiable human ambition to acquire material things.

The eye is never satisfied with seeing; endless are the desires of the heart. We devise new schemes on the grave of a thousand disappointed hopes. Like Moses on Mount Nebo, we behold the Promised Land from afar, but may not enter it. Discontent abides in the palace and in the hut, rankling alike in the breast of prince and pauper. Death finally terminates the struggle, and grief and joy, success and failure all are ended. Like children falling asleep over their toys, we loosen our grasp on earthly possessions only when death overtakes us. Master and servant, rich and poor, strong and feeble, wise and simple, all are equal in death. The grave levels all distinctions and makes the whole world kin.²

In George Bernard Shaw's play *Man and Superman*, we find the kindred observation, "There are two tragedies in life: One is not to get your heart's

1. *The Jack Benny Program*, March 28, 1948.

2. *Union Prayer Book* (New York: Central Conference of American Rabbis, 1962), 2:310.

desire. The other is to get it.”³ The notion that getting what we long for can be disastrous is illustrated graphically in the Bible’s book of Numbers. Complaining bitterly about their discomforts, including the monotonous diet of manna, despite its being God-given, the Israelites long for meat and wax nostalgic about “the fish that we used to eat free in Egypt, the cucumbers, the melons, the leeks, the onions and the garlic.”⁴ Such were the real, exaggerated, and imagined hardships of desert life that, in retrospect, slavery seemed like paradise. The people’s base ingratitude and ceaseless bellyaching angers the Lord. Moses, too, is fed up. Turning in frustration to God, Moses professes his inability to carry the people all by himself and asks, “Where am I to get meat to give this people when they whine before me . . . ?”⁵ God responds by sending a storm of quail, inundating the encampment with a torrent of birds that pile up some three feet deep, covering an area two days walk across.⁶ The people gather it and eat until it “comes out of their nostrils” and becomes “loathsome.”⁷ Not surprisingly, a severe plague ensues and many die.

This cautionary tale is reinforced elsewhere in Numbers, where we find words of blessing known to Jewish tradition as *birkat kohanim*, the Priestly Benediction: “May God bless you and keep you! May God deal kindly and graciously with you! May God bestow favor upon you and grant you peace!”⁸ The first phrase, “May God bless you and keep you,” is generally understood to be a prayer for material prosperity. Having this in mind, an ancient rabbinic tradition restates the verse in a strikingly contemporary manner, putting it this way: “May God bless you *with possessions* and keep *those possessions from possessing* you.”⁹ Thus are we taught that it is not only possible, but can be harmful, to have too much of a good thing.

This is a lesson most of us are reluctant to take to heart in twenty-first century America, despite the bracing reinforcement of personal experience. Rarely does our newest possession fascinate us for long. Rather than satisfy our appetite, additional possessions seem to whet it, sending us forth in search of newer, better, more, but coming up empty. We are blessed and

3. *Man and Superman*, act. 4, 1903.

4. Numbers 11:5.

5. Numbers 11:13.

6. Numbers 11:31.

7. Numbers 11:20.

8. Numbers 6:24–26.

9. See the commentary on Numbers 6:24 in J. H. Hertz, ed., *The Pentateuch and Haftorahs* (London: Soncino Press, 1971), ,595.

burdened with more possessions than any generation in the history of the world. Most of us own far more things than we need, put to regular use, or fully appreciate.

Indeed, materialism, narcissism, and workaholism are hallmarks of modern Western secular culture. That culture has also brought us profound and abundant comforts, pleasures, and blessings, above all the freedoms, rights, and liberties that characterize democracy. But freedom becomes license without an accompanying moral code, self-discipline, and a communitarian ethos that emphasizes sharing, conservation, and voluntary limitations on our inherent self-centeredness.

A value system that contends we can “have it all” is spiritually empty; it encourages us to act in ways that rob life of meaning and threaten to leave us with nothing of genuine worth. Work is essential, of course. “Six days shall you labor,” Scripture insists.¹⁰ Work satisfies our need to be creative and productive. It is the source of our livelihood and our capacity to assist others. But when we live to work rather than work to live, when we place the pursuit of wealth and success ahead of family, faith, community, and country, when we acquire too much and share too little, we exhibit the telltale signs of *affluenza*, a chronic, debilitating, soul-sapping disease.

But let me be clear. While there are religious traditions that embrace asceticism, Judaism is not one of them. It makes no virtue of poverty. Rather, it sees it as an unjust social condition we are obligated to alleviate, even if we cannot fully eradicate it. Thus, on the Day of Atonement, the holiest day of the Jewish year, a day of fasting and prayer, we read from Isaiah 58, a text that denounces fasting, with bitter irony, when it is not accompanied by ethically responsible, generous, and compassionate deeds.

“Is this the fast I look for?” God asks, “A day of self-affliction? Bowing your head like a reed and covering yourself with sackcloth and ashes? Is this what you call a fast, a day acceptable to the Lord? Is not *this* the fast I look for: to unlock the shackles of injustice, to undo the fetters of bondage, to let the oppressed go free, and to break every cruel chain? Is it not to share your bread with the hungry, and bring the homeless poor into your house? When you see the naked, to clothe them, and never to hide yourself from your own kin?”¹¹

10. Exodus 20:9.

11. Isaiah 58:5-7.

Yet even as our tradition commands each of us, even the poor, to engage in acts of loving-kindness and righteous giving, it places limits on how much we should give and forbids us to be so generous that we impoverish ourselves.¹² Jewish tradition also holds that we are permitted to enjoy life. A talmudic passage teaches that we are called to account not just for the sins we committed, but for the legitimate pleasures of life we passed up.¹³ I recall a telling conversation, early in my rabbinic career, between a friend who was an Episcopal priest and my wife, Susie, at an annual holiday party we hosted in our home when I was president of the local clergy association. Dessert featured a luscious Black Forest cake. Coming into the dining room for a second helping, my colleague said, with a smile, “This is what we Christians call ‘sin.’” Susie replied, “This is what we Jews call ‘pleasure.’” Until that moment, little had I suspected that Susie was such a profound theologian!

Indeed, the tradition to which she alluded takes things a step further. It holds that if we refuse to partake of life’s pleasures, we are guilty of base ingratitude. It is as if, the rabbis suggested, a king were to invite everyone in the kingdom to a lavishly prepared banquet at the royal palace, the tables overflowing with every manner of delicious and appealing food and drink,¹⁴ and one of his subjects says, “Nah. I’m not hungry.” There is a certain arrogance and ingratitude in refusing to partake of God’s gifts.

Nonetheless, if we forget the second half of the blessing, “May God . . . keep *those possessions from possessing you*,” if we are not careful, the rabbis are warning us, the things we think we own will end up owning us instead, enslaving rather than liberating us. Thirty-five years later, I still recall vividly a moment when this lesson struck me with particular force. I was standing on a California sidewalk, in front of my in-laws’ home. I had given up a promising career in law and Susie, our two young sons, and I were about to depart for Jerusalem for my first year of rabbinical training. We had sold our comfortable suburban house, our two automobiles, and lots of other “stuff.” As the buyer of our second car drove away, I put my hands in my pockets, realized that I didn’t possess a single key, and I felt incredibly free.

Perhaps this should not have come as such a surprise, but I was not yet aware of the teaching of the ancient rabbinic sage, Ben Zoma, who asked

12. Babylonian Talmud, *Ketubot* 68a.

13. Jerusalem Talmud, *Kiddushin* iv, end. See, also, *Jewish Encyclopedia* (New York: Funk and Wagnalls, 1906), s.vv. “abstinence.”

14. Cf. William G. Braude, trans. *The Midrash on Psalms* (New Haven: Yale University Press, 1959), 1:352; “All I have created, I have created for you,” *Midrash Rabbah, Kohelet*, 7:28, Babylonian Talmud, Sanhedrin 38a.

rhetorically, “Who is rich?” His answer was, “Those who are happy with what they have.”¹⁵ How much better off we would be if we could experience fully the pleasure of what we already possess, if we did not need a thing until we already had it. Even better, if we were to align our values and priorities with what really contributes most to happiness and meaning in life: good health, loving relationships, honest work, supportive communities, and helping others.

Recognizing that our values are formed in childhood and that parents are their children’s most impactful teachers, Jewish tradition urges us not to spoil children or accustom them to a pampered existence.¹⁶ Rather, by word and example, we should help them learn to enjoy life’s simple pleasures, understand and accept limits, value what they have, and share with those in need. This is, by no means, an easy task. Today’s children are bombarded from every direction with distorted value messages and subject to many influences beyond parental control. We must fight back.

My first full-time congregation was in Greenwich, Connecticut, a very affluent community. Soon, our two young sons were under the misimpression that everyone in town except us was “rich.” Susie and I were mortified and worried. From then on, when one of the boys used the word “rich,” we would ask, “Do you know the Jewish definition of rich?” Or, “Are they happy with what they have?” This mantra rapidly became as tiresome to our kids as did quail to our ancient ancestors, but they got the message. They are now adults and parents in their own right, and I hope and pray that they will never use or hear the word “rich” without remembering its true meaning, and where they learned it.

Ultimately, the issue is one of balance. As the famous, first-century rabbi Hillel, taught, “If I’m not for myself, who will be for me? If I’m only for myself, what am I? And if not now, when?”¹⁷ If we’re not for ourselves, who will be? No one. Utter selflessness would be a kind of saintly foolishness, even self-destructive. But if we are unconcerned with the well-being of others and only look out for ourselves, what are we? Vain, self-centered jerks. And if we don’t strive for a healthier alignment between serving ourselves and caring for others now, when will we do so? Tomorrow? Can we be sure we’ll have one?

15. *Pirke Avot* (Sayings of the Fathers) 4:1.

16. Babylonian Talmud, *Hullin* 84a.

17. *Pirke Avot* (Sayings of the Fathers) 1:14.

The truth of human existence is that life gives us no guarantees. We are not promised good health, long life, prosperity, success, or happiness. What life gives us is a series of todays, each of them a precious, irrecoverable gift, an opportunity to give and receive love, to bless the lives of others, to make a lasting difference for good. If we're fortunate, we'll have many todays. We'll never have a single tomorrow.

Thus, we read in the Talmud, "Rabbi Eliezer would say, 'Repent one day before your death.' Asked his disciples, '[Do we] know on which day [we] will die?' Said he to them, 'In that case, we should repent today, for perhaps tomorrow we will die; hence, all our days are passed in a state of repentance.'"¹⁸ I don't take Rabbi Eliezer to mean that we should live our days in regret and self-reproach, but rather, introspectively, not putting off essential deeds of love, healing, kindness, forgiveness, justice, generosity, and compassion, thinking there will always be another opportunity to do them, when there's no assurance that will be so.

In Jewish tradition, repentance is more than feeling regret for our failures and shortcomings and trying to make amends to those whom we've hurt. It is an active, ongoing process of improving one's character by means of reflection and resolution, developing habits of mind and action that allow us to grow and transcend ourselves. Our ancient rabbis were well aware of the complexity of human nature. While they were hopeful about human possibility, they understood that human perfection is a noble, but unattainable goal. Therefore, they urged us to harness even our lesser attributes in service of good. They viewed human beings as having two fundamental and conflicting drives, which they called *yetzer ha-ra* and *yetzer tov*, "the evil inclination" and "a good inclination."

As it turns out, the so-called "evil" inclination is more akin to ego or ambition. Were it not for that inclination, they said, people would not have children, build homes, or create businesses.¹⁹ In other words, actions we undertake to gratify our personal needs often benefit others as well. The sages explicated the biblical verse, "You shall love the Lord with all your heart, your soul, and your might," in a similar vein, understanding the Hebrew word *me'odecha*, "your might" to mean possessions.²⁰ Thus: "You shall love the Lord, your God, with all your heart, your soul, and your possessions." While ambition and acquisitiveness are not inherently

18. Babylonian Talmud, *Shabbat* 153a.

19. *Genesis Rabbah*, 9:7.

20. Babylonian Talmud, *Berachot* 61b.

praiseworthy, the material resources we obtain honestly and share generously are a way to express love for God. What could be more meaningful?

With respect to *how* we gain money and possessions, the Talmud tells us that the first question God will ask when calling us to account for our lives is, “Did you conduct your business affairs with integrity?”²¹ Israeli economist and professor Meir Tamari elucidates this theme in his book, *With All Your Possessions: Jewish Ethics and Economic Life*,²² whose purpose, he writes, is to provide “authentic Jewish answers to the challenge of wealth.” For much of the past two thousand years, Jews lived in semi-autonomous, self-governing communities where every aspect of life, including economic activity was governed by Jewish law. There emerged what Tamari calls

[A]n ethical and moral framework...introducing nonmaterialistic considerations, a unique social structure, and distinctive role models, which together tempered and restrained the excesses of more egotistic economic activity...This framework sought to sanctify man’s everyday actions in this field, in exactly the same way as it introduces holiness into the domain of other basic needs like sex, food, [and] shelter....Man’s economic desires are...legitimate, permissible, and beneficial, but restricted, educated, and sanctified by observance of God’s commandments.²³

Consequently, such seemingly secular subjects as weights and measures, fraud, misleading sales practices, payment of debts, employer-employee relations, intellectual property, negotiating practices, corporate and individual liability, competition, interest rates, prices and profits were seen as inherently religious. The fundamental spiritual principal that undergirds this framework is that all property, all wealth, belongs to God. As Scripture puts it, “the earth is the Lord’s and all that it holds.”²⁴ It follows that we are not the owners, but the custodians of what we possess. Thus, both the source of our means and our use of them are matters of ultimate significance.

In his profoundly moving book, *Man’s Search for Meaning*,²⁵ written largely while an inmate in Auschwitz, psychoanalyst Viktor Frankl argues that our

21. Ibid., *Shabbat* 31a.

22. Meir Tamari, *With All Your Possessions: Jewish Ethics and Economic Life* (Northvale, NJ: Jason Aronson, 1998).

23. Ibid., pp. 1, 3–4, 29.

24. Psalms 24:1.

25. Viktor Frankl, *Man’s Search for Meaning* (New York: Washington Square Press, 1959).

deepest human need is not for power or other kinds of gratification, but for meaning. But he contends that the question, “What is the meaning of life?” is a meaningless one. Why? Because there is no universal meaning applicable to everyone. The most profound question of human existence, Frankl held, the question each of us must address, is “What is the meaning of *my* life?” And the answer is not something we discover, but something we create. It is the product of our choices.

A meaningful life is about making choices—choosing between good and bad and between less and more worthwhile, between important and unimportant, between ordinary and extraordinary. From a religious perspective, these choices are grounded in the affirmation that we live on in many ways after our physical death. We live on, if we are blessed with progeny, in our children and grandchildren and great-grandchildren and in the generations yet to come, who inherit our values and carry our very essence in their DNA. We live on in the memories of those who knew and cherished us. We live on in acts of goodness, compassion, and justice we perform, leaving a lasting impact on the lives of others. We live on in the actions others perform when they are inspired by our example. We live on in the causes and institutions in which we invest our passion, time, effort, and money, and which are larger, more significant and more enduring than our fleeting, perishable, sometimes lonely and bewildered selves. And we live on, we hope and pray, in the loving embrace of God who gives us life, both temporal and eternal.

In offering these assurances, religious traditions provide more than a perspective on mortality and immortality. They provide an agenda for living wisely and well: devoting ourselves wholeheartedly to family, faith, community, and country; performing consistently the deeds by which we want most to be remembered; doing our utmost to set an example we hope others will emulate; investing our precious lifetime in things that truly matter, that make a difference, that last, that endow our lives and those of others with purpose and meaning.

Edna St. Vincent Millay was surely right. We cannot hold the world “close enough.”²⁶ And as Rabbi Milton Steinberg reminded us, the things we value above all are never truly ours. We are privileged to enjoy them for a time, but they are and have always been “a loan due to be recalled.”²⁷

26. Edna St. Vincent Millay, “God’s World,” in *Renascence and Other Poems* (New York: Harper and Bros., 1917).

27. Milton Steinberg, “To Hold with Open Arms,” in *A Believing Jew: the Select Writings of Milton Steinberg*, ed. Maurice Samuel (New York: Harcourt Brace and Co., 1951).

Mortality teaches us both the art of embracing and the art of relinquishing all that matters most. The tension between embracing and relinquishing is a paradox embedded in the nature of existence itself. Thus, even as we hold life precious, we must prepare to let it go. Our aspiration, in Steinberg's words, is to "clasp the world, but with relaxed hands," to "embrace it, but with open arms."²⁸ In the process, we create, experience and enhance the meaning of our lives.

28. Ibid.

Case Study

Disruptive Philosophy: A Turnaround Artist with a Heart

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As Ishiro Tanaka¹ left the train and walked to the hanger, he felt something odd. He was not excited to spend time with his engines. Yes, he felt the jet engines on which he worked were “his” engines. He loved to hear them sing a song as they hummed. Like a shadow over his heart, in recent weeks, he had been feeling less eager to be at work. The airline was in trouble and he suspected that any day he might be laid off. But perhaps today would be a moment of change, and his feelings would return to the excitement he used to feel coming to work.

After changing into his work clothes and getting his tools laid out for his first preventative maintenance, an activity at the other end of the hanger caught his attention. People were gathering, and he said to himself,

1. This is a composite story, based on the experience of more than one JAL employee. With the exception of Dr. Inamori and senior leaders Mr. Oota and Mr. Nishizawa, names and some details were changed to preserve confidentiality. Stories are from interviews with JAL employees and representatives that were conducted by phone and in Kyoto and Tokyo, Japan, by Drs. French and Bilimoria. The core principles of Dr. Kazuo Inamori's management philosophy presented here, including the Twelve Management Principles, can be found online and in all of Dr. Inamori's major publications. They are also included in Chapter Two, “Have the Right Attitude,” of the *JAL Philosophy Handbook* and “The Reprimanding Methods of Kazuo Inamori,” from *President*, March 18, 2013.

“Oh no, here comes the announcement!” Instead of an announcement, a striking man walked up to a group of the mechanics and began talking. One of his friends whispered that this was Kazuo Inamori, the new CEO of Japan Airlines. Inamori was asking his friends questions about their maintenance tasks. He seemed genuinely interested in how often they did each task. Ishiro lowered his eyes and slightly bowed when Inamori asked him how he knew when a task was done well. In almost a whisper, Ishiro said the engine sings to me. Mr. Inamori smiled and said that was better than karaoke, and everyone laughed.

Ishiro Tanaka was experiencing the arrival of a new CEO and a new brand of CEO—an ethical turnaround artist, someone who led by the heart not the budget. When we think of turnaround leaders, images of tough, no-nonsense executives come to mind, like Al Dunlap (aka Chainsaw Al), who see the world in purely financial terms. In more recent eras, whether as venture capitalists or private equity providers, the turnaround executive is known for cutting the workforce, selling off assets, and stripping the company. Seldom would we think of concepts like ethical leadership, caring for and including staff and customers, and emotional sensitivity as part of a turnaround. It is a rare turnaround leader who leads simultaneously from the head, heart, and soul. Kazuo Inamori is just such an ethical turnaround artist, and he has proved it more than once. He uses philosophy as a disruptive innovation.

On February 1, 2010, Kazuo Inamori made a speech to the management of Japan Airlines (JAL), a legacy carrier that had fallen into bankruptcy in the wake of post-9/11 airline industry decline and the global economic downturn. “I would like to manage this company just for the employees,” he said, “not for the government or the shareholders.” This powerful statement provided a glimpse of the philosophy behind the sweeping transformation that Inamori planned to undertake, as he answered a call from the Japanese government to step in and save JAL. Although he was technically in retirement, Inamori was sought out for this seemingly hopeless task because of his remarkable track record of building strong companies based on shared vision and authentic, values-driven, transparent leadership rooted in the deep appreciation for and empowerment of employees at every level within the organization. The Inamori philosophy and amoeba management style had previously established and sustained the success of international corporations Kyocera and KDDI.

While some would double down on goals and metrics, focus efforts, and cut costs to return to profitability, Kazuo Inamori did something different.

He focused on people and the customers and believed that if you do this, profits will come. This is not a new philosophy. Some family businesses have been doing this for generations, like the J.M. Smucker Company, and have used it to grow their businesses into multibillion dollar enterprises.

But this was different. Inamori used his philosophy as a disruptive innovation from the way things were done in big business, in Japan, in the airline industry, and in failing companies. Like the national culture in Japan, in the airline business, stress and hierarchy rule. The airline industry is fighting for survival worldwide *and* in Japan. Like Japanese culture, the airline industry is known for its status distinctions—there is a pilot and a copilot, a first officer, a chief flight attendant, etc. —a very clear hierarchy. Amid this hierarchy, Inamori believed they should focus on the people who provide the service. Herb Kelleher, Rollin King, and Colleen Barrett did something similar with Southwest Airlines in the United States and changed an industry. Most formerly or currently nationalized airlines were not having this type of success in adapting.

Turnaround with Soul

The troubled JAL that Kazuo Inamori was handed suffered from many practical challenges, including a poor corporate structure with a bloated middle management tier, the siloing of units, ineffective internal communication, and inefficient operations characterized by wasted or misdirected resources and frequent duplication of effort. Beyond this, there was an overarching issue of low morale, a sense of helplessness in the face of external pressures on the airline industry, and the complete lack of a clear identity for the company.

Some of the existing JAL leadership even believed that airlines should not be required to be profitable at all: that providing air travel was a service, like the postal service, that ought to be subsidized and protected and certainly not asked to compete in the marketplace. JAL had a leadership crisis as well as the rest of their troubles.

Into this space came Inamori, asserting determinedly that JAL must be made profitable and that the first step that had to be taken was for the entire company to adopt and train deeply in a consistent management philosophy with the ethical value at its core that every decision should be made based on an altruistic answer to the question, “What is the right thing to do as a human being?”

It Starts with Training

Kazuo Inamori had an established reputation throughout Japan (and elsewhere around the world) as a highly successful and inspirational business leader, so there were certainly many among the ranks of JAL employees who listened with hope and open minds to his plans to remake the corporate culture of the company. However, not everyone was so receptive. In order for the changes he planned to enact to take root, Inamori had to break down the hierarchical organization that had characterized JAL, flatten the organization, imbue a sense of personal responsibility throughout the ranks, and make individuals at every level feel invested in the success of the company.

To accomplish this, he took a remarkably hands-on approach that shattered the usual rigid status and role barriers found in Japanese business culture. For example, in his introduction statement, Inamori shared sayings from sages and philosophers that focused on profound goals like happiness and leading meaningful lives. JAL's executives were in shock. One executive voiced his opposition, saying, "What you said makes no sense!" Another executive icily retorted, "Recoveries aren't found in idealism!" A third asserted, "JAL isn't a slogan-posting kind of company. From now on we can post a large number of posters, but it's just about pointless. Plus we don't have the money to make posters." Another senior manager said, "You won't make any progress" and immediately pressed Inamori to revoke what he had just said.

Yet, Inamori remained unfazed by the discord. He had drinks with managers at JAL and invited them to "let their hair down" and speak frankly about their concerns about the future of JAL and feelings about whether the company's problems could be fixed. He wanted his interactions to be more than a typical karaoke night out with executives. He engaged the doubters one-on-one, answering their questions about how his reorganization idea, improvements in accounting techniques, and training in corporate values could lead to a turnaround for the airline.

In the first memorable drinking get-together, Inamori threw his hand towel at a nay-saying executive. As this executive explained later, "I feel proud to have been strongly reprimanded by Inamori. Although it was something that happened while we were drinking, the next day when we saw each other, I felt it was still awkward, but it wasn't anymore when he called out and greeted me. With this sort of attitude from the top of JAL, I regained my conviction. I'm going to give my honest views on things. I still haven't forgotten when I

felt that. There was that, and one other time I'll never forget. Once a month (on the 3rd), we'd have a progress report meeting (Inamori brought all the executives and all the section chiefs in to attend these meetings) and before we started he bellowed, "Are you bystanders?" He was definitely taking this all seriously. There had never been a boss like this in JAL who would be so passionate that his face would turn red."

At that get-together, Inamori was also confronting some internal and external criticism that he was too "pro-labor." One executive said to Inamori, "You are wrong, because you are focused on being for the good of the employees, which means that you're too pro-labor. I warn you, do not trust the employees." Showing his commitment to his philosophy, Inamori demanded, "Why can't you trust your employees? They will never trust you, if you don't trust them."

Inamori personally took part in executive level training programs and met with employees at all levels. Training sessions also included videos of Inamori explaining his philosophy. He encouraged all JAL employees to think about how to raise profits and cut expenses and to share their ideas and suggestions—even down to everyday changes around offices, such as bringing coffee mugs to work instead of using disposable cups and taking notes instead of making copies of papers. This made employees feel both individually empowered and accountable to one another, and "this transparency and active communication with their colleagues led to a strong sense of unity."

One executive remembers leaving one of the leader training meetings shaking his head. He could not believe a CEO, someone independently wealthy and beyond retirement age, would spend his time with others in these detailed discussions. Yet, as Managing Director Yoshihito Ohta, who came from Kyocera with Inamori to help turn around JAL, described: "Truth be told, at the outset of the leader training, there were many executives who wanted an outside lecturer to come. It seemed to be a common thing in the past. I had said time and time again—at Kyocera we developed our own lecturers. One's own company should build one's company culture. If JAL doesn't build JAL's culture, it won't take root." Inamori, in this training "dojo," like in so many formal and informal meetings, in offices, on the hangar floor, and behind ticket counters, had begun to model the emerging culture passionately and from his heart.

He was not always soft spoken or gentle about his message. In one such exchange, an executive argued with Inamori about the necessity of JAL turning a profit, insisting that their role was merely one of providing public

transportation. Others agreed, even suggesting that they should fear profitability, because “if we make a profit, people will ask us to do more, make more demands on us.” Inamori became very frustrated with this jaded, civil servant-type attitude (likely a product of when the company had been government-owned, before the 1980s) and challenged the executive to try to think instead from the perspective of JAL employees who would never be able to enjoy job security and “peace of mind” unless the company provided the stability that came only from sustained profitability. He reprimanded the executive and others at the company for having too much concern for their own comfort and not enough for the overall health of the organization, saying that “in self-interest, there is no room for altruism,” and “that the company did not have people who would work desperately for the employees.” Inamori told all the managers that they had to have genuine care for JAL’s survival—that they could not merely “be bystanders” and allow the company to fail. He framed this as an ethical obligation.

In June of 2010, Inamori arranged for about fifty senior executives of JAL, including the president of the company, to receive no fewer than seventeen sessions of instruction in the new JAL Philosophy (based on the established Inamori management philosophy). This training was not primarily about how to do double entry accounting or plan flight routes to maximize profits. It was about being good people, within and outside of the context of working at the company. The topics covered included (but were not limited to) these examples:

The Twelve Management Principles

1. Clearly state the purpose and mission of your business.
2. Set specific goals.
3. Keep a passionate desire in your heart.
4. Strive harder than anyone else.
5. Maximize revenues and minimize expenses.
6. Pricing is management.
7. Success is determined by willpower.
8. Possess a fighting spirit.
9. Face every challenge with courage.
10. Always be creative in your work.
11. Be kind and sincere.
12. Always be cheerful and positive. Hold great dreams and hopes in the pureness of your heart.

Kazuo Inamori's Pragmatic Studies: Management and Accounting The Six Endeavors

1. Strive Harder than Anyone Else
2. Remain Humble
3. Reflect Daily
4. Appreciate Life
5. Do Good Deeds and Serve Others Endlessly
6. Don't Dwell on the Past

Through this training, Inamori urged the adoption of “unity of purpose,” a “common language,” and a sense of “being in the same boat” among all JAL employees. His hands-on approach provided dramatic evidence that he took this more seriously than posters and sayings. During these training programs, employees were invited to discuss possible ways to improve their service, maximize customer experience, and reduce costs. This made the training more than listening to someone preach; rather executives and employees alike began to take ownership of their own role in the company's failure (rather than blaming others) and began collectively determining the way forward. As one executive put it: “In retrospect, I think coming together seventeen times in one month for leader training turned out well.” Another noted that undertaking the training four times a week “gave birth to a transformation in our hearts.”

Nice Guys Do Finish First

With this approach, Inamori made his leadership at JAL about issues of character. He brought with him tried-and-true methods of accounting and unit organization. He is a back to basics person, but back to philosophical basics of common courtesy, being respectful of others, and being motivational. It was not surprising that he would use a one-cell biological creature as his metaphor for management—the amoeba. Inamori called his approach “amoeba management” because it was simple but ever changing and adapting. This approach divided an organization into small, flexible units that are each accountable for hitting targets of achievement within their areas of responsibility and for communicating extremely detailed financial information, best practices, and cost-saving innovations to other units and to the leadership, to ensure that every unit is doing everything possible to increase profitability.

At the same time, he insisted that the adoption of this approach was meaningless and the company would still fail if the employees, from highest

to lowest ranks, did not also at the same time study and wholeheartedly adopt the Inamori philosophy that demands not just changes in conduct but the intentional shaping of character. According to Inamori, “The outcome of our lives and work is the product of three factors: attitude, effort, and ability. Effort and ability range from 0 to +100 points. As these two factors are multiplied rather than simply added, it means that people who passionately exert unbeatable efforts to compensate for “average” abilities can accomplish more than geniuses who rely only on their abilities while making minimal efforts. This product is further multiplied by attitude, which can range from -100 to +100. If our attitude is the least bit negative, the outcome of our lives will also be negative. Thus, while ability and effort are important, it is our attitude which counts the most.”

Disruptions and Disbelievers

Despite his positive reputation, Inamori experienced pushback from some executives who refused to believe that the change in corporate culture he was trying to effect was either necessary or sufficient to save the company. Some managers who could not adjust to the new management approach were culled, either by being encouraged to leave voluntarily or through reductions in force that were part of the downsizing.

To dissolve attitudes of disdain and detachment that had developed at the bankrupt JAL between managers and employees and employees and customers, Inamori led by example. He insisted that every person at the airlines should be willing to assist with any job that needed doing and never say, “that’s not my job.” He said that everyone should step up and help: “Carry bags if they need to be carried, even if you’re the pilot.” He also told executives to keep similar hours to their subordinates and not to afford themselves unnecessary privileges and luxuries not enjoyed by all.

When one executive complained, “Why should we have to work as hard as our employees? We are executives.” Inamori told him, “Because you are leaders, you should work harder!” Inamori modeled the humbleness he was asking for by eating a simple rice bowl in the company cafeteria, just like all the other employees. He always carried his own bags, and he used economy class seating when he flew JAL.

Inamori asked every employee to make customer service and customer satisfaction their personal responsibility. Even cargo workers should go up to departure lounges to watch the passengers with their families and be reminded of their humanity. He advised all employees to show appreciation

for customers “from the bottom of their hearts.” He advised all employees to show compassion for customers and always treat them as fellow human beings.

Displaying a positive attitude at all times became the most highly weighted factor in employee merit evaluations. Employees were moved when a JAL passenger wrote to the company, telling how Inamori had helped her get her heavy bags down from the overhead compartment on a flight, without even being asked to do so. The general response from employees was, “If even our chairman does such things, we must do better, too.”

Being Mindful of Core Values and Relationships

Inamori also showed JAL what he meant by making decisions based on the criteria of “doing the right thing as a human being” when he was faced with the choice of breaking the alliance that JAL had with American Airlines as part of the OneWorld program and potentially aligning instead with the then-seemingly more successful Sky Team network of international carriers. JAL had joined OneWorld in 2007 and found many benefits to being connected through the program with other international carriers. OneWorld links up several major “home city” airlines like British Airways (London) and JAL (Tokyo), and it tends to be more business-focused and aimed at premium/business passengers. JAL had had an even longer code-sharing relationship with American Airlines that dated back to 1999.

When the argument was made to Inamori that JAL should abandon its longstanding ties to American Airlines in order to pursue higher profits through other potential alliances, he said that JAL should not consider such a move because it would be like “tossing away an old friend like a used piece of paper.” The leadership of JAL listened to this and agreed to stay with American Airlines, despite impressive counteroffers from their competitors. Some both inside and outside the company saw this as “a very astonishing decision.” However, it had tremendous positive impact. JAL employees saw the move to stay with OneWorld as a sign of the values that JAL intended to embody, including loyalty, fairness, and integrity. The relationship between JAL and American Airlines also deepened, with the two airlines making greater efforts to learn best practices from one another and to support each other. As a result, both airlines are now flourishing, and American Airlines, after its merger with US Airways, is the largest airline in the United States.

Sticking with American Airlines showed an appreciation for the importance of relationships that illustrated an important value to JAL employees.

Inamori repeatedly emphasized the vital need to nurture key relationships throughout his turnaround process, including the relationships between managers and employees and employees and customers. Taking fiduciary responsibilities seriously and fostering mutual respect are highlighted themes in the new JAL corporate culture.

Back to Basics: Recognize Why Everyone's Role Matters

Near the Haneda Airport in Tokyo, there is a Sky Museum that celebrates every job at JAL and the importance of each employee's contributions. There are areas in the museum—which is interactive and kid-friendly—that highlight and explain the kind of work done by maintenance engineers, cabin attendants, air staff, flight crews, and ground and cargo staff. Nearby, the JAL Safety Education Center depicts, in excruciating detail, the events of the tragic crash of a JAL jet on Mt. Osutaka, Japan, in August 1985, that resulted in the deaths of 520 people (making it the most deadly airline crash in history). Together, these exhibits underline the message in the JAL Philosophy that each employee at the company matters when it comes to being stewards of the airline's ongoing safety and profitability. They represent a unique way to make emotional connections with employees so that the messages coming from leadership resonate more profoundly and authentically throughout the organization.

Now, with Inamori no longer at the helm, JAL continues to train all its employees extensively in the JAL Philosophy, from new arrivals to the highest-ranking executives. Members of subsidiary companies and contract employees are also included in the training, so that they can see what JAL is all about and study the core values that set the company apart. Often, a customer's first encounter with JAL is through a subsidiary company or contract employee (e.g. in booking tickets), and the training is to ensure that the messaging, impressions, and ethical practices are consistent and reflect positively back on JAL. This comprehensive training has the additional benefit of providing the opportunity for all these contributors to JAL to network and get to know one another. It has helped to reduce old barriers of bureaucracy and excessive red tape. For example, in the past, JAL might have flown an airship that can hold two hundred people filled with only twenty passengers. Now, they can scale down to a smaller plane that fits the actual demand of the route with a simple phone call between executives who know and trust each other through their ongoing JAL Philosophy training.

When Inamori left his post at the airlines, he received over twenty thousand handwritten thank you messages from JAL employees. Employees report that the feeling of being members of a team, all pulling together for the safety of their passengers and the profitability of the company, persists. The airline, now relisted on the stock exchange, remains profitable and continues to stand by its commitment to the OneWorld network. JAL's value increased dramatically in less than three years, and in 2014, it had the highest operating margin in the industry: truly a v-shaped turnaround. All the "amoeba" units within the company share daily numbers, as well as monthly results, and budgets are revised for accuracy every month to maintain full transparency and accountability.

Concluding Thoughts and Hope for the Future

By combining keen business acumen and tried-and-true highly transparent management and accounting techniques with empathy, charisma, personal example, and a passionate commitment to employee welfare and consistent, ethical policies and practices, Kazuo Inamori has demonstrated that being successful and doing the right thing as a human being are not only compatible, they are a soundly reinforced strategy. Although he initially faced skepticism that establishing philosophical ideals throughout an organization could drive up real-world profits, he proved that his approach, which appeals to both the practical and emotional sides of employees and managers, yields dramatic and lasting results. Through his Seiwajuku business management training and other programs that disseminate his philosophy, Inamori encourages other aspiring ethical turnaround artists not to shy away from the challenge of replicating these results, even in extremely diverse organizations: "Uniting the hearts of people raised in different environments requires a universal management rationale. The rationale must inspire confidence, respect, sympathy, and passion in people everywhere. I believe that sharing such a management rationale with employees in all parts of the world enables us to break down cultural barriers and proceed with business as a unified body."

High Pressure

The Inverse Relationship Between Funding and Falsehood

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Science is essentially the search for objective knowledge, or truth, concerning the natural universe. From nuclear chemistry to astrometric projections, science is all-encompassing. Scientists use a disciplined approach to study nature: the scientific method. Observations are developed into a hypothesis, for which experiments are designed to either prove or disprove it. After enough data is acquired, basic conclusions can be drawn, which can then be put to further testing before communication to the rest of the scientific community. Science is practiced worldwide, and, ideally, all scientists follow this method. The field is purely objective in this regard; sufficient data must provide for only one conclusion, which is subject to rigorous verification by fellow scientists. However, times have changed, and science is not as pure as it once was, or at the very least, should be.

But before we dive into the actual ethical dilemmas concerning this community, we ought to take a look at the career path of a scientist, beginning with undergraduate education. A student majors in a scientific discipline and becomes gradually more versed in his (or her) field's theories as he takes more and more specific classes. He also engages in research, which may at first consist of menial tasks, such as dishwashing, simple solution preparation, and other ancillary functions. Eventually, he may be given experiments to perform, but there is often not much credibility given to his data.

Now he is a graduate student. He takes more advanced courses in his field and is given actual projects on which to work. As he enters his third or fourth year in his PhD track, he begins to feel more and more pressure to produce results, so that he can graduate within a reasonable amount of time. He works long days and weekends attempting to do so.

When he is awarded his doctorate, he then pursues a postdoctoral fellowship in his discipline, the primary function of which is to crank out publications. If he can publish enough, he may be given an academic professorship. As a professor, he writes grants dependent on students whom he supervises and based on his students' data in order to keep the lab func-

tioning, as well as educating new students. Most professors finance their salaries and laboratories through such federal grants. However, there is a limited amount of funding available and, with increased budget cuts in funding, the government must decide which projects to fund while axing other valid scientific ideas. While the amount of funding is decreasing, the number of professors writing grants continues to increase, as demands imposed upon the professors continue to mount. Thus, the chances of getting a grant funded become slimmer and slimmer until the glut of demand exceeds available resources.

The reality for professors is that with a low supply of funding, the pressure to find ways to cut corners and ignore negative data is ever present. Thus, the pressure builds on the scientist to maintain his livelihood, and so he may corrupt the scientific method to the detriment of the data. In extreme cases, data is falsified in an attempt to compete for and secure grant money. It may be harder and harder for the scientist to maintain ethical integrity throughout his career. Here, I will describe several potential causes behind corruption of science, anecdotal evidence of the demands of this ethical quagmire, literature examples of moral failure, how science used to be, how it is today, and how we can try to restore the study of truth to its former glory.

The greatest threat to science is confirmation bias, the tendency to prefer data that confirm or support a hypothesis. Rather than accepting data that do not agree with the hypothesis, the professor's first comment now may be, "What did you do wrong?" Certainly, human error can factor in, but then why believe data that support the hypothesis at first glance?

This support of positive (supporting the hypothesis) data is not only observed in data analysis, but in acquisition as well. Scientists sometimes actively search for data that will support their hypotheses, rather than exploring all options. Questions are asked that the researcher may believe he already has the answer to; he looks preferentially to results that he would expect if his theory were true. This is not a phenomenon particular to science, as humans tend to discard evidence contrary to their preexisting beliefs (Mynatt, Doherty, and Tweney 1978; Lord, Ross, and Lepper 1979).

While confirmation bias cannot be totally avoided, the way hypotheses are formulated can be altered to minimize its effects. The null hypothesis, as proposed by Sir Robert Fisher, a noted statistician and geneticist, states that two measured phenomena are unrelated (Fisher 1935). As such, it can be disproved or rejected by data, but never proven during the course of

experimentation; “Only negative data resulting in rejection of a hypothesis represent real progress; positive data in support of the hypothesis cannot exclude the possibility that it may be rejected by future experiments” (Anderson, Sprott, and Olsen 2013). In this approach, negative data is more useful than positive data. Unfortunately, it is significantly harder to disprove a null hypothesis than to use inductive reasoning to support an alternative hypothesis. As such, a compilation of negative data is very difficult to publish in a scientific journal, where separate groups of researchers are competing to get credit for an idea or material and the benefits of negative data are not shared within the walls of academia.

Outside of the academic setting, scientists are competing to gain patents for their ideas and methods, as well as to please consumers and their employers, the research institutions, which provide them with the job, while at the same time demanding results and funding for their work. Indeed, the taint of scientific corruption may be more developed in industrial settings, in which positive data may be the only thing that supports a scientist’s livelihood. Against this backdrop, one can more easily see how and why a professor feels compelled to consider falsification of data.

It is this overwhelming pressure to get positive results that favor a specific hypothesis that can induce scientists into compromising their morality. It does not start out with blatant falsification of data. It may originate in something seemingly innocuous, such as omission of a data point that results in a stronger correlation curve. Søren Kierkegaard suggested that we slowly and perhaps unconsciously convince ourselves that small wrongs are not wrong (Kierkegaard 1959). Thus, the challenge lies in avoiding such self-deception, which can snowball so far as to allow for justification of more egregious forms of data falsification.

So what qualifies as falsification? Is it merely limited to generating data not resulting from an experiment, such as using Photoshop to add bands in a Western Blot? Or does it extend to cherry-picking data points or adjusting significant figures to round numbers into ones more amenable to the desired result? Or is it just adding a few percent to one’s chemical yield? If the goal is to maintain the purity of science, reporting anything less than the exact data is falsification.

This assertion is idealistic, so we ought to examine how some justify succumbing to the temptation of data adulteration. The most common case is, perhaps, in reference to removing a data point on a graph because it disagrees with the trend, simply because such a minor transgression doesn’t *really* alter

the results. More often than not, removing the outlying data point results in a curve that retains the statistical significance otherwise present when the point is included. And so, this scenario of rationalization falls to the interpreter to determine whether or not the action is unethical. A consequentialist would not begrudge the rationalization; duty ethics would forbid it.

In cases of extrapolating or conjuring up data, the answer is clearer. Both a Kantian and a utilitarian would agree that blatantly making up data is egregious. The only beneficiary would be the student falsifying the data and perhaps his professor, though if caught, it could mean a revoking of the student's degree and sanctions against the professor. On the other hand, chances are that only the student will know of his action and the data may be published and communicated to the world as fact, to be adopted and readopted as valid.

To protect against this, science utilizes a rigorous peer review process, in which professors across the world review publications before they are accepted into a journal. The perusals are more stringent for higher impact journals. This, unfortunately, is not infallible. In early 2014, a paper was retracted shortly after publication in *Nature*, a highly regarded science journal. Haruko Obokata of Japan was found guilty of research misconduct after submitting two articles with radical claims about simple ways to fabricate stem cells from white blood cells that could differentiate into any cell type. This had been regarded as an enormous breakthrough. An inquiry was conducted and the investigative committee found evidence of falsification and fabrication. Images were spliced together to form improved images of results. Data were duplicated from her dissertation to explain different results. *Science*, another well-regarded scientific journal, quoted the Riken committee, "Dr. Obokata's actions and sloppy data management led us to the conclusion that she sorely lacks not only a sense of research ethics, but also integrity and humility as a scientific researcher" (Normile 2014). One of the retracted publications had fourteen authors, and only one spoke up against Obokata, initially sparking the investigation (Sample 2014). It is shocking to note that these papers passed the most stringent peer review process in the scientific community. Perhaps it does not fall to the reviewers to determine deliberate fraud, but who else would be able to do so? Is the system so clogged with potential publications that the review process no longer works as effectively as it should?

Another case comes to mind—the infamous Schön scandal at Bell Labs in 2002. Jan Hendrik Schön published about ninety articles, many in leading

journals, within two years, claiming semiconductors (used in computer circuits, LEDs, solar cells, and others) could be made from ordinary non-conductors, and thus, his work was considered another enormous scientific breakthrough. In fact, these experiments gained him “Breakthrough of the Year,” a prestigious award, as well as consideration for the Nobel Prize in Physics. However, a small cadre of professors became suspicious when they couldn’t reproduce his results in their well-equipped and well-funded laboratories. Rumors began spreading and others noticed inconsistencies; three unrelated papers Schön authored were found to have seemingly identical graphs. Bell Labs conducted its own investigation, which showed that Schön had “substituted figures from various papers, removed data points that disagreed with his predictions, and used mathematical functions in place of real data points. In 16 of 24 cases [investigated], Schön’s data was found to be manipulated or falsified.” In addition, the original raw data was no longer available (admittedly deleted by Schön himself, citing a lack of storage space on his computer) and the original transistors used were broken and irreplaceable. He was subsequently fired and other companies withdrew employment offers. But the true problem was just barely uncovered, “when a researcher is able to publish at such a prolific rate with the near awe-struck reverence of the entire physics community and no one stops to question his experiments, it throws a negative light on the reputation of objective scientific inquiry. The once ‘highly competent system of rigorous analysis and observation’ doesn’t hold up any more under the numerous publications in the field” (Brumfiel 2002; “Scandal” 2002).

While funding is a problem of too much demand, it seems publications function with too much supply. So what do we do? Are there just too many new scientists and too few jobs? Is the field now too competitive, with regard to scientists racing to publish similar projects before others that they succumb to the pressure to falsify data?

Indeed, falsification of one’s own data is not the only method used to gain an edge in the field. It is sickening to note that scientists are stooping to the level of sabotage when their own experiments do not work. In 2010, Dr. Vipul Bhriгу, a postdoctoral scholar, pled guilty to malicious destruction of personal property; in this instance, the property being “lab research” and “cells.” “Bhriгу, over the course of several months at Michigan, had meticulously and systematically sabotaged the work of Heather Ames, a graduate student in his lab, by tampering with her experiments and poisoning her cell-culture media” (Maher 2010). The scholar was only caught after cameras

were installed months after the initial sabotage took place. This is but one instance of questionable practices in science, others including withholding key information about protocols, vindictive review, and dishonest references, and in a meta-analysis of misconduct surveys, a third of scientists admitted to such offenses, with 70 percent claiming to have observed these going on in their work (Fanelli 2009). These figures are astounding. Seven out of ten scientists note questionable activity going on around them, *and most don't report it*. Worse still, the government can't bar a scientist from getting funded unless they are specifically convicted of misconduct, which only involves falsification and fabrication of data. Bhriku actually returned to his old post at the University of Toledo, claiming he quit his job in Michigan because he didn't get along with his boss, though he was subsequently relieved of duty (Maher 2010). This behavior is reprehensible, and should not have been allowed to progress to this stage.

In the past, science was quite different than it is today. For instance, in the 1970s, there were relatively few PhD programs, compared to the plethora available today. Professors did not have to spend a large portion of their time trying to make grant deadlines and could actively mentor their students. If students are being pressured to produce results, they may be learning to commit fraud in their training. And then we are left with professors with such mentalities. Graduate students and former professors interviewed for this article agreed that the pressure is real and the world of science has changed to the point where falsification, at any level, of data is conspicuously present (Gardner 2014, Litman 2014, Mills 2014, Smith 2014).

During the scientific boom of the 1940s, 1950s, and 1960s, scientists published using simple language, relatively free from esoteric concepts and countless acronyms; e.g., "We shot the rat in the head; it died." Aside from colloquial diction, the journals would publish negative data. As mentioned above, this is a true loss. Not only would a large contributor to temptation to falsify be eliminated if negative data were permissible, but other scientists would not repeat costly experiments only to come up with the same negative results, saving time and money. This would also take away the pressure to falsify because the demands to publish and to achieve "breakthrough" results would be minimized, or wouldn't exist if the scientific community and its selective backers permitted publishing of negative results.

The core issues corrupting science inevitably are influenced by these demands and, in a word, are about profit generation and fame. We need a society that values science and is willing to pay for it, without the interces-

sion of catastrophes and disasters. There are more and more scientists competing for less funding, who are looking to pad their resumes and academic credentials to secure tenured teaching posts. Such invites fraud. Without increasing the number of faculty positions, the pressure on young scholars to publish increases. Such invites fraud. Publications are being skimmed, rather than perused in the peer review process, due to inundation of the system. Such invites fraud. Further, most journals will not publish negative data. Such invites fraud.

Scientists must take the approach that any falsification, no matter how minor, is fraud and should not be tolerated. Science is meant to be pure, but this purity or idealistic purity is compromised by the pressures and demand/supply problems discussed above. The scientific method does not work if the scientist is not allowed to go down the wrong pathway. Scientists need to learn that no sometimes actually does mean no. Failure allows for both progress and education, yet it is not tolerated in the scientific community. As one former professor from a national research institution, remarked: "It is so important for things not to work [or to] get negative data that I don't think a student has had very rigorous training if they haven't had this experience. Not every idea is gold bullion; some are steaming piles of shit. Get used to it." The scientific community should get used to the reality that not every experiment works out the way that it had hoped, but to alter data and publish inaccuracy harms the greater good for all, or so the utilitarian would believe, and the strict ethicists would gasp in horror. At the end of the day, something must be done, as more scientists are grappling with these demands and pressures. Will they decide what is in their best interests or what is the best interest for the scientific community or the best interest for the world? Only time will tell.

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Transnational Feminism and the Body of the Image in Democratic Republic of Congo

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In 1975, Susan Brownmiller published *Against Our Will*, in which she proposed that a common political logic lay behind numerous wartime and peacetime acts of violence against women throughout history. While tolerated in practice, rape has long been against laws of war (see Copelon 1994, 200–203). The new element in Brownmiller’s book was her analysis of peacetime rape as a tool of male domination, rather than as a crime against and within male-dominated kinship structures. Moreover, even in peacetime, sexual violence has been very hard to prosecute and, in almost every historical culture, women who brought complaints were more likely to be shamed and discredited than served justice. Brownmiller’s work provoked a historical analysis of rape in both war and peacetime contexts that overturned any understanding of sexual violence as apolitical and inevitable.

Subsequent decades of activism and reflection at the national and international level have led to the realization that “rape” is a phenomenon circulating in images, fantasies, and discourse, as well as a phenomenon affecting physical bodies and their capacities. The polyvalence of violent scenes is particularly complicated in cases where governments and activists respond to reports of sexual violence in other countries. Women’s bodies cannot be conceptually or materially separated from the specific conditions and activities in which they act and desire, nor from the political histories in which nations struggle for power and legitimacy. Full justice for such women—justice that rises above suspicions of being an excuse for further domination by global elites—must restore or improve this context, not simply condemn the perpetrators. This complexity is demonstrated by recent international concern over the great numbers of women assaulted in the Congo Wars of the last two decades.

The Democratic Republic of the Congo (DRC) has been at war since approximately 1996, when the (Tutsi-led) Rwandan Patriotic Front, having

just overthrown the Hutu government responsible for the 1994 genocide, moved into the eastern provinces of then-Zaire to pursue former genocidaires and to defend Congolese Tutsi whose citizenship President Mobutu had recently threatened to revoke (Turner 2007). This campaign was supported from within Zaire by the forces of Laurent-Desiré Kabila, who overthrew Mobutu by the end of 1997 and declared himself president of the renamed Democratic Republic of the Congo, ending the First Congo War. After Rwanda and Uganda turned against him, Kabila relied on Angola, Zimbabwe, and Namibia to maintain power, but he was assassinated. It is generally believed that the Second Congo War, which eventually involved nine nations and many more armed groups, resulting in 4–5 million deaths, was driven by internal factions' and neighboring countries' desire to control access to the DRC's reserves of precious minerals, particularly in the east and south. Enormous population shifts and many human rights violations were documented from 1998–2002. In 2002, Joseph Kabila, the new president and son of Laurent-Desiré Kabila, signed a second peace agreement incorporating multiple factions into a single government and a single national army, the FARDC (Forces Armées de la République Démocratique du Congo).

Elections were held in 2006. Since the end of the Second Congo War in 2002, however, there have been numerous defections, uprisings, and continued fighting in the east of the country and in the more central province of Katanga. This is the context in which many male children have been forcibly recruited as soldiers and many adult women and girls (as well as some men) raped by fighters—but many have also been killed, driven from their homes, and weakened by famine and disease (Csete et al 2002). Apart from mining, the economy of these regions has been devastated. Women farmers who work alone or in small groups are at particular risk of being assaulted or forcibly recruited by combatants for domestic service or sex. Finally, soldiers in the FARDC are more loyal to their commanders than to the institution as a whole, which makes discipline from above difficult. They are often vastly underpaid, which motivates them to pillage the countryside as much as the groups against which they fight (Kippenberg et al 2009). In some cases, these conflicts are justified in the name of ethnic hostility, particularly around the legacy of the Rwandan genocide, and the covert involvement of Rwanda's government remains a matter of contention.

Ironically, this period of warfare also witnessed major developments in the international discourse and enforcement of human rights, including women's human rights (Peters and Wolper 1994; Miller 2004; Bergof-

fen 2012, 8–10). Human rights also became a significant arena for the expansion of global feminist activism. At the international level, a series of UN-sponsored conferences and resolutions (including the Convention to Eliminate All Forms of Discrimination Against Women) have helped women from around the world to articulate minimal principles for their empowerment, as well as to develop a more sophisticated analysis of war and militarism (see, for example, Turshen and Twagiramariya 1998; Enloe 2004).

International law played a significant, if unexpected, role in this development. Following Rwanda's genocide, the UN Security Council authorized a special tribunal to address crimes against humanity (grave breaches of human rights within a country that would be war crimes if committed against soldiers or civilians of an enemy state). In one significant case, *Akayesu* (1998), the International Criminal Tribunal for Rwanda (ICTR) found a mayor guilty of allowing and encouraging rapes, among other acts considered genocidal. This decision was augmented in 2001 by the International Criminal Tribunal for the former Yugoslavia (ICTY), which found several Bosnian Serb soldiers guilty of human rights violations for committing sexual violence against women in their custody (the notorious "rape camps") (Bergoffen 2006). These tribunals used a combination of prior precedents and treaties, such as the Geneva Conventions and the decisions at Nuremberg, as well as the laws of related countries and cultures, to build an internationally binding set of conventions (see de Brouwer 2005 and Kippenberg 2005, esp. ch. 3). Although the 2001 decision of the ICTY acknowledged that rape contributed to the genocidal effect of the Bosnian Serb strategy (by seeking to impregnate Muslim women with "Serb" children), it also considered that the rapes constituted, on their own, violations of women's right to sexual integrity. In 2003, the International Criminal Court (ICC) (established by the Rome Statute to replace ad hoc tribunals) heard its first case of crimes against humanity involving rape, although the outcome of this trial is uncertain and highly politicized.¹

Debra Bergoffen is one of the most important theorists of the logic behind these decisions. In her recent book, *Contesting the Politics of Genocidal Rape* (2012), Bergoffen argues that the ICTY judgments are significant because 1) they acknowledge women's right to sexual integrity as a human right,

1. Jean-Pierre Bemba, commander of the rebel MLC, brought his fighters into the political system and became one of four vice-presidents of Joseph Kabila's unity government, but he is accused of numerous war crimes from the time when his forces were active in neighboring Central African Republic.

rather than referring to the right to modesty or honor (which are often defined by male relatives and compatriots); and 2) they recognize that the human right to sexual integrity is distinct from the right to freedom from violence, for example, torture, as prohibited by the older Geneva convention: oppressive circumstances may nullify women's freedom to consent or refuse sexual interaction even in the absence of overt violence. Along with Tanya Horeck (2004), Bergoffen has also highlighted the role that sexual violence seems to play as a "spectacle," assaulting both women's and men's self-understanding as members of a community with physical and moral integrity (see chapter 3).² This function seemed particularly prominent in the genocidal context of Rwanda and Yugoslavia, in which women were raped in front of male family members to demonstrate their impotence.

Sexual violence is not the only danger to women's human rights; so are the threat of death, displacement, malnutrition, and lack of access to education and work (Miller 2004, 17–19). International as well as national legal systems pose problems for rape victims who testify, such as anonymity and security, or more often lack of urgency and effectiveness (Copelon 1994). Some countries (including the United States) did make progress in reforming their laws on violence against women during these years, even if much remains to be improved at the level of culture. Far from drawing a sharp line between wartime and peacetime sexual coercion, however, many feminists hope that international consensus on rape as a crime against humanity will improve treatment of rape victims and efforts at prevention *within* the countries that accept the jurisdiction of UN bodies and the ICC (to which, unfortunately, the US is still not a signatory) (Miller 2004, 26; Du Toit 2009; Bergoffen 2012, 72–73).

However, the expansion of international law and juridical institutions is also viewed with caution for two reasons. First, international law has tended to reflect the powers and interests of the most economically, militarily, and culturally dominant nations. By identifying crimes against "humanity" that are not crimes of interstate war, such institutions challenge the principle of

2. The concept of the image or the "spectacle" with which I am working in this paper is drawn from multiple sources, including the Turkish Castoriadis (1987), who contends that human consciousness is shaped by a collective pool of imagined realities and possibilities against which individuals may reflectively turn, the French Debord (1994) who argues that the value of all contemporary activities and products is not only measured by exchange but by their ability to attract attention in an international *representation* of reality, and the Gabonese Tonda (2005), who distinguishes between the historical irreversibility of violence that establishes symbolic parameters for collective existence and the psychological mutability of violence that operates within the register of images or the social "imaginary."

national sovereignty. But they have tended to affect the sovereignty of the United States or Northern Europe less than the sovereignty of countries from the global south (the US refuses to join the ICC, while most of its current cases involve central African nations) (Bidima 2013, xxxi; Philipose 2009). As Elizabeth Philipose points out, sexual violence by male American soldiers against Iraqi women (or against female American soldiers) has not been referred to the ICC; nor was the sexual violence of French soldiers after the genocide in Rwanda (2009, 179, 192). Moreover, such institutions are often perceived alongside the International Monetary Fund (IMF) as political tools of the globally dominant nations, even if this is neither their rationale nor their actual function. Not infrequently, the economic restructuring that accompanies intervention gives multinational corporations from the wealthy countries increased access to resources (Philipose 2009, 189). Under the rubric of “policing” and “justice,” it depoliticizes conflicts between nations and nonstate actors that are not just about ethnicity and historical territory.

Second, despite dramatic changes in communication technology, there is an imbalance in the degree and kind of information that countries have regarding one another’s problems. Not only do more people in the wealthier countries, both experts and laypeople, have access to certain information about problems in poorer countries than the reverse; in some cases they know little about those countries *apart from* their conflicts. During the period of European colonization, social sciences and popular culture were saturated with narratives and images of non-European backwardness, incompetence, and exoticism—including sexual pathology (Miller 2004, Philipose 2009). In both the domestic and international context, legitimate feminist outrage at violence against women has sometimes overlapped with or been manipulated by racists who believe that members of some “other” ethnicity are more sexually aggressive than the members of their own group (Davis 1994, Hansen 2008). The real or imagined “spectacle” of sexual aggression by and among minorities, immigrants, or foreigners serves as a psychological justification for aggression toward them in a different way than a scene in which one’s own group is humiliated. Moreover, sexual violence is far easier for most audiences to understand (or to believe they understand) than a report on how multinational companies benefit from monopoly mining rights or on collaboration between generals and foreign investors. Commercial matters cannot easily be brought before international criminal courts, although they have serious consequences for

women as workers and citizens. By contrast, the spectacle of rape seems self-evident because of ideas about sexuality that are overlaid by a history of domination along racial lines.

For centuries, sexual violence in wartime was considered inevitable, indeed biological. Many forms of everyday male domination, such as forced marriage or coercive survival sex for poor women, were also considered necessary evils or blamed on women's "weakness." When military definitions of ideal masculinity spread through civilian populations or when armed men take advantage of war to express their own effects of humiliation, anger, revenge, or aggression in violence toward women, the "image" of rape circulates between both contexts. Some of the most devastating effects of sexual violence result not from the physical violence of the act, but from the way it claims a victim's body symbolically for the aggressor's own imagination. Definitions of ideal masculinity and ethnicity can change over time, and men's ability to imagine themselves may come to depend on violent images (Enloe 2004, 4–7). As Hutchinson and Jok (2002) have shown in the context of the South Sudan, and as was evident in the Yugoslavian war, when paternity is interpreted in biological terms that explicitly exclude enemies, rather than in cultural terms, rape becomes an increasingly plausible way to claim territory and to express masculinity as aggression.

Some kind of serious conflict has plagued the Democratic Republic of the Congo, since *at least* the mid-nineteenth century, when (among other atrocities) Belgian military and corporate agents held Congolese women hostage to force their husbands to tap rubber in the forests (Hunt 2008). Nor must we forget the civil wars between pro-Belgian agents over mining in Katanga immediately after independence and the nationalist/Maoist civil war during the early 1960s (see Verhaegen 1991 141–42) in the eastern part of the country where the worst human rights violations were found, followed by the long dictatorship of Sese Seke Mobutu, who was long supported by the United States.³

The men and women who endured these events share historical time and space with those who have been born since decolonization or Mobutu's death in 1997. In the minds of young people, old nightmares coexist with their own dreams for participation in the contemporary world of global wealth. Whether urban or rural, teenaged or middle-aged, women want to be protected against violence and have the prospect of material security

3. Mobutu's army, the FAZ, was tacitly encouraged to pillage the population in lieu of salaries (see Wrong 2001, 46).

for their children and their communities, a share in the wealth generated by the country's vast resources. This means that they must be part of the peacemaking and rebuilding process (Puechguirbal 2003, 1274–76). We must believe that the hostile framing of relations between men and women can be turned around, but this is difficult until women are recognized and able to recognize themselves as potential brokers of national peace (capable of exerting coercive pressure, independent of the support of former male combatants) (Enloe 2004, 217–36).

The government of the DRC has taken some steps in this direction; there is now a Ministry of Gender, Family Affairs, and Children. Since 2007, President Kabila's wife has been leading a public campaign against sexual violence in warfare (Kippenberg et al 2009). Perhaps more importantly, representatives of women's organizations have increasingly been included in negotiations and female judges appointed to hear both international and national cases involving the conduct of soldiers. For example, one of the ICTR decisions was written by Justice Florence Mumba, who had previously participated in the UN Commission on the Status of Women (Bergoffen 2012, 23). The UN, in turn, has increased the number of female peacekeepers. Although it requires its soldiers to comply with the laws of war, which forbid sexual violence, the DRC shares with other modern countries, such as the United States and Australia, a military culture in which sexual aggression is assumed to be part of masculinity, and in which few resources are devoted to prosecuting rapists, especially those higher commanders considered essential to the military mission (Nayak 2009, Baird 2014). Of course, the government cannot control rebel militias (such as the M23, whose commander Bosco Ntaganda recently surrendered to the ICC), deserters, or the families that often shame and exclude raped women. Nor, given the current international economic situation, can they prevent the poverty that drives many women to engage in survival sex, of which foreign peacekeepers, as well as armed combatants may take advantage.

Feminist interest in the women involved in such conflicts cannot stop at the borders of the body, but also has to include the political, financial, and technological apparatus that constitutes the actual and optimal functioning of those bodies. This means that above all, whatever country they may inhabit, whether the United States or France or the DRC, survivors must be known for more than the rapes they have endured; the *event* of their lives cannot be reduced to the *event* of sexual violence. This requires what Cynthia Enloe calls feminist curiosity (2004). Their habits, the technol-

ogy of their labor, the games they play with their children, the magazines or books they read when possible, and the movies they hope to watch or *make* must be part of the body of international knowledge informing public discourse and included in the general vision of reparations. This is the only way to break out of the global spectacle in which poor countries only appear when they are at war and in which their female citizens only appear when raped—offering wealthy countries the obligation or opportunity to govern them from afar. Women’s full mental and physical health, not simply their sexual health, must be a topic of concern; while victims of wartime sexual violence do need counseling and sometimes surgery, so do those who have suffered from family violence, who are sick, or have lost homes and loved ones due to many other aspects of war.

In a larger sense, the challenge posed by such curiosity points to two possible meanings of justice for victims of sexual violence. One has to do with demanding public accountability for harm done, and, by means of punishment and example, the prevention of future harm. This is an important task, and not an easy one, especially when the harm has been done by powerful people who insist on impunity. Moreover, it is the task undertaken by most of the international institutions described above, perhaps because it seems to demonstrate the “success” of some states and the “failure” of others. The other meaning of justice has to do with repairing someone who has been harmed; restoring her prior activities and relationships—and even if her dreams have been catastrophically altered, then enabling her to eventually create and pursue new ones. Very few institutions have devoted themselves to this task, which is the one Nietzsche would have considered truly active and not merely vengeful or preventive.

As Human Rights Watch explains, “International human rights law also enshrines the right to an effective remedy, which obligates the state to prevent, investigate, and punish serious human rights violations. Peace treaties, postwar tribunals, and international courts recognize the need for ‘reparations’ in many cases of transitional justice. States must also provide reparations to victims of human rights violations, such as compensation for damages. The UN has reaffirmed these principles specifically in relation to eliminating violence against women” (Kippenberg et al 2009, 18).⁴ However, Ruth Rubio-Marín (2006) observes that reparations are

4. The footnotes to this document cite the following sources: See UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 15. See also

often symbolic and the last bill to be paid by cash-strapped governments. Indeed, the prospect of reparations challenges the structural inequalities that are pervasive in war-torn, but also in many peaceful societies. Going beyond the generalities of law as well as those of the spectacle of sexual violence, real repair requires a far more detailed understanding of how a given woman's life may differ concretely from what an international public assumes or imagines than may emerge in the usual legal case.

Lynn Nottage's drama *Ruined* (2009) presents the lives of several women who have been affected by the fighting in the eastern DRC, workers and entertainers in a brothel. As a theatrical production, *Ruined* directly confronts the question of how we imagine the victims, perpetrators, and survivors of sexual violence, as well as the ways in which the spectacle both reveals and conceals. Mama Nadi, the play's main character, "buys" and "sells" young women who lack a community, but also protects them to the extent of her abilities. She hosts, gathers news, brokers sexual services, and fences precious stones for businessmen and members of warring factions, who use her establishment for recreation, intelligence gathering, and as a stage for intimidating their opponents. She resists marriage, but between the lines we understand this is a choice she wishes she *could have made* for herself. One of her employees, Josephine, was the daughter of a traditional chief, betrayed by his second wife during a raid that left her with serious scars. Salima, a farmer who became pregnant as a result of a rape on her way home from the fields, is sold to Mama Nadi when her husband rejects her. Sophie, the youngest and educated if not middle-class, was injured with a bayonet so badly that she can neither hope to marry nor take paying clients. Mama Nadi puts her to work as a singer, in part from charity. Later, Sophie is caught stealing from the till to save money for reparative surgery at the Panzi Hospital—a dream Mama Nadi understands and supports, for reasons that remain ambiguous until the very end.

Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("Impunity Principles"), U.N. Doc. E/CN.4/2005/102/Add.1, February 8, 2005, adopted by the UN Commission on Human Rights in Resolution E/CN.4/2005/81, April 15, 2005, principle I; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Reparations Principles"), adopted December 16, 2005, G.A. res. 60/147, U.N. Doc. A/RES/60/147 (2005), principle 11; UN Human Rights Committee, General Comment 31, para. 16; United Nations Declaration on the Elimination of Violence Against Women, December 20, 1993, G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993).

This play has the potential to be sensationalistic, but the potential is deflated by the myriad small historical details that encourage the foreign reader to learn more, as well as by conflicts portrayed between characters over class and education, the magazines they hide from their employer and read to one another, and Mama Nadi's pleasure in sweets and brand products that friends and clients bring to her from the city. Bitterly reflecting on how her family lost their land, Mama Nadi describes her dreams this way:

I want a powerful slip of paper that says I can cut down forests and dig holes and build to the moon if I choose. I don't want someone to turn up at my door, and take my life from me. Not ever again. But tell, how does a woman like me get a piece of land, without having to pick up a fucking gun? (2009, 27)

It is in such details that we glimpse the texture of the lives that have been disrupted by war, the fabric that any true justice would both repair and allow these women to embellish. We also obliquely witness the damage these wars have done to men, both in Salima's report that a soldier who paid for relations with her demanded to be held while he sobbed after describing a massacre in which some of her own relatives might have been murdered; and in the distraught efforts of her husband Fortune, now himself a soldier, to reconcile with her despite the unborn, unwanted child with whom she finally commits suicide.

In the case of the Democratic Republic of Congo, cutting the space for such detail into the foreigner's theater, television, or computer screen requires unloading and neutralizing over a hundred years of prejudicial images about the "heart of darkness" associated with the Congo in wealthy countries. This is an aesthetic, as well as a sociological or ethical project. The task is more difficult for an Anglophone public insofar as so much of the DRC's contemporary cultural production is in French (the national language), if not one of the many regional languages like Lingala, Swahili, or Tshiluba (for example, many teledramas from the Kinshasa troupe Theatre Congolais, some of which are lighthearted and others of which deal with social problems, are available on YouTube and give a tantalizing glimpse into many forms of interiors, fashions, and mannerisms associated with different social classes in the DRC. However, the dialogue appears to be entirely in Lingala, which I do not understand). I searched for contemporary political theater by Congolese playwrights, particularly women playwrights, which might be comparable to the American play *Ruined*, but I could not locate

the few works for which I found references (for example, by the Feminata troupe, which performed a play called *Panic at Makobola*) (see Musengeshi 2003). Finally, undoing the global spectacle in which black manhood is identified with violence and hypersexuality also requires the diversity of interests and experiences among Congolese men to be acknowledged, as Nottage tries to do with the characters Christian and Fortune. In addition to physicians like Denis Mukwege of the Panzi Hospital, there are Congolese authors who have spoken out against the epidemic of sexual violence, such as the novelist Désiré Bolya Baenga (2005), and the sociologist Jean-Jacques Purusi Sadiki (2010), a scholar of the historical forms of women's political power in the African Great Lakes region.

In *Imaginal Politics*, Chiara Bottici observes that “human rights are simultaneously a means for ideological justification of the status quo and for its utopian subversion” (2014, 170). One could say the same of the image, whose contribution to the justification and the enforcement of human rights Bottici believes is undervalued. A tacit image of what counts as human and what counts as an ideal human life pervades the discourse of human rights, even if these images are implicit and only glimmer, like the magazines under Sophie's bed, between the scenes that are presented to the international public. These images are brought out by theater, literature, and film and coexist with other tacit images of the inhuman, for which Africa in particular has been a metaphor. Recognizing the spectacle's role in politics, Bottici adds, also allows us to be cautious concerning the audience's capacity for saturation and exhaustion (175–76) and to remember, as Enloe suggests, that curiosity may do what compassion cannot. To preserve the life, capacity for truth, and potential healing value of the image, it is crucial that it contain openings onto the ways men and women are embedded in, indeed *identifiable only with the full assemblage* of their laboring, loving, praying, and ludic activities—an assemblage about which we can know and also imaginatively identify—not just with the indignant subject or injured body in an iconic scene of violence. In the specificity of such images, and in the concrete means to realize them, the healing power of justice can complement the power to punish that is the state's primary terrain.

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The International Criminal Court at Ten

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Introduction

When assessing the tenth anniversary of the International Criminal Court, one is necessarily confronted with a question as to when is the actual birthday of the Court. The institution itself now celebrates 17 July, and it is apparently a much appreciated paid holiday for employees at the Court, who take advantage of the day off to soak up the sun at Scheveningen beach. But the Court wasn't really "born" on 17 July, which is the day the Rome Conference concluded in 1998 with the famous vote by which the Statute was adopted. The Rome Statute requires sixty ratifications for entry into force,¹ and this was only achieved on 17 April 2002. Article 126 says that entry into force takes place about two months after the requisite ratifications, so the magic date might be 1 July 2002. It is an important date in any event, because it marks the starting point of the Court's temporal jurisdiction.² But the Court wasn't functional on 1 July 2002. Judges and a Prosecutor had not yet been elected, and the subsidiary instruments required by the Statute, the Rules of Procedure and Evidence and the Elements of Crimes had not yet been adopted. The Court was only in a position to actually begin its judicial activities in June 2003, when the Prosecutor was sworn into office. Thus, the Court actually has several possible birthdays. Its employees would no doubt be delighted if every one of these were to be celebrated with a paid day off. For the purposes of this article, let us say that the Court is "about" ten years old. The aim of this short article is to consider some features of the institution's work in this first decade of its activity.

1. Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, Art 129 (hereinafter Rome Statute). See RS Clark, 'Article 126', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd ed, CH Beck et al 2008) 1775–1776.

2. Rome Statute (n 1) Art 11. See SA Williams, 'Article 11', in Triffterer (n 1) *ibid.* 539–545.

Too many judges, too little work

It is often overlooked that when the Rome Statute was adopted, the *ad hoc* tribunals for Yugoslavia and Rwanda had been operational and engaged in trial work for only a few years. Most of the rich lessons from their activity in the procedure (and substance) of international criminal law had yet to be learned. Thus, when the first trial began at the International Criminal Court in 2009 it was using a procedural model that had been designed more than a decade earlier. The invaluable lessons learned from the experience of the *ad hoc* tribunals were not taken into account at all.

The procedural system of the United Nations international tribunals had been largely left to the judges, whereas that of the International Criminal Court was more rigorously codified by the states that negotiated the Statute and the Rules of Procedure and Evidence. Many felt the Rome system was better, and certainly it more closely resembled models in domestic legal systems. But while this may have been an advantage, there were also disadvantages with the inflexibility of the scheme. At the United Nations tribunals, the Rules of Procedure and Evidence have been subjected to a constant process of fine tuning and amendment. The judges have adjusted the procedure in light of experience but also to accommodate changes in the nature of the case load. Although the same should be possible at the International Criminal Court, in practice there is nothing of the sort. The Court's Rules of Procedure and Evidence have never been amended. While complex when compared with the *ad hoc* tribunals, the amending process at the Court should not be so terribly difficult. On closer examination, it seems that the failure to amend the procedural regime is not so much a function of the difficulty of the process as a genuine resistance to the idea.

Outside the Court's own institutions, much thought is given to amendment among academics.³ But within the Court, and the Assembly of States Parties, the idea took hold that it was premature to contemplate amendments with respect to the procedure, structures and other operational aspects. The theory was that a "full cycle" (arrest, confirmation hearing, trial, appeal) should be completed before any changes would be considered. The approach contrasts rather sharply with the attitude taken at the *ad hoc* tribunals. Perhaps there is some merit in this more conservative and cautious

3. RS Clark, 'Possible Amendments for the First ICC Review Conference in 2009' (2007) 4 *New Zealand Yearbook of International Law* 103 and C Burchard, O Triffterer and J Vogel (eds), *The Review Conference and the Future of the International Criminal Court* (Kluwer Law International 2010).

position. It may be the reflection of the involvement of diplomats both in the Assembly of States Parties and within the Court itself (where they are, strictly speaking, former diplomats). Diplomats might be nervous about reopening compromises that were negotiated with difficulty, fearful that one change would lead to a cascade. Thus, although given the opportunity to make minor (and perhaps major) repairs to the system at the Kampala Review Conference, there was a refusal to consider the matter. Instead, much time was consumed at Kampala with a series of “stocktaking sessions,” which were a mix of academic conference and NGO campaign meeting. While interesting and worthwhile in a sense, they hardly merited the expense and energy of bringing more than a thousand people to central Africa. The term “stocktaking” implied introspection, but there was very little of that in reality. Most of the sessions involved hectoring States Parties about their obligations to the Court, rather than reflection on the problems within the Court. There was also a sense that these and similar activities had been conceived rather late in the preparations for Kampala once it was understood that the agenda of amendments—which was, after all, the purpose of the Review Conference—would be rather more slender than many observers would have expected.

Actually, it takes little imagination to see how the procedure can be improved, the pre-trial and trial activity simplified, and the Court made more efficient. In that sense, the Kampala Conference was a missed opportunity. An unfortunate message was delivered of an institution that is rather reluctant to acknowledge its shortcomings and that seems content with its performance.

One of the innovations in the Rome Statute is the confirmation hearing, the preliminary proceeding at which the Pre-Trial Chamber is to determine whether there are “substantial grounds” to go to trial.⁴ The confirmation hearing can add up to a year to the length of the proceedings as a whole. Its enthusiasts explain that it adds a layer of protection against abusive trials, which may well be true. In four cases, the confirmation hearing resulted in dismissal of the charges, which is reassuring to defense lawyers (and troubling, to the extent that it reflects misjudgment by the Prosecutor).⁵

4. Rome Statute (n 1) Art 61. See K Shibahara and WA Schabas, ‘Article 61’, in Triffterer (n 1) 1171–1181.

5. *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 February 2010); *Prosecutor v Callixte Mbarushimana* (Decision on the confirmation of charges) ICC-01/04-01/10-465-Red Pre-Trial Chamber I (16 December 2011); *Prosecutor v Callixte Mbarushimana* (Judgment on the appeal of the Prosecutor against the decision

But in all such arguments, a cost-benefit analysis is central. Is the added length to the proceedings, especially if the accused is in custody, worth the investment in time and resources that is involved?

The closest that the *ad hoc* tribunals come to a confirmation hearing is the so-called Rule 61 Procedure. Under the Rules of Procedure and Evidence of the *ad hoc* tribunals, when an arrest warrant cannot be executed there is a special procedure at which evidence may be produced and witnesses called. The accused is, of course, not present at the hearing, and may not even be represented by counsel.⁶ At the conclusion of the hearing, the Trial Chamber may determine “there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment.” Rule 61 was adopted as a compromise intended to assuage critics from continental European justice systems who charged that the lack of an *in absentia* procedure would seriously hamper the work of the Tribunal.⁷ The main distinction is that a Rule 61 proceeding does not pronounce a sentence. In the early years of the International Criminal Tribunal for the former Yugoslavia, several hearings were held pursuant to Rule 61, but the practice was discontinued once the Tribunal had defendants in custody and the suggestion that it could only function if it could conduct *in absentia* hearings no longer made any sense.⁸ Reflecting on the procedure, Louise

of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’) ICC-01/04-01/10-514 Appeals Chamber (30 May 2012); *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11-382-Red Pre-Trial Chamber II (23 January 2012); *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11-373-Red Pre-Trial Chamber II (23 January 2012).

6. *Prosecutor v Karadžić et al* (Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-5-R61 & IT-95-18-R61 (11 July 1996) para 4. But see *Prosecutor v Rajić* (Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence) IT-95-12-R61 (13 September 1996); *Prosecutor v Rajić* (Separate Opinion of Judge Sidhwa) IT-95-12-R61 (13 September 1996) paras 10–16.

7. *Prosecutor v Rajić* (n 6). ‘A Rule 61 proceeding is not a trial in absentia. There is no finding of guilt in this proceeding’. *Prosecutor v Dragan Nikolić* (Review of Indictment Pursuant to Rule 61) IT-94-2-R61 (20 October 1995): ‘The Rule 61 procedure [...] cannot be considered a trial in absentia: it does not culminate in a verdict nor does it deprive the accused of the right to contest in person the charges brought against him before the Tribunal.’

8. See F Patel King, ‘Public Disclosure in Rule 61 Proceedings Before the International Criminal Tribunal for the Former Yugoslavia’ (1997) 29 *New York University Journal of International Law and Policy* 523; M Thieroff and EA Amley, Jr, ‘Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61’ (1998) 23 *Yale Journal of International Law* 231; BT Hildreth, ‘Hunting

Arbour said it was “detrimental” to the work of the Prosecutor.⁹ Neither the International Criminal Tribunal for Rwanda nor the Special Court for Sierra Leone ever showed any interest in Rule 61 proceedings. They are now little more than a footnote, and with hindsight look like efforts to create work for judges and prosecutors at an institution without defendants. In that sense, there are obvious similarities with the confirmation hearing of the International Criminal Court. As the institution gets busier, it seems likely that the confirmation hearing will be reduced in scale until at some point there is a willingness to eliminate it altogether.

The Regulations of the Court require that the decision on the confirmation hearing be issued within sixty days of its conclusion.¹⁰ Working within this requirement, the Pre-Trial Chambers have issued lengthy rulings in which the facts and law are reviewed.¹¹ The time limit is useful, because where one is not imposed, the judges generally take much, much longer to issue written rulings. On the arguably simpler issue of whether or not to issue an arrest warrant, they have sometimes taken several months.¹² By comparison, issuance of an arrest warrant at the *ad hoc* tribunals is a matter of a few days.

Questions about the utility of the confirmation hearing inexorably lead to thoughts about the value of the Pre-Trial Chamber itself. Again, this is a feature introduced in the Rome Statute that has no equivalent at the *ad hoc* tribunals, where the same issues are very adequately dealt with by a single pre-trial judge. A minimum of one-third of the entire cohort of judges at the International Criminal Court is tied up with this pre-trial work. If the Chamber were abolished, there would be more judges for trials which are, after all, the bread and butter of the institution.

At the other end of the system sits the Appeals Chamber. There was no appeal at Nuremberg or Tokyo. When the Yugoslavia Tribunal was

the Hunters: The United Nations Unleashes its Latest Weapon in the Fight against Fugitive War Crimes Suspects—Rule 61’ (1998) 6 *Tulane Journal of International and Comparative Law* 499; AL Quintal, ‘Rule 61: The “Voice of the Victims” Screams Out for Justice’ (1998) 36 *Columbia Journal of Transnational Law* 723.

9. L Arbour, ‘The Crucial Years’, (2004) 2 *Journal of International Criminal Justice* 397.

10. Regulations of the Court, Adopted by the judges of the Court (26 May 2004) ICC-BD/01-01-4 Reg 53.

11. For example, *Prosecutor v Lubanga* (Decision on the Confirmation of the Charges) ICC-01/04-01/06 (29 January 2007); *Prosecutor v Katanga et al* (Decision on the Confirmation of the Charges) ICC-01/04-01/07 (30 September 2008); *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009).

12. For example, *Prosecutor v Bashir* (Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09 (4 March 2009).

established in the early 1990s, the text of the International Covenant on Civil and Political Rights made an effective right of appeal a *sine qua non*. Proposing inclusion of a right of appeal for the Yugoslavia Tribunal, the Secretary-General's Report said "such a right is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber."¹³

The implication, confirmed by the reference to Article 14 of the International Covenant, was that this was to be an appeal from the final verdict. The corresponding provision, Article 25 of the Statute of Yugoslavia Tribunal said: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds."¹⁴ But the judges themselves soon determined that in addition to an appeal of conviction—the only requirement imposed by human rights law—that interlocutory matters could also be dealt with.¹⁵ The idea stuck, and was incorporated in the Rome Statute.¹⁶

By the time the International Criminal Court completed its first full cycle of judicial elections in early 2012, a full-time five-judge Appeals Chamber (together with professional assistants and secretarial help) had occupied a floor of the Court's premises for nearly the entire period without ever engaging in the fundamental reason for its existence: appeal by an accused of a conviction. The Appeals Chamber has barely managed to keep itself occupied with interlocutory appeals. The occasional decisions are generally sparsely reasoned and there are few separate or dissenting opinions. The job could very well have been accomplished with a panel of part-time or standby judges, called to The Hague as required and remunerated according to the work that they actually accomplish.

Would the sky fall in if there was no interlocutory appeal at all? There might be variations in procedure from one chamber to another, but that is something that many justice systems accept as a fact of life. Some argue the virtue of "clarifying" the law so as to ensure "legal certainty." But it might be more constructive for a Court in its early years to "let a hundred flowers bloom," and to encourage experimentation and innovation. The

13. Report of the Secretary-General Pursuant to Paragraph (2) of Security Council Resolution 808 (1993), UN Doc S/25704 (1993) para 116.

14. Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc S/RES/827 (1993), annex, Art 25(1) (hereinafter ICTY Statute).

15. Rules of Procedure and Evidence, Rules 72(B), 73(B), 108bis(A).

16. Rome Statute (n 1) Art 82. See C Staker, 'Article 82', in Triffterer (n 1) 1475–1480.

Rome Statute contemplates a division of labor whereby the Pre-Trial and Trial Chambers are enriched by a large proportion of judges with criminal trial experience. That makes sense. But the consequence may be that there is less criminal trial experience at the Appeals Chamber, and a tendency for it to be top-heavy with judges from the international law stream. This means that tricky determinations about trial procedure made by experienced judges working at the coal face are being second-guessed by those who are probably less familiar with daily life in the courtroom.

A much-heralded innovation in the Rome Statute is the recognition of a role for victims of crime. The Statute's provisions concerning victim participation might well have been interpreted relatively narrowly. Instead, an elaborate and costly regime of victim representation and participation has developed. Much of the institutional energy of the Court in its first decade has been devoted to addressing this. But it is not apparent that the right scheme for victim participation has been found. One suspects that if the victims understood that many millions had been invested—mainly in professional salaries and international travel—in order to ensure the respect of their rights, they might ask if they could simply be given the money instead. The continental procedural model of the *partie civile* on which victim participation was premised seems very remote from what we actually see in the Chambers of the International Criminal Court.

One example of this indulgence is the Trust Fund for Victims, whose establishment is called for by Article 79 of the Rome Statute.¹⁷ As it was understood, this was to provide a mechanism for seizing the assets of the wealthy warlords and tyrants upon successful prosecution by the Court. Of course, to date it has collected nothing of the sort, because no trials have been completed. It was probably unrealistic to view the defendants as a reliable source of resources that might be used to address issues of compensation and restitution for victims. At the *ad hoc* tribunals, most of the defendants have been declared indigent for the purposes of legal aid. Even the notorious Charles Taylor, widely alleged to have billions tucked away in foreign bank accounts, was not declared to be capable of paying his own lawyers' fees because the money could not be found. And proof of assets for the purposes of legal aid should not be nearly as demanding as for the seizure of bank accounts and other property.

The Fund itself gets a limited income in the form of voluntary contributions from the wealthier States Parties. The money is being spent on a

17. Rome Statute (n 1) Art 79. See M Jennings, 'Article 79', in Triffterer (n 1) 1439–1442.

range of projects in regions where the Court is active. For the year 2010, the Fund expected an income of something under 2 million euro in such gifts. It had budgeted an operating cost of 1.2 million euro. This is an expensive way to do what amounts to overseas development assistance. Maybe States should give their money to the UNDP or Oxfam, and let the Trust Fund become inoperative until such time as the Prosecutor is astute enough to catch a wealthy defendant.

The Challenge of Selecting Situations and Cases

Although the procedural issues pose interesting challenges, it may be that the crux of the difficulty facing the International Criminal Court is substantive. After all, this is where the real differences lie between the Court and the *ad hoc* institutions. James Crawford, who chaired the International Law Commission drafting committee in the early 1990s, has said that the statute it prepared was what the Commission thought would meet general acceptance. Professor Crawford has suggested that the world may not have been ready for the more radical concepts that emerged from the Rome Conference. If he is right, this may help us to understand the difficulties that the Court faces in becoming operational and effective.

The Rome Statute makes an important distinction between “situations” and “cases.” The process of prosecution begins with identification of a “situation” rather than a “case.” Thus, we have the “Situation in the Democratic Republic of the Congo” and the “case” of Thomas Lubanga, leader of a combatant faction in a civil war accused of recruiting child soldiers. There is the “Situation in northern Uganda” and the “case” of Joseph Kony, head of the Lord’s Resistance Army.

The great originality of the International Criminal Court compared with all of its predecessors is that the Prosecutor selects both the “situation” and the “case.” At the other institutions, starting with Nuremberg, the “situation” has invariably been selected by the political body that created the tribunal. The Prosecutor at these institutions only selects the “case.” In 1945, the four-power London Conference charged the International Military Tribunal with delivering justice to “the major war criminals of the European axis.” The four prosecutors concurred about the individuals they would prosecute. Even there, it seems they were instructed by their various governments in making this choice. In the course of the trial, the judges heard evidence of war crimes perpetrated by the Allied forces—the

Katyn massacre, unrestricted naval warfare—but were without jurisdiction to address these issues. Had one or more of the prosecutors suggested that these matters be dealt with in the interests of “balance” and fairness, he would have been quickly replaced by someone prepared to live within the Tribunal’s mandate.

When the International Criminal Tribunal for the former Yugoslavia was established in 1993, it was said that the shortcomings at Nuremberg had been corrected. A specific provision in the Statute enshrines the independence of the Prosecutor. The Prosecutor is appointed by the Security Council, and “shall not seek or receive instructions from any Government or from any other source.”¹⁸ But he or she must still live within the confines of the narrow jurisdictional scheme established by the Security Council. At the *ad hoc* tribunals, the Prosecutor’s discretion is limited to the choice of “cases.” The “situation,” on the other hand, is part of his job description and he cannot change it. This was also the International Law Commission’s vision of the prosecutor of an international criminal court, but one that the Rome Conference did not endorse. Indeed, the *proprio motu* prosecutor enshrined in Article 15 of the Rome Statute has been held out as one of the great achievements of the negotiations.¹⁹

Political factors are not entirely absent in the selection of “situations” at the International Criminal Court. Alongside the *proprio motu* authority of the Prosecutor is the power given to the Security Council²⁰ and to States Parties²¹ to refer “situations,” thereby “triggering” the exercise of jurisdiction, to use the jargon of the Court. But it is a trigger with a safety catch, because the Prosecutor is not obliged to proceed at the behest of the Security Council or a State Party. He or she may even decline to pursue the agenda set by the Security Council or a State Party, subject to a vague and untested degree of judicial supervision.²² To date, the Prosecutor has never resisted the initiatives of the Security Council or States Parties. In the case of the four self-referrals, from Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali, in practice these

18. ICTY Statute (n 14) Art 16(2).

19. Rome Statute (n 1) Art 15. See M Bergsmo & J Pejić, ‘Article 15’, in Triffterer (n 1) 581–593.

20. Rome Statute (n 1) Art 13(b). See SA Williams and WA Schabas, ‘Article 13’, in Triffterer (n 1) 563–574.

21. Rome Statute (n 1) Art 14. See A Marchesi, ‘Article 14’, in Triffterer (n 1) 575–579.

22. Rome Statute (n 1) Art 53. See M Bergsmo and P Kruger, ‘Article 53’, in Triffterer (n 1) 1065–1076.

were instigated by the Prosecutor rather than the State Party concerned. It seems likely that the referral letters were drafted in The Hague and simply sent to the national capitals for signature. The Security Council referrals of the situations in Darfur and Libya were welcomed because they brought the Court to the center of some of the great international crises of the day. Indeed, it was for situations like Darfur and Libya that the International Criminal Court was created.

The enthusiasm for the *proprio motu* Prosecutor was the result of two different and perhaps somewhat disparate objectives: to free the Court from the hegemony of the Security Council, and to create an institution where the decisions about targets for prosecution are based upon judicial rather than political criteria. One nourished the other. Adversaries of the Security Council invoked the goal of an apolitical prosecutor without giving much thought to how this would work in practice. Fans of the independent and impartial prosecutor transposed models from domestic justice systems, where all serious crimes against the person receive attention, without adequate reflection about the different imperatives of an international system.

When Luis Moreno-Ocampo took office in June 2003, he could build on much experience from his predecessors at Nuremberg, Tokyo, The Hague and Arusha. But in the selection of “situations,” he was in virgin territory. A team of lawyers hired to set up the Office had prepared draft Regulations that attempted to parse the matter of selecting situations. The initial draft Regulations contemplated a highly transparent process of the selection of situations based upon objective judicial standards. The Prosecutor himself quickly understood that the Rome Statute did not provide much guidance on what those standards really were. Moreover, he was astute enough to recognize that mechanistic application of regulations such as those drafted by the advance team might have unexpected consequences that would be politically unwise. In the result, the draft Regulations were not adopted. Much later, the Prosecutor proposed Regulations where the issue of selection of situations was addressed in a vague manner, and in such a way as to provide him with essentially unlimited discretion.

Some students of the Rome Statute have read Article 15 as suggesting that the Prosecutor is required to act relying upon information received, from whatever source, as long as there is a “reasonable basis” to proceed. This is an absurdly unrealistic interpretation in light of the resources of a Court that has been barely able to deal with a handful of cases in a decade and that now appears overwhelmed by the new situations that have arisen

quite unpredictably in Libya and Côte d'Ivoire. The drafters at Rome gave little thought as to the basis on which the Prosecutor would exercise his phenomenal discretion. Had they done so, it is likely that they would have been unable to agree. When they attempted to codify the exercise of the authority to decline to proceed in the case of referral by the Security Council or a State Party, the best they could come up with was "interests of justice" as a criterion. It was a way of avoiding clarification and it amounted to a lack of regulation, although there have been naïve attempts to interpret the "interests of justice" formulation so as to make it say more than it really does.

The Rome Statute itself advances three concepts that may assist in the application of prosecutorial discretion: complementarity, gravity and the "interests of justice." The first of these creates a presumption in favor of national jurisdictions, directing the Court not to proceed when national jurisdictions are willing or able to prosecute. Article 17 of the Statute offers some instruction about the scope of "unwillingness" and "inability."²³ The issues lend themselves to a reasonably objective assessment. The same cannot be said of such stunningly nebulous concepts as "gravity" and the "interests of justice." These notions are so malleable as to provide any imaginative prosecutor with a rationale for what may be, in reality, rather arbitrary choices.

In order to avoid the challenge of selecting situations, early in his term the Prosecutor essentially abdicated the responsibility. He rather quietly encouraged some States to refer situations to the Court and then proceeded on this basis without challenging the validity of such choices. He used a novel interpretation of Article 14, by which States could "self-refer" situations within their own territory. The Prosecutor explained that States Parties had decided to refer the situations in Uganda, the Democratic Republic of the Congo and the Central African Republic, and acted as if he was virtually bound to proceed in the absence of evidence that the situations were inadmissible. The Prosecutor did the same when the Security Council referred the "situation in Darfur," in March 2005.

This was an expedient by which the Prosecutor avoided selecting a situation on his own. But even then, it soon became apparent that situations were a Matrioshka doll, and that there were situations within situations. When he obtained the first arrest warrants, in 2005, in the "situation in Uganda,"

23. Rome Statute (n 1) Art 17. See SA Williams and WA Schabas, 'Article 17', in Triffterer (n 1) 605–625.

the targets were the Lord's Resistance Army rebels. The big human rights NGOs took the Prosecutor to task for failing to proceed against the pro-government forces as well. It was at this point that he discovered "gravity", a term buried in the Statute and essentially forgotten or overlooked, until that point, by academic writers in the major commentaries.²⁴ Justifying his focus on the rebels, the Prosecutor said they were killing many more people than the government forces, and this meant they should be prioritized by the Court. He suggested he would get to the pro-government forces later, but never did. There was the lingering suspicion of an agreement, or perhaps only a tacit understanding, by which Museveni's helpful "self-referral" of the situation in Northern Uganda meant the focus would be on Museveni's enemies rather than on himself.

In practice, it seemed that the fabled de-politicized Prosecutor was in fact not immune to political factors. Soon, gravity was invoked once again to explain why the Prosecutor had decided to reject the many complaints about violations of the Rome Statute perpetrated by British troops in Iraq. He explained that many more people were being killed in Uganda and in the Congo, so these areas deserved the attention of the Court as a priority. The explanation was unconvincing, because the evidence of the massive death toll in Iraq was notorious. The Prosecutor seemed to be confusing "situations" and "cases", comparing the "cases" of alleged deaths in British custody in Iraq with the "situations" of mass killings in Uganda and the Congo. Days later, he announced that he was proceeding against Thomas Lubanga, a Congolese warlord, on charges of recruitment of child soldiers. But if the Democratic Republic of the Congo was inherently more serious than Iraq, because of the number of deaths, why wasn't the Prosecutor dealing with murder rather than that arguably less important crime of recruitment?

James Crawford may well have been right to suggest that the world is not ready for a Court with an independent and impartial prosecutor, analogous to what we expect in the national justice system of a functional, democratic society that is based upon the rule of law. International human

24. SA Williams, 'Article 17', in O Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos 1999) 393. See also M Bergsmo and P Kruger, 'Article 53', in *ibid.* 708–709; JT Holmes, 'Complementarity: National Courts *versus* the ICC', in A Cassese, P Gaeta and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* vol I (OUP 2002) 667–686; G Turone, 'Powers and Duties of the Prosecutor', in *ibid.* 1153–1154; É David, 'La Cour pénale internationale' (2005) 313 *Recueil des cours* 248–251.

rights courts, like the European Court of Human Rights, have held that there is a procedural obligation upon States to investigate and prosecute all serious crimes against the person. But the theory does not lend itself to a simplistic application in the international criminal law environment. The International Criminal Court cannot prosecute all atrocities that go unpunished at the national level. Choices are inevitable. The Prosecutor claims he makes them on the basis of judicial standards. But the whiff of politics is inescapable.

Possibly this is what really ails the Court. Seductive as the vision of an independent Prosecutor may be, the idea that the choices of situations are left to one unaccountable individual, who employs vague concepts of “gravity” and “interests of justice” to explain these, is perhaps not the Court’s greatest strength but rather its greatest flaw. At the Rome Conference, the drive to eliminate a role for the Security Council in the determination of “situations” was understandable. But it may have caused another problem in the neglect of the ineluctable role of politics. The challenge, as the Court enters its second decade, may be to find ways to remedy the situation by governing and regulating the role of political factors in the choice of “situations” rather than pretending that they are simply absent.

Towards the second decade

There is a strong impression that after the euphoric success of the Rome Conference and the precocious entry into force of the Statute, the actual operations of the Court have been a disappointment. Afflicted with a cumbersome and inflexible procedural regime, there is nevertheless resistance to contemplation of any reforms. The Court lacks vision and leadership. Its employees exude frustration and even demoralization. The ardor of the African states that ratified the Statute in large numbers, proving its appeal to countries of the South confronted with internal conflict, has cooled.

Compare this with the accomplishments of the United Nations tribunals at a similar stage in their development. Nine years after the adoption of the Security Council resolution establishing the International Criminal Tribunal for the former Yugoslavia, it had completed the trials of twenty-five accused persons. In eighteen cases, even the appeals were finished. Forty-six people were in detention in The Hague, compared with five for the International Criminal Court. The International Criminal Tribunal for Rwanda cannot claim to have been quite as productive, but its performance is still rather stellar when set beside that of the International

Criminal Court. Nine years after its establishment, it had completed the trials of thirteen accused. Several appeals had also been adjudicated. And at the same age, the Special Court for Sierra Leone had completed three trials of nine defendants through to the appeals stage.

The Prosecutor has been rather dismissive of criticism about the Court's poor performance. Yet he has himself been responsible for forecasts that have failed to materialize. A year after taking office, the Prosecutor proposed a budget based upon the proposition that "[i]n 2005, the Office plans to conduct one full trial, begin a second and carry out two new investigations."²⁵ A flow chart derived from the Prosecutor's plans indicated that the first trial before the Court would be completed by August 2005.²⁶ He became somewhat less ambitious in 2006, when a three-year strategic plan proclaimed the expectation that the Court would *complete* two "expeditious trials by 2009, and . . . conduct four to six new investigations."²⁷ In fact, only one trial started in 2009. No reasonable observer would use the adjective "expeditious" to describe its glacial pace. In February 2010, a new three-year strategic plan from the Office of the Prosecutor said the Court would finish the three trials then underway or about to begin, and start "at least one new trial." In addition, the Prosecutor said he intended to continue ongoing investigations in seven cases, and conduct "up to four new investigations of cases."²⁸ In fact, by early 2011 not even one trial was even close to completion. The first judgment only came in early 2012, seven years behind schedule, and was followed by a second at the end of the year.²⁹ These mistaken projections reflect an unrealistic assessment of the difficulties facing the institution.

But there are many encouraging signs that it continues to enjoy the confidence of a large number of States, including many who have yet to join the Court. In early 2011, the Court presented itself as one of the useful options to deal with evolving crises in Libya and Côte d'Ivoire. When the Security Council referred Libya to the Court, both the Prosecutor and the Pre-Trial Chamber reacted with a sense of urgency that neither had shown

25. Draft Programme Budget for 2005, ICC-ASP/3/2 para 159.

26. *Ibid.* 49.

27. OTP, 'Report on Prosecutorial Strategy' (14 September 2006) 3.

28. OTP, 'Prosecutorial Strategy, 2009–2012' (1 February 2010) 2.

29. By the end of 2012, the Court had delivered two trial judgments in cases against Thomas Lubanga Dylo and Mathieu Ngudjolo Chui. (See *Prosecutor v Thomas Lubanga Dylo* (Judgment) ICC-01/04-01/06-2842 (14 March 2012) and *Prosecutor v Mathieu Ngudjolo* (Judgment) ICC-01/04-02/12 (18 December 2012).)

years earlier when it had been asked to do the same thing in Darfur. Another sign of health is the successful adoption of amendments at the Kampala Conference that will eventually permit the Court to exercise jurisdiction over the crime of aggression. While the pace of ratification has slowed, political changes such as the jasmine revolution in the Arab countries open up new opportunities. Tunisia's accession to the Rome Statute in June 2011 is a positive indication in this respect.

The Court remains confronted by the need to address shortcomings that have manifested themselves in its first years of operation. Other international courts and tribunals—the International Court of Justice and the European Court of Human Rights, for example—also face challenges to adjust as the world changes around them. But there is confidence in their continued existence as a more or less permanent fixture of the global order. This cannot yet be said as safely about the International Criminal Court. The Court must address its problems with a greater sense of urgency, and one of concern that if there is a failure to do so adequately, States may begin to lose the enthusiasm for the institution with which it has been blessed since the 1990s.

Note: This contribution, which served as the basis for the key-note speech by Professor Schabas at the conference on tenth anniversary of the ICC (21 June 2012, London), is an update of an article first published in (2011) 22 *Criminal Law Forum* and adjusted for the publication in this book. Reprinted with permission of the author and publisher (Springer).

The (Morally) Courageous Leader Inside-Out Leadership

Captain Stephen Trainor
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Transcript of Integrity Week Keynote Speech,
Case Western Reserve University

It is truly a privilege to be here on the campus of Case Western Reserve University and participate in Integrity Week. Thank you to the Integrity Board members and everyone who has played a role in the week's activities, especially to John Weibel, Samantha Tucci, and Larry Monocello for being such gracious hosts during my visit. I also think it is a powerful statement that the university has empowered the Integrity Board to spend an entire week highlighting character and leadership. However, I am also very pleased to be on campus and share time with my dear friend and former Naval Academy colleague, Professor Shannon French. The Naval Academy bond is one that students and faculty share forever and I am so happy to be here to support the important collaborative work occurring between the Integrity Board and the Inamori Center.

I had the privilege of serving in the Navy for thirty years and I truly appreciate the gracious welcome you provided to me today. My military career was an incredibly rewarding and challenging experience that provided a tremendous foundation on which I continue my passion for leader development with businesses, public, and nonprofit organizations at the Soderquist Center for Leadership and Ethics.

I have a two-fold goal this afternoon: first, I hope to offer some insights on leader development through the lens of personal experiences and stories, and second, I will make a case for a model or a method that I believe helps us develop the ethical muscle needed to exercise morally courageous leadership in our lives. Contrary to conventional thinking, you don't have to be a superhero to lead with moral courage, but you do need a unique approach to prepare yourself.

We hear a lot about courage these days. Stories are written about courage in the news, videos of courageous acts are played on the Internet, and tales of courage are shared among family, friends, and coworkers. When

we hear courage described, it most often falls into one of three basic categories: physical, mental, or moral courage. Despite how prominently and frequently courage is portrayed and discussed around us, I believe there is a general misunderstanding about how courage works and whether or not it actually can be developed.

Conventional thinking argues that courage is an attribute reserved for and exercised by special people in unique circumstances. Unfortunately, such an approach to courage creates a problem for everyone else. If courage is found only within a limited set of people, how do we know who the courageous person is when we need one? This unrealistic approach results in most of us ignoring or dismissing the very real possibility that each of us has the ability to exercise courage if prepared adequately. This idea is particularly important for organizational leaders because they are very likely to face challenges which demand the exercise of different forms of courage (sometimes simultaneously). The discussion today will focus not on physical or mental courage, but on moral courage. It is not because I believe either physical or mental courage are less important, but it is because I believe exercising moral courage often precedes or supports the others.

The first time I reflected seriously on the idea of courage was as a young undergraduate midshipman at the Naval Academy. The image I have is still very clear. I was seated in an old, dark lecture hall on the campus in Annapolis and Vice Admiral Jim Stockdale limped back and forth in front of our seats, telling us about his eight years in a prisoner of war camp, after being shot down over Vietnam in 1965. Admiral Stockdale was the senior officer over hundreds who were imprisoned in that camp and he was awarded the Congressional Medal of Honor for the physical, emotional, and moral courage he exercised while leading his fellow prisoners. Admiral Stockdale told of the brutal torture and years of solitary confinement at the hands of his captors. As an aspiring future Navy pilot, I was shocked by the description of his physical injuries, but I was riveted by the stories he told about exercising the courage to withstand the emotional trauma and how he motivated others to press on and resist, despite guaranteed outcomes of pain and separation.

At the time, I remember thinking how hard it must have been for Admiral Stockdale and his fellow POWs. It would have been so easy to give in, to take the easy path, but why didn't he? Stockdale claimed that he never lost faith that he'd get out of that camp and that the experience would define his life. But he also said that he had to accept his current situation, however bad it was. At the time, I concluded that Admiral Stockdale

possessed superhuman attributes. His ability to remain resolute and lead his comrades amidst horrendous circumstances left me perplexed. I could find no explanation for how a normal person could withstand and survive, much less thrive, as a result of such an experience.

The reality is superhuman people only exist in the movies, but it is nearly impossible for just about anyone to imagine how they would respond if placed in Admiral Stockdale's shoes. As a result, we end up believing that courage is the stuff of legends, an elusive pipe dream for the average person, and we continue with our normal routines. The fact is that each of us will face physical, emotional, and moral challenges that demand more of us than we think we can deliver.

My basic argument is [about] the perceptual gap between the real danger that we face and our ability to overcome the challenge where fear exists; the larger the perceptual gap, the greater the amount of fear experienced. Likewise, it seems reasonable to argue that the smaller the perceived gap, the more likely one is to think, speak, or act in a way that seems to be courageous, or overcomes our fears. Could it be that Admiral Stockdale somehow perceived a smaller gap between his abilities and the challenges that he faced? Was he somehow better prepared in a way that allowed him to more courageously face the challenges of being a POW? Is it possible that the right form of preparation will help close the perceptual gap between ability and challenge and promote the exercise of courage? If so, courage is not beyond our reach. It is practical and attainable, even for mere mortals.

So what does it take to close the gap and exercise moral courage? My discussion today is an attempt to offer some concrete steps to move ourselves in the right direction. Right up front, my conclusion states that, contrary to conventional thinking, you don't have to be a superhero to lead with moral courage, but you do need a unique approach to prepare yourself to exercise it. I use an athletic analogy to describe the approach to becoming a morally courageous leader because, just like physical performance, courage and character are not attained through revelation or appointment. Instead they must be cultivated and perfected, just as a disciplined athlete trains and prepares for the competition. Like the performance of an athlete, the ability to exercise moral courage involves effort in several areas. First, it requires agility or leader mastery across different domains. Second, it demands a deliberate focus on strengthening our core, or the integrity and completeness of our character. Finally, it requires the motivation to act, when everything around us is aligned against action. I'll begin by discussing leader agility.

But before I do, I will extend a critique or a critical conclusion about leader development that likely applies to many of you. I believe that nearly every organization and most individual leaders approach development from the wrong direction and that important failure has direct implications on the growth and strength of our character. In fact leader development is nearly always role or position specific—from the outside in. You're a new manager, a committee or department chair, a team or organization leader, and you realize that you lack the preparation for your new role responsibilities. You seek out leader development or perhaps your boss offers development to you. For quite some time, the bias in business and in the military has been role specific—develop the person for the position. I argue that, to grow agility, the approach to leader development should be focused in the opposite direction, what I call “inside-out leadership.”

Here is the basic model. Focus first on self-leadership, which is the deliberate emphasis on the basic motives and abilities that guide and enable us to participate effectively and positively in relationships, small groups, and larger organizations. If viewed as a vector, self-leadership is our ability to direct inward and guide ourselves in important, socially relevant ways. Ultimately, self-leadership is a function of our belief systems and [the] associated self-concepts.

The second piece of inside-out leadership is followership. Why included followership in the model about leadership? In any organization, in any relationship for that matter, there is always someone or some group to which you are accountable or from which direction comes. The reality of those relationships are that we need a continuing and expanding ability to lead upward, especially in the dynamic and complex work environments of today. Followership is the extent to which we shape the vertical relationships around us. Followership is influenced directly by the strength of our values.

The third aspect of inside-out leadership is peer leadership, which is perhaps the most powerful, and yet most misunderstood and least perfected area of development. Every leader has peers, near or far, virtual or in-person, intra- or extra-organizational, with whom they interact and perform. Today's business, military, and organizational environments are more horizontal than ever before and the demand a greater ability to lead across or horizontally in organizations. The extent to which we engage in effective peer leadership is a function of the loyalties we have to those peers and for the larger organization that we share.

The last element of inside-out leadership, and in my opinion, very least, is positional leader development, which includes an expanding array of skills, abilities, experiences, and knowledge to accomplish role responsibilities and complex tasks. Why do I say least? Because nearly all of the more than \$13 billion a year that American businesses spend on leader development is invested in positional leadership, to the near exclusion of self, follower, and peer leader development.

To make matters worse, I have discovered through years of working with midshipmen at the Naval Academy, and now with business leaders, a unique bias towards leader development that says, “I understand what leadership is, I’ve seen it in action, just tell me what I need to know to do my job.” This position bias is not necessarily arrogance, as much as a response to the organizational environment and a general impatience with the hard work of leader development. I believe that just like exercise, most people search for a shortcut to success, the “ab-buster,” the “SEAL training workout,” or another quick-fix solution to leadership challenges. Unfortunately, just like athletic training, impatience and lack of discipline come at a cost to character and moral courage.

Without an intentional focus on the first three areas of leader development, it is nearly impossible to have the agility to lead with moral courage. I argue that the quality of one’s leadership and the ability to exercise moral courage is directly related to the depth of development in self, follower, and peer leadership. Coupled with positional and role leadership development opportunities, a leader possesses the basic ability (and agility) to face ethical challenges from nearly every direction. However, just like the competitive athlete, a leader who develops agility without also strengthening core ethical muscles is training for a marathon by running short sprints. You may be in good shape, but you won’t be well-prepared for the ultimate challenge of the race course.

The duality of leader agility and ethical core strength is critical when facing moral danger because nearly every human possesses the protective fight or flight response, but that response is largely unpredictable. Very often, our response to a dangerous situation is to flee because it quickly removes the threat with the least amount of stress and effort. The basic unpredictability of that response poses an important problem for most people and organizations. How do we know with certainty how people will respond to a dangerous situation? If our natural (or at least unpredict-

able) response to a morally fearful situation is to take the easiest way out and flee the danger, as opposed to engaging the challenge head on, what hope do we have for success?

Some people may think that military soldiers are innately courageous, but that strength and consistency of purpose is not something that comes naturally to everyone in uniform. The military spends significant time, energy, and lots of money training teams of people to stand fast and fight in the face of danger. Like an athlete or a soldier, a leader's character must be developed to effectively meet those challenges. Ask almost anyone who has succumbed to a significant moral or ethical failure and they will tell you that they were not prepared to face the dilemma or challenge. They had not invested the energy into it, and therefore didn't have the muscle to stand fast in the face of moral danger. In addition, when the situation is deconstructed, the vast majority of the time the challenge was not role-specific, but focused directly at self, follower, or peer leadership.

My primary assertion is that core ethical strength can be developed methodically and purposefully by deliberately strengthening three muscles that support leader agility: beliefs, values, and loyalties. Each of those muscles, acting in unison, creates purpose, trust, and commitment that enable the action of moral courage against a challenge. The stories and ideas that follow illustrate how leader agility and ethical muscle can be developed.

A very important part of flying a helicopter at sea is, of course, safely landing it aboard the ship. One of the methods used to ensure a safe landing is a device we called the "bear trap," a steel box attached to the ship with two powerful jaws which secure the helicopter to the flight deck upon landing. The key objective for the pilot was to align the helicopter with the trap before attempting to land. The same idea applies to leadership. All too often leaders set off on a path or decide on an action that is clearly not in their best interest, but they do it anyway. Why does that happen so frequently to leaders?

I argue that leaders pursue the wrong path for several reasons, but very often due to a lack of alignment between actions and purpose. In fact, I believe a root cause is the actual substitution of action FOR purpose. This is based upon a simple exercise of asking people to describe their purpose. Most of the time, people respond to that question with a description of something significant that they do, or have done. However, purpose is not so much what we have done, but why and how you do what you do. In other words, purpose is the set of beliefs (the why and the how) that drive what

you do. To understand and articulate one's purpose demands deep reflection around the question, "What is right and how do I decide?" Some may describe this as a worldview, others a personal philosophy and in many cases such reflection conforms to more general approaches of moral philosophy (e.g., justice and fairness, the greatest good for the greatest number, what conforms to universal human principles, or revelation by God). However, without the depth of that reflection and direction (around why and how) it is nearly impossible for a leader, or anyone for that matter, to clearly and consistently discern a path forward.

Have you deeply reflected on your purpose (the why and how of what you do)? The fact that most people have not illustrates what is all too common in organizations today—the struggle to act. It's become harder to act, because competing priorities make it difficult to discern the right path. However, through greater clarity of our purpose, the right path (or paths) becomes more visible. Admiral Stockdale believed that he would eventually prevail, and the code of honor shared by his fellow POWs would protect and enable them to endure, despite being in the worst of all possible circumstances. At the individual level, the first step you must take is to reflect and articulate what you truly believe. By describing and declaring your beliefs, you take the first step of self-leadership and solidly fix the gap between your present self and the moral challenges you will face. This form of accountability and reinforcement not only demonstrates the boundaries, but the direction of our character as well. Not that the direction of our character cannot or will not change over time, but it begins with a solid declaration. By checking your internal alignment, you set and strengthen your leadership purpose.

In addition to defining one's purpose, leaders face yet another problem when it comes to deciding the path to follow. Quite often, even with a solid understanding of your beliefs, a leader is presented with multiple right paths to pursue. How do you know and trust which path is the best course of action? In my early days as a Navy helicopter pilot, I remember hearing someone say to "keep the main thing, the main thing" and thinking to myself, "That sure seems obvious!" However, I discovered early on that the cockpit of a Navy helicopter at sea was full of activity, which confused and complicated things. Making internal and external radio communications, monitoring the instruments, watching the navigation picture, dealing with the noise and vibrations of the engines and transmissions, executing the assigned tactics—while actually flying the helicopter—all competed for the

skill and attention of crewmembers. Operating in unfamiliar or difficult situations, like shipboard take-offs and landings at night, only made things worse. My lesson was learned on a night-time take-off at sea, when the loss of an engine showed me the true meaning of “keep the main thing, the main thing.” I became a quick believer in that philosophy and I have since discovered that this idea applies to leader development as well.

The argument is based upon work with Naval Academy midshipmen and a variety of business leaders who, when asked to describe what is most important to them (the “main thing”), typically respond with a list or a description of their basic values (e.g., excellence, integrity, family, faith, hard work, etc.). Unfortunately, there is a central problem with this sort of answer. While values help identify and describe what people think is important and good, values alone do not build essential ethical muscle until something very serious is done with them. To be useful and build the trust needed to exercise moral courage, values must not only be identified, but they must also be prioritized.

Unfortunately, not only do most leaders fail to prioritize values, they do things that create dangerous conflicts between the things they prize the most. For example, if integrity and excellence are valued equally, then what should a leader do when seeking an answer is likely to also reveal a serious shortcoming in your work? If work and family are equally important to a leader, what are the implications of working on a tablet at your daughter’s soccer playoffs? Instead, most leaders declare an equal set of three to five values, enough to fit on an index card posted to the cubicle wall. Instead, leaders must identify “the main thing;” the most important value from among all those they cherish. Providing clarity and priority to values builds consistency of action and fosters the bonds of trust among the people around a leader.

Admiral Stockdale often described the values of camaraderie, integrity, and warrior defiance that helped to sustain and guide the POWs who were held in captivity for so many years. How did the prisoners know what was most important when their physical torture resulted in a breakdown that divulged important information about their comrades? I recall Admiral Stockdale explaining that every prisoner would eventually break under torture, but the most important thing was to resist as long as possible, knowing two things: their fellow prisoners would back them up and each prisoner would regain the ability to resist the very next time. Defiance, camaraderie, and integrity each became the main thing, but not simultane-

ously. When those values came into conflict, it was up to Stockdale and the other leaders to prioritize the values for their followers. Without exercising that ethical muscle, the bonds of trust would have broken and their ability to persevere would have been threatened.

How do you know which among your values is most important (and why)? There are tools to help identify and sort through values, but for simplicity's sake, a leader must focus on prioritizing and then integrating the most important personal and professional values. Leaders who do this build self-accountability and priorities which guide their lives. However, values are much more dynamic than beliefs and the relative importance of values may change dramatically at different times or stages of life. Regularly engaging in this process maintains the muscle to act in the moment and make timely and precise decisions informed by principles, rather than random pressures. Without the strength to clarify what is most important and focus on it fully ("keeping the main thing, the main thing"), leaders will be buffeted by the many powerful pressures of the moment.

With an ethical core of beliefs and values established, many would argue they have sufficient strength to face the difficult challenges of leadership, but it takes one more very important muscle to be fully prepared to exercise moral courage. That last, but most important ethical muscle, is commitment. Most people argue that they are strongly committed to their key beliefs and important priorities, which is generally true. However, most people do not know how they will react when their beliefs or values begin to cost them something. It is easy to know what is right and important when the stakes are low. When the stakes are high enough to actually cost something is when the muscle of commitment is desperately needed.

One of the most incredible stories I remember Admiral Stockdale tell so many years ago was when he learned that he was to be paraded in front of foreign journalists who were visiting Hanoi to chronicle the conditions provided to American prisoners. Clearly a propaganda ploy, Admiral Stockdale described using a piece of wood and a razor to so severely beat and cut his head that his captors never showed him as an example of their humane treatment. Why would anyone endure such harm to avoid a simple photograph? While beliefs and values may be powerful enough to drive the assumption of significant risks or take actions to achieve positive outcomes, why would anyone choose something with a guaranteed negative result? The reason lies in the deeply held commitments Admiral Stockdale had for his comrades, his code of conduct, and his country.

Commitment, strengthened by pure loyalties, is the power behind the most amazing acts of moral courage. Loyalty is the most powerful component of commitment because it determines the direction and strength of action delivered against a moral danger. Unfortunately, most leaders have not done the heavy lifting to determine precisely where their loyalties lay. Just as it is impossible to have two most important values, the loyalty between commitments cannot be split and leaders who fail to understand the true nature of their loyalties will hamstring their actions at the most critical point in time.

The first step to develop a pure hierarchy of loyalties is to place “self” in the middle of a blank page and ask the question, “To what or whom am I loyal?” Asking this question is very different than asking, “To what or whom am I accountable?” Loyalties are those things or people you would willingly sacrifice for based upon shared beliefs and values, whereas accountabilities are things or people you would assume risk for in return for extrinsic or intrinsic rewards. Once all of the loyalties have been placed on the sheet, the most difficult conditioning exercise begins. Each loyalty must be hierarchically arranged in an order above self and no two things or people may share the same level of hierarchy. The end result is a powerful demonstration of your commitment to people, organizations, and ideas. With loyalties firmly established, the ethical muscle of commitment, supported by purpose and trust, generates the power to act in the face of moral danger.

Beliefs, values, and loyalties are not merely slogans on a wall; they are the meaning behind purpose, trust, and commitment, the drivers of our decisions and actions. The real power of this approach to exercising moral courage is that it can be developed, practiced, and shaped continually, just as an athlete trains and prepares for the competition. The model of inside-out leadership—agility, core strength, and action is not limited to the work of a solo performer. Purpose, trust, and commitment are three of the central attributes of high-performing teams and are key factors that influence effective organizational change and agility in an increasingly complex world.

In the end, it is not merely enough to want to act in the face of moral danger. But neither is moral courage relegated to the realm of superheroes. Leaders must and can develop the agility and ethical muscle to face moral challenges and take a stand for self, team, or organization. The key is to train and be ready for action. Just like the disciplined athlete, the integrity

of a leader's character requires constant attention and development in order to act in alignment with purpose, to build focus and energy through trust, and deliver moral courage through the power of commitment.

Thank you very much for inviting me to speak to the Integrity Week community. I wish you all the very best.

Talking Foreign Policy Transcripts

Talking Foreign Policy is a production of Case Western Reserve University and is produced in partnership with 90.3 FM WCPN ideastream. The quarterly program is hosted by Case Western Reserve University School of Law Interim Dean Michael Scharf. This issue of the *Journal* contains the transcripts of the September 2013 broadcast about combatting maritime piracy and the January 2014 broadcast about regulating cyberwarfare. Archived broadcasts (both in audio and video format) of *Talking Foreign Policy* are available at law.case.edu/TalkingForeignPolicy.

Talking Foreign Policy, September 6, 2013 broadcast¹

Participants:

Michael Scharf

Roméo Dallaire

Rosemelle Mutoka

Sulakshna Beekarry

Milena Sterio

SCHARF: Welcome to *Talking Foreign Policy*, I am your host Michael Scharf of Case Western Reserve University School of Law. In today's broadcast we'll be discussing the persistent problem of maritime piracy. We'll begin our discussion with General Roméo Dallaire, the UN Force Commander who tried to save the Tutsis during the 1994 Rwandan Genocide. Nick Nolte played him in the award-winning 2005 film *Hotel Rwanda*. Since then, General Dallaire has been appointed a Canadian senator, written two best-selling books, and is the founder of the Roméo Dallaire Child Soldier Initiative² at Dalhousie University in Nova Scotia. Thanks for being with us General.

DALLAIRE: Thank you.

1. Transcript edited and footnotes added by Cox Center Fellows Aaron Kearney and Nathan Nasrallah.

2. See <http://www.childsoldiers.org/>.

SCHARF: I would like to start off by asking you to tell us a little about your journey from UN Force Commander to human rights advocate, focusing on child soldiers.

DALLAIRE: It was very much based on the experience in Rwanda. Previous to that, I was a NATO commander, so we were essentially engaged in classic warfare at the end of the Cold War. All these new imploding nations and failing states got us involved in a number of countries. The Rwandan mission that I commanded, which ultimately ended with the genocide in Rwanda, brought me face to face with the ability of human beings to be able to destroy each other on massive scales and with near impunity. Also, the use of youths and children, using youth militias to conduct a lot of this destruction and those traumas of 1994. I was able to then nurture this feeling that there had to be something better in the world than simply letting these catastrophic failures happen, and so I got engaged in trying to get back into the field and trying to prevent some of it from happening.

SCHARF: Now you have written two best-selling books. The first one was *Shake Hands with the Devil*³ and it's a powerful indictment of the international community's inaction in the face of genocide in Africa. Do you think the world has learned the lessons from Rwanda now that it is twenty years later?

DALLAIRE: It is interesting the way you put it, in a professorial way—they learned a lesson. I think they learned to create some tools that would prevent that from happening. As an example, and I think the dominant example, is the Responsibility to Protect doctrine that was finally approved in 2005 in the General Assembly,⁴ which essentially the world signed up to. [It] states that if a nation is massively abusing the human rights of its own people or can't stop it, we and all the other nations under the UN must go in and intervene to protect. So that was an extraordinary product that was brought about. The problem, however, with that is that although they have learned that and they know it's there, they are not applying it. They are not operationalizing it.

SCHARF: So, for example, with respect to Syria, Obama has been saying we have to take action for humanitarian reasons and other countries and

3. Roméo Dallaire and Brent Beardsley, *Shake Hands with the Devil: The Failure of Humanity in Rwanda*. (Da Capo Press, 2005).

4. UN General Assembly, Resolution 63/308, "The Responsibility to Protect," October 7, 2009, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/308.

members of our Congress here in the United States are saying it's not legal to do so and we have no obligation.⁵

DALLAIRE: Well, both are wrong. In fact it starts as far back as Libya, as we went in sort of half-cocked sending in air forces, where, in fact Gaddafi said, "I am going to crush these cockroaches."⁶ Those were exactly the same words used by the extremists in Rwanda that brought about the Responsibility to Protect. And we should have put boots on the ground to protect the civilians and ultimately not have them [Libyans] bleed in trying to establish some order. Well, Syria offered us exactly the same situation, but we didn't take it up. When I was asked two years ago, which was already six months into the Syrian campaign, "What do you think we should be doing?" I said, "We should be applying Responsibility to Protect, but there haven't been enough people killed to actually provide the politicians in this world who have the ability to intervene to want to intervene." So the will to intervene is not behind the Responsibility to Protect.

SCHARF: Now, in Rwanda we were talking about 800,000⁷ slaughtered in four months. In Syria the recent estimates were 1,400 people were killed by recent chemical weapons attack, but maybe 100,000 people have been killed since the fighting began in March of 2011.⁸ How many do you think would be enough before the scales tip in favor of some sort of humanitarian intervention?

DALLAIRE: You are hitting the heart of the problem. How many humans have got to suffer for those who have the capability of responding, and considering those humans equal to them, to be worth us taking those risks and going in and helping them? And we haven't broken that code. We've found means of maybe how we should do it, but we haven't found the willingness of our leaders, who are politicians who are risk averse [that] are not statesmen who are prepared to take risks to demonstrate responsibility, demonstrate a lot of willingness to move to a higher plain than self-interest. Those statesmen aren't there and that's why we are into number crunch-

5. Paul Campos, "Striking Syria is Completely Illegal," *Time*, September 5, 2013, <http://ideas.time.com/2013/09/05/obamas-plan-for-intervention-in-syria-is-illegal>.

6. "Libya Protests: Defiant Gaddafi Refuses to Quit," *BBC News*, February 22, 2011, <http://www.bbc.co.uk/news/world-middle-east-12544624>.

7. Roland Adjovi and Nandor Knust, "Rwanda," in *Max Planck Encyclopedia of International Law*, edited by R. Wolfram (Oxford University Press, 2013).

8. Josh Levs, *Syria* "'Red line' debate: Are chemical weapons in Syria worse than conventional attacks?" *CNN News*, August 28, 2013, <http://www.cnn.com/2013/08/27/world/meast/syria-chemical-weapons-red-line/index.html>.

ing. And to be quite honest, the recent gas attacks and chemical attacks are a crime against humanity. So fine, bring in the International Criminal Court, but that is not the red line in reality if we are responsible towards the Responsibility to Protect. The red line was two years ago and we didn't intervene. Now it's nearly impossible unless you get a ceasefire and move in a separation force under the UN to permit then a future negotiation stage.

SCHARF: Let's now talk a little bit about child soldiers, because that's what you have been working on lately. Your recent best seller *They Fight Like Soldiers, They Die Like Children*⁹ is about the problem of child soldiers and you make the case that the international community is ignoring that problem at its own peril. Can you elaborate on that?

DALLAIRE: It's very much peer focused. Many of the nations that are seeing the use of child soldiers, either by government forces or nonstate actors, are countries where the demographics are such that 50 percent, sometimes more, of the population are under the age of eighteen, which is the age under the Optional Protocol on Child Rights where children are not to be recruited nor used in operations and conflict.¹⁰ So you've got this massive reserve of youth that is being abused and they are seeing each other so used and it can sort of perpetuate itself because you know, "I went through it so maybe this is the way we can do it and let's keep it going." So the greatest risk of the child soldiers is the fact that it can be an instrument of war, a weapon of war that can sustain itself time after time, because the demographics are permitting it to happen.

SCHARF: Yes, and you have gone from looking at child soldiers to now focusing on an even more narrow problem, that of child pirates, maritime pirates. So your recent editorial in the *Toronto Globe and Mail* was headlined "Child Pirates are Everybody's Problem."¹¹ Can you tell us why we should be concerned about child piracy?

DALLAIRE: Because the impact of them is of course an economic one that is directly related to our self-interests, our economic self-interests, but also the child piracy has this funny way, in my perspective, of going beyond its

9. Roméo Dallaire, *They Fight Like Soldiers, They Die Like Children* (Walker and Company, 2011).

10. UN General Assembly, Resolution 44/25, "Convention on the Rights of the Child," November 20, 1989, <http://www.un.org/documents/ga/res/44/a44r025.htm>.

11. Roméo Dallaire, "Child Pirates are Everybody's Problem," *Toronto Globe and Mail*, February 10, 2012, <http://www.theglobeandmail.com/commentary/child-pirates-are-everybodys-problem/article544972>.

borders. This is not a border-restricted use of children, like let's say child soldiers which would be in a nation, a conflict zone, and apart from the LRA who have been sort of very mobile . . .

SCHARF: That's the Lord's Resistance Army, which operates in northern Uganda and Sudan.

DALLAIRE: Yes, and they are now in the Central African Republic and are being supported by Sudan to maybe ultimately subvert South Sudan. So it gets pretty complicated, but apart from that particular group, the others are very localized. So the question is, with pirates it is not, it spreads. We are seeing Western Africa now also seeing a surge in the use of piracy and the availability again of youths who can be given empowerment by weapons and indoctrination.

SCHARF: So what percentage of pirates are children would you say? Is it around 50 percent?

DALLAIRE: Well, the figures seem to be about a third or so, but imagine when they are on the seas and you got people on big ships, naval ships, or other ships, and they are protecting and opening fire against the pirates, are they able to discern whether or not this is an adult or a youth? What we are seeing are a lot of these kids being killed.

SCHARF: When they do discern who is a child and who is an adult, many of the countries have a policy that is sort of like the local fishing policy, when you catch a fish that's too small you have to send it back, so they call it "catch and release." Do you think that is the right way to be treating the juvenile pirates?

DALLAIRE: Absolutely not! In fact, the link that brought us in to child piracy comes from child soldiers, which is what is happening on the ground before they're actually deployed. If on the ground you have an atmosphere that permits this to happen, you have recruitment and rerecruitment, of course they are going to go to sea and you have a problem. So how do we curtail it on the ground? I am a strong advocate for a nonpunitive juvenile type of court process in which the youth that are taken, they are not incarcerated [but] they are held. In the process of this nonpunitive juvenile court, they are given the opportunity of being rehabilitated and reintegrated and ultimately are able to be extracted from that cycle of, if not banditry and piracy, maybe even conflict and fighting, if conflict erupts.

SCHARF: What about the adults? What can be done to discourage them from recruiting the children?

DALLAIRE: Take every one of them, throw them in jail, and throw away the key!

SCHARF: So in fact, what we're hearing is that some courts around the world are increasing the penalty when an adult pirate is found on a ship with children. They're treating that as an aggravating factor. And that can send a signal that might have a deterrent effect. It is time for a short break. When we return we will bring three of the world's leading experts on piracy into the conversation, stay with us.

SCHARF: Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 Idea Stream. I'm Michael Scharf, and I am joined in studio by General Roméo Dellaire, Judge Rosemelle Mutoka of Kenya, piracy prosecutor Sulakshna Beekarry of Mauritius, and Professor Milena Sterio of the Cleveland Marshall College of Law. We are talking about the problem of child pirates. Let me begin with Sulakshna Beekarry; to prepare for your first piracy cases in Mauritius I understand that your government studied the best international practices and adopted a state-of-the-art approach. Walk us through what that means. What does your government do when an accused pirate appears to be a juvenile?

BEEKARRY: I have to say, we have not faced that issue in practice yet, but it is an issue which is expected and guidelines have been discussed, a draft put up, but not yet finalized with other states of the region, in particular the Seychelles. Now, these guidelines would include what to do in that situation and how to determine an age, going from teeth examination and a lot of other medical ways of determining the real age.

SCHARF: That's because everybody they catch, knowing that there's often a catch and release policy, will say, "I may have a beard and a low voice but I am only fourteen," right?

BEEKARRY: And how do you know who is speaking the truth and who isn't? But I feel as well that the decision might come much earlier. It might come on a decision to accept that at transfer or not where juveniles are involved, but this remains to be seen in the future.

SCHARF: Judge Rosemelle Mutoka, you spent 2011 in the United States as a distinguished jurist in residence at Case Western Reserve and we are

glad to have you back in Cleveland. You have presided over seven piracy cases in Kenya. Were any of those juvenile cases?

MUTOKA: Thank you, Michael. Yes, I have presided over seven cases. I have concluded three and unfortunately none of the three have had any juveniles. But at least two of them had juveniles. I took plea in two cases. Before my court, it is not very common for the pirate defendants to claim that they are juveniles. In fact, they avoid saying that and you perhaps just want to look at them and because of their size and the way they appear, you perhaps think you should take them for age assessment, because they will not tell you, that was not my experience.

SCHARF: Now that is very interesting, so where I thought everybody would want to claim to be a juvenile, either because they are fearful of the pirates that hired them or for other reasons, they are all claiming to be adults when you suspect they are actually under age?

MUTOKA: It is an interesting phenomenon, and the reason for it became evident later in the process. When they come in, we had the challenge of communication because they speak Somali and they can't communicate in the language of our court, English. What became evident to us later was the fact that they did not want to be separated from each other. They knew that if they were classified as juveniles, then they would be taken to a juvenile facility. That meant they would be kept away from their comrades, which they did not want. So they would not admit they were juveniles.

SCHARF: Now, from our conversations I know that you had all sorts of special care for these convicted pirates. You sent them to special prisons, not as part of the regular population. You helped educate them so that if they were illiterate they could learn to read and write. What was your thinking on that?

MUTOKA: It is because we had juveniles among the convicted pirates, and we wanted to make sure that the juveniles in particular were protected and received special care. It was easier to group them all together in a special facility because of the issue of language. If you had them together in one place it was easier to arrange for an interpreter to be with them and to be able to communicate with, not only just among themselves and the prison authorities, but also when they had people visiting, because there was a lot of interest in these cases and we had a lot of people coming from all over the world.

SCHARF: How long were the sentences usually?

MUTOKA: The first case we had, the first case registered in Kenya, was 2007. The first conviction was in 2009 and each one of them was sentence to serve twenty years imprisonment and immediately they appealed. Subsequently they received sentences between five and seven years, and right now that seems to be the trend. There is one case from about two years ago where the sentence was to serve twenty years, and the only reason is because people died as a consequence of their acts of piracy.

SCHARF: So there were murders? They were convicted of murder?

MUTOKA: No, not murder. They were charged with piracy not murder, but people were killed during the attack.

SCHARF: When these pirates are in the Kenyan jails as part of rehabilitation you do educate them? You teach them to read and write? Is that part of it?

MUTOKA: Yes, that is part of it.

SCHARF: So let me ask this—it's been said that short sentences and decent jails, three square meals with educational opportunities, is not much of a deterrent for people facing famine in their own country. Some have even compared the treatment of the Somali pirates in Kenya, in the Seychelles, and in other countries, as similar to going to university.¹² Is that a fair criticism?

MUTOKA: Well, I do not agree with that. I think that is a very simplistic approach to what has been done. Actually, when you think about the fact that in Somalia there is a complete breakdown in law and order and most of these young men that are used to committing piracy offenses are not educated, so they look for something to do. If you take out [these men,] it doesn't matter how many you take out, because there are still others available. So it's not so much the fact that you think you are going to pass a message to people who really don't care. They are looking for a livelihood, so for them that is collateral damage, you move on, so I think that argument is simplistic when you look at what's happening in Somalia.

SCHARF: So prosecution is not really going to deter anybody no matter what the penalty? In the US they have given some life sentences,¹³ for

12. Jessica Hatcher, "Somali Pirates Find Life in Kenyan Jail More Comfortable than on Ocean Waves," *The Guardian*, August 16, 2013, <http://www.theguardian.com/world/2013/aug/16/somali-pirates-kenya-jail-indian-ocean>.

13. Brock Vergakis, "Jury Recommends Life Sentences for Somali Pirates," *USA Today*, August 2, 2013, <http://www.usatoday.com/story/news/nation/2013/08/02/somali-pirates-jury-life-sentences/2613527/>.

example, and the prosecutors in their closing arguments said, “We need to give them the most serious penalty.” In fact they were asking for the death sentence in order to send a signal back in Somalia that piracy won’t pay. What I hear you saying is, they are not listening in Somalia. It doesn’t matter what signals the prosecution is sending in foreign courts—that’s not being heard by the populations that are resorting to piracy.

MUTOKA: I am not saying that it’s not effective. I do believe, of course, that it may be a deterrent, but I don’t think it’s a deterrent to the extent that you say, if you give long sentences, of course that would stop them. Because these are desperate young people who are looking for a livelihood, so my argument and my experience is that they are contrite about the things that have happened. If you talk to them one-on-one, they will tell you that and most of them—who have been sentenced by Kenyan courts—have tried to get something else to do because, of course, now after educating them and talking to them, they feel that there’s something else they can do with their lives. Somalis’ are enterprising people; they are very hard working people.

SCHARF: Do they obtain employment in Kenya or do you send them back to Somalia after they have served their sentence?

MUTOKA: They are usually sent back to Somalia, but you know Kenya has a unique situation where we have Somali-Somalis and we have Kenyan-Somalis and, of course, the only difference between them is the border. They speak the same language. So, where as we make orders for repatriation and they are sent back, but you know the systems we have in place do not insure that they go back and they stay back in place in Somalia.

SCHARF: Let’s bring Professor Milena Sterio into the conversation. Milena, before the break General Dallaire gave us his prescription for solving the problem of child piracy and we just heard Judge Mutoka’s discussion of how Kenya dealt with child and youthful pirates. What would you add to that and do you agree with the approach that they are enumerating?

STERIO: Yes, I do agree with the approaches and it would be great if either one of us could say or do something that would, in the short term, solve the problem of child piracy. That is not the case unfortunately, but we can certainly offer best practices or recommendations. So I think the proper approach is definitely trying to ascertain the suspected pirate’s age from an early stage so that they can be appropriately treated, separated from the adult population, and provided with those educational opportunities.

When it comes to the prosecution and then the sentencing, the age of the suspected defendants should definitely be taken into account. Then once we are talking about sending them to an appropriate correctional facility to serve their sentences, they should definitely be sent to a facility for juveniles where those educational rehabilitation opportunities are present. It might be easier said than done but . . .

SCHARF: How do we know what the line is between a juvenile and an adult? Are we talking about eighteen years of age?

STERIO: So there is really no consensus in the international community as to the appropriate age of minimal criminal responsibility. There is a United Nations convention called the Convention on the Rights of the Child¹⁴ that defines a juvenile as anybody who is under eighteen, so under that convention the age would be eighteen. However, when it comes to the prosecution treatment of suspected juveniles it's ultimately up to each country and the domestic juvenile system to determine where we set that minimum age of criminal responsibility.

SCHARF: Where do we set that in the United States?

STERIO: In the United States it really depends from jurisdiction to jurisdiction. The minimum could be as early as seven or eight. In some jurisdictions the prosecutor will have the discretion to charge somebody as an adult or not. But certainly in the United States when somebody is fifteen or sixteen, many times when it comes to violent crimes, we treat them as adults.

SCHARF: So, in particular those people who are older teenagers, sixteen, seventeen, seventeen and a half, they are, under the current approach, being treated as juveniles. And the current approach seems to be very black and white, very rigid. Are you advocating a looser approach where you look at facts and circumstances like they would do in the United States?

STERIO: If you adopt an approach that says that you should take the person's age into account, into consideration, that gives you the flexibility to then say, "If you are thirteen we'll give you a lighter sentence. If you're seventeen, which is much closer to eighteen, however arbitrary that age might be, we might give you a slightly harsher sentence."

SCHARF: Okay, now looking at the other side trying to not deter the child pirates, but deter the people that are recruiting and using them, I wonder

14. UN General Assembly, Resolution 44/25, "Convention on the Rights of the Child," November 20, 1989, <http://www.un.org/documents/ga/res/44/a44r025.htm>.

if we can go back to General Dallaire and focus on what they do to deter use of child soldiers. Recently, the ICC, International Criminal Court, prosecuted a military commander for the recruitment of child soldiers as a crime against humanity, is that right?

DALLAIRE: That's right, but it was a long, long, glacial exercise to get that first convictions in front of the court. But it's also been very difficult to get the court to fully grasp the impact on these children when they are recruited in order to establish the right level of punishment to be given to the adults. One of the reasons why it's difficult to establish that is that when you are bringing these children in as witnesses or they're young, nineteen, twenty, and the court is in the Hague, there's a whole exercise of that, but the defense is also very, very powerful. The defense lawyers are just taking the witnesses apart because of what they've gone through. The girls especially—they've been raped, they've been abused, they have a child or two, they are probably even sick with AIDS. The defense tactics are destroying the witnesses' ability to provide the court with a sustained logical explanation of what has happened to them. In the recent case before the International Criminal Court, that resulted in the prosecution having to withdraw the charge of rape where we know the individual was engaged in rape on a series of occasions, but they just could not get the witnesses to talk about it in court.

SCHARF: The case you are talking about is the Lubanga case.¹⁵ They did end up convicting Lubanga of recruiting child soldiers.

DALLAIRE: Well, he only got fourteen years, while the guy has been using all kinds of children and he's been slaughtering and killing and using them as we were using World War I soldiers, you know, in frontal assaults and having them be blown away. He's been throwing kids back into the bush when they are injured, when they are sick. I mean the scale of what this individual has done is off any of our scales. But he ends up with only a fourteen-year sentence.

SCHARF: So you're saying that that case did not send the signal you wished it had?

DALLAIRE: It's not strong enough yet; it's a start, because we finally got it there, but the handling, how we can handle this is not resolved. How

15. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, March 14, 2012, <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>

can we protect the witnesses so that they are going to be credible in front of the court to be able to bring the right sentence?

SCHARF: Now, when countries in the area like Mauritius, Kenya, and the Seychelles are prosecuting the pirates that the United States, the European Union, and Canadians are apprehending, they often are prosecuted not just under the crime of piracy as defined in the UN Law of the Sea Convention¹⁶, but sometimes under other terrorism conventions, for things like hostage taking and hijacking of a ship. Do you think they should also prosecute the pirates for crimes against humanity using the precedent of the International Criminal Court's conviction of Lubanga?

DALLAIRE: This is a great opening to the maturing of the whole international judicial system. Can crimes against humanity be prosecuted in domestic courts? I say, absolutely. In Canada, we recently prosecuted a genocider from Rwanda, though we did so for multiple murder because we did not have a statute criminalizing crimes against humanity.

SCHARF: Let us go back to our prosecutor from Mauritius, Reshma Beekarry. Would your country be able to prosecute crimes against humanity? Do you have that crime on your books?

BEEKARRY: Interestingly, our thinking has gone in that direction, but with a slight variation. Two years ago, we reached an agreement with the ICC. The ICC will be coming to sit in Mauritius and to have those crimes prosecuted in our local courts. We actually enacted a piece of legislation called the International Criminal Court Act 2011 in Mauritius. And for us, that is a novel idea. We have not quite reached the kind of thinking you are mentioning, Professor Scharf. We could give it thought; but it could take quite a bit of thought.

SCHARF: So there is the possibility that if Mauritius finds itself with a major recruiter of child pirates, you could prosecute that person not just for piracy, but maybe for the crime against humanity of recruiting child pirates, like the ICC has done for recruiting child soldiers?

BEEKARRY: Possibly. I would think the seed for that has already been sown. We have already opened the door for the ICC to come and sit and for us to start looking towards bigger crimes. Until now, these crimes have only been prosecuted in The Hague.

16. United Nations Convention on the Law of the Sea, December 10, 1982, 1833 U.N.T.S. 397.

SCHARF: Now, there is one little wrinkle here. Piracy is normally, as I understand it, a crime committed in international waters, on the high seas. But where is the recruitment being committed? That is on dry land. I will turn this to our professor from Cleveland State, Milena Sterio. Is there any recent precedent for prosecuting dry land piracy?

STERIO: Yes. We actually have very interesting, important recent precedents on that in the United States courts. There have been two cases—one called *Ali*¹⁷ and the other one called *Shibin*¹⁸—where the defendants were essentially prosecuted for aiding and abetting piracy [facilitating piracy] for acts that they committed from dry land. They were prosecuted under the United States Piracy Statute.¹⁹ One of them was convicted and received a life sentence; and the other one's proceedings are still ongoing. In both instances, the United States courts have accepted this notion that you can commit acts of facilitation on dry land and be prosecuted as a pirate.

SCHARF: Tell us about this Ali case. What was he actually doing?

STERIO: Ali was essentially a hostage negotiator. After there were hostages taken by Somali pirates, he had facilitated the negotiation of the ransom. He, I think, had stepped foot onboard the vessel, but the vessel, at that point, was in the Somali territorial waters. So Ali, the defendant himself, had never acted on the high seas. He had committed other acts of negotiating the ransom from Somalia [dry land].²⁰

SCHARF: Wasn't his defense that he was actually trying to facilitate the rescue and the release of the victims?

STERIO: Yes. He basically claimed that he was a good guy, since he was trying to help the release of the hostages. Of course, United States prosecutors did not buy that argument and prosecuted him as a piracy facilitator, instead of a hero.

SCHARF: What is the difference between that case and the situation of insurance companies? If you are insured by a company like Lloyds of London, your vessel is hijacked, and the pirates say, "We want a million dollars for the release of your vessel and its crew." Lloyds of London sends in a hostage negotiator who handles everything. Then, they pay it off and

17. *United States v. Ali*, 718 F.3d 929 (2013).

18. *United States v. Shibin*, 722 F.2d 233 (2013).

19. 18 U.S.C.A. § 1651 (West 1948).

20. *See United States v. Ali*, 718 F.3d 929 (2013).

maybe jack up your insurance premium for the future. Everybody lives happily ever after, especially Lloyds of London, who is making a fortune. Why shouldn't Lloyds of London be prosecuted under the Ali precedent?

STERIO: Good question. There is a provision in the United Nations Convention of the Law of the Sea that might make prosecution of insurance companies difficult. In the article that deals with aiding and abetting, it says the defendant must intentionally facilitate. So the insurance companies could make the argument that they are not really "intentionally" doing anything. If anything, they are helping after the fact. But I agree with you; it is a fine line.

SCHARF: Okay. And this guy Ali, I have heard that he was the highest-level pirate prosecuted in modern times. Is that right?

STERIO: That is right. And by the way, the Ali case is the only modern piracy case based on universal jurisdiction in the United States courts. Ali had no nexus and no connection to the United States; the victims were not American, he was not American, and the case occurred in Somalia. So it's really a fascinating case.

SCHARF: So the highest-level guy is just a negotiator. No kingpins, no financiers, no top people have been prosecuted?

STERIO: Not yet. But this opens the door for those kinds of prosecutions, at least in the United States. Now we know that, in US courts, if you commit acts on dry land of aiding and abetting piracy [facilitating piracy], and that can include financing a future pirate attack, you can be prosecuted for piracy.

SCHARF: Judge Mutoka was saying earlier that Kenya has only been prosecuting the foot soldier pirates that they capture, and she is not absolutely sure if there is a deterrent effect. I guess if these people are fungible and they are just the foot soldiers, this is sort of like trying to deal with the narcotics trade by just going after the so-called mules. What we learned in that area is until you start going up to the leaders of the cartel, you were not able to make a big difference. General Dallaire, what does that say about our strategy for combatting piracy? Are we going about it all wrong by just plucking the foot soldiers off from the vessels and prosecuting them?

DALLAIRE: I think that there has got to be concurrent activity. You can't stop prosecuting the pirates and only focus on the financiers. In the case of the child soldiers and the child pirates that continue to be recruited, used,

and later become the casualties, we meet judicial solutions for them as best we can. I think that you have to keep at that to make a responsible action in that regard. However, where we are failing is not pursuing action before the International Criminal Court, equating acts of piracy to crimes against humanity. But the International Criminal Court does not have its own police. If the pirate kingpins are in nation that is a failing state, which does not have a rule of law or a basis for wanting to go after those guys, how do you get into a sovereign state, go after them, and haul them out? That is where there is a nuance that I think has not yet been pursued. When we introduced the Responsibility to Protect doctrine, we began to question whether the Westphalian concept of sovereignty was still absolute. Now, we can intervene for a good reason in certain cases. I would argue that piracy is affecting the international community. We should find a means of actually getting people to go after the bad guys and haul them out.

SCHARF: Now, Judge Mutoka, you have told me that the bad guys [the financiers] are living pretty openly and well in Kenya. Can you tell us a little bit about that?

MUTOKA: Yes. Actually, research has shown that there is a lot of investment of piracy proceeds in Kenya. In fact, statistics show that there is about \$2.1 billion that has been invested in Kenya and cannot be accounted for. Of course, then, it has something to do with organized crime. And piracy is an organized crime . . .

SCHARF: So they are not investing it in the stock exchange; they are investing it in narcotics trade and such things.

MUTOKA: Exactly. Then, they invest in real estate. One of the effects of investing in that kind of business or venture is that they have to use illegal means. There is a lot of bribery in order for them to be able to get licenses and to do what they are doing. Eventually, the Kenyan economy is affected very negatively by this.

SCHARF: But your government does not seem to be doing a lot about these pirates who are living openly, driving fancy cars, and living in big mansions. How do you explain that?

MUTOKA: In fact, I think that because of a need to do something about it, the chief justice in my country decided that we are going to set up an international crimes division. He said that one of the main reasons we are setting it up is that the economy is mortally threatened by interna-

tional-related crimes. This division is going to deal with all manner of international-related crimes, including piracy, trafficking, narcotics trade, and so on. I believe that, through this effort, the obligation will fall on law enforcement agencies to do something about these crimes, particularly money laundering. That is where you can be able to get a hold of this kind of investment in Kenya.

SCHARF: We have been discussing some interesting approaches to try to deter the pirates: going after the financiers, the money launderers, and the recruiters. It is time for a short break. When we return, we are going to look at what needs to be done to prevent a resurgence of piracy when the Anti-Piracy Naval Forces have to depart the Indian Ocean, which is going to happen soon. Stay with us. We will be right back.

SCHARF: I am Michael Scharf, and we are back with *Talking Foreign Policy*. I am joined in studio by a former UN force commander, a judge who has presided over dozens of piracy trials in Kenya, the chief of piracy prosecutions of the island-country Mauritius, and an international law professor. We are talking about the scourge of maritime piracy. Let me go back to our prosecutor, Reshma Beekarry. In our final segment, let's step back to discuss the big picture. Reshma, you know the prosecutors from the Seychelles, you know them from Kenya, you know them from several other countries; you have had a lot of discussions in order to get the best practices for your upcoming prosecutions. Do you think that the prosecutions all around the world are having a deterrent effect on piracy?

BEEKARRY: I understand from discussions I have had that views are split on this. I do not think there has been any study to give us a definite answer as to whether these prosecutions are having a deterrent effect. I think some people have been quoting naval operations or the use of private guards as the real reason for a deterrent effect; so there is an issue there. As far as I am concerned, my personal feeling is that they actually do. Prosecutions send out a very strong signal that impunity is not going to be allowed, and you will be made to pay for it.

SCHARF: In the last segment, Professor Sterio was telling us about some of the recent precedents in the United States. Judge Mutoka, can you tell us about what you consider your most important piracy judgments in Kenya?

MUTOKA: I think it is the first one that I handled. It was a case where pirates hijacked a Norwegian ship, which was rescued by the Swedish

Navy. The most interesting thing was that when the case came up for hearing before me, we had to have three sets of interpreters. We had a Somali interpreter for the Somalis; we had a Norwegian interpreter, who communicated with the Swedish interpreter; the Swedish interpreter would then take it back to the court interpreter, who would say it in English. That was very interesting. Eventually, I convicted the pirates and sentenced them to serve eight years imprisonment.

SCHARF: How many pirates, in total, have been convicted in Kenya?

MUTOKA: To date, one hundred and fifteen pirates have been convicted and seventeen cases with seventy-seven defendants are pending.

SCHARF: When those seventeen cases are over, is it correct that Kenya is washing its hands of these prosecutions and walking away?

MUTOKA: I would imagine that that is a correct summation. The prosecutions were based on understandings that were entered into between Kenya and the countries that would be affected by piratical attacks in the Horn of Africa. To my knowledge, we have not renewed any of the understandings that we had. The last case we had was last year. To date, they have not brought any new cases.

SCHARF: Was there sort of a quid pro quo? Was the United Nations giving money and assistance to Kenya in order to take on these pirate cases?

MUTOKA: I might not be able to correctly answer that, because I am not too sure about what went on behind the scenes. I only know what is on paper. I do know that there was a lot of assistance that was given towards improving the infrastructure. Technical assistance was also given to the judiciary, the president, and the police.

SCHARF: Is that money no longer flowing? Is that part of the calculus?

MUTOKA: I imagine that it is still there. We do have interest that has been expressed in areas of training, especially the training of judicial officers; this means that support is still being provided.

SCHARF: Let's go back to our prosecutor from Mauritius. Is Mauritius receiving international donor money to try to convince Mauritius to take on piracy cases?

BEEKARRY: I am not sure I would make that link straightaway. But the transfer agreement with the European Union came with an assistance package. This was fully related to the trials themselves, the training of

prosecutors, and just having a secure courtroom with metal detectors, dogs, and video link facility. That is how far the assistance has extended.

SCHARF: Milena Sterio, you and I went to the Seychelles to assist in some piracy work, and we were told that the UN built a state-of-the-art prison in their national park. Can you tell us about that?

STERIO: It wasn't actually a new prison, but rather a special prison wing, where the suspected pirates are being held. There was certainly assistance by one of the United Nations offices with respect to training the judges, the prosecutors, and the defense counsel. We've been focusing on the prosecution side, but the defense is also important for fair trials. I do know that the international community has been involved in helping.

SCHARF: I am sure that it is not just the money that convinces countries to prosecute. For instance, both in the Seychelles and Mauritius, tourism is being negatively affected by the perception that there are pirates in your waters. Reshma, your country worries about that as well, right?

BEEKARRY: We do. It has affected the whole region in a lot of ways. You would not want it to continue.

SCHARF: The US has also been prosecuting pirates, as Milena Sterio told us earlier about two recent cases of dry-land piracy. But there was also a case that was really unusual; it is not your typical piracy case. It involved the Sea Shepherds.²¹ This is that vessel called the *Bob Barker* that you see in the TV series *Whaling Wars*. The vessel goes after the Japanese whaling fleets and tries to ram them to stop them from hunting endangered whales. What happened in that case, Milena?

STERIO: The Sea Shepherds case was just recently decided in the Ninth Circuit here in the United States. In that case, which was actually a civil law suit [private tort case], the judge in the Ninth Circuit found that a marine organization like the Sea Shepherds can be considered a piratical organization, as long as they are not operating on behalf of a government. As long as they are operating for their own private purposes, it does not really matter that they are not sea robbers; they were ramming the whaling fleets to protect the whales. If they are committing violent acts on the high seas, for the purposes of United States law, they can be considered pirates.

21. Institute of Cetacean Research v. Sea Shepherd Conservation Society 708 F.3d 1099 (2013)

SCHARF: Greenpeace better watch out, right?

STERIO: [laughs] Yes, definitely.²²

SCHARF: We have been talking about prosecutions, and we have been talking about precedents. And we've been debating whether prosecutions deter piracy. Another deterrent is the use of private security guards, with whom companies that own private vessels are contracting to protect their ships. And most importantly, several countries have sent armed vessels to patrol the waters off the coast of Somalia. General Dallaire, how many vessels would you say are out there? It sounds to me like there is an armada of US and European vessels.

DALLAIRE: I do not have the figure, but I think you are quite right. It is a sizeable fleet, which includes Chinese and Russian vessels as well. It is a very polyglot fleet. There is problem with using extreme measure [using the military] in any conflict or any situation with insurrections. The military takes a very definitive position, and the position is not one that can be sustained in the long term. It is not the normal course for a nation to always have its military deployed in a security role.

SCHARF: It is quite expensive, isn't it?

DALLAIRE: It is expensive, and it is not necessarily the most effective tool. When we moved all those naval assets there, we obviously recognized that this had a sort of finite time to it. This was because of the nature of the fleets that could be maintained there, the cost, and the like. The question that never seemed to be coming to the floor and that people have been avoiding is, "What happens when they leave?" They're going to leave. So the fear is that you leave a vacuum. So there have been these security companies and other arrangements made. I think that is where the international community fails. As an example, why isn't there a UN naval capability? We have UN land capabilities. When I was in Cambodia in 1992, we had a naval capability in that mission to fight pirates off Kompong Som. Why doesn't the UN have that? Why doesn't it have its own capability versus having to seek or wait for donor countries to provide?

SCHARF: It sounds almost like this is a surge. We can take an analogy from Iraq and Afghanistan and maybe go even farther back in history when the US sent the marines against the Barbary pirates. In these cases, the hope

22. A few weeks after the broadcast, Russia arrested the crew of a Green Peace vessel that had been protesting drilling in arctic waters, claiming that they were pirates.

was that if we have enough military assets there, we will finally defeat the pirates. Then, we can manage the situation on a lower level. But you're saying that is not going to happen. When they pull out those assets, you think piracy is going to spike.

DALLAIRE: You have not broken the back of the whole system.

SCHARF: Is it possible to do that without solving the failed state that is Somalia?

DALLAIRE: This is where I come back to the question of sovereignty. If a sovereign nation, by its inept capabilities as a failing state, is putting a whole bunch of other nations at risk, there is surely a means by which the International Criminal Court and international community can handle something like that. That is why I have always felt that the ad hoc international tribunals, which led to International Criminal Court, was the first step in bringing global justice. A new dimension is needed and I think this is a great opportunity to try to bring international justice to another level of engagement in a case where a nation-state is, in fact, putting other nation states at risk by its inability to curtail what is coming out of it.

SCHARF: Meanwhile, Somalia is like a vacuum; it is a lawless place. In fact, Al Shabaab, which is a terrorist organization affiliated with Al Qaeda, is on the border of Kenya. I understand that your government, Judge Mutoka, invaded Somalia to destroy the Al Shabaab troops two years ago?

MUTOKA: That is true, yes.

SCHARF: Are Kenya's troops still there?

MUTOKA: They are still there. In fact, there has been a call from the Somali government that they should leave; but they are still there. The Kenyan government argues that it has to protect the border between Kenya and Somalia so that any cautions are not renewed there. You are aware that there have been a number of sporadic attacks, especially on churches; I've never understood that, though. The attacks have been attributed to Al Shabaab. We feel as a country that Kenya has helped in bringing down piracy by insuring that they do not get any routes in passage.

SCHARF: I think what I'm hearing is that until Somalia has an effective government, a rule of law, and international justice helping out; the pirates are going to continue to flourish, along with the drug traffickers and the organized criminals, because that's what happens in a failed state. It is not

just Somalia—there is also Yemen, and now pirates are breaking out in some weaker states on the West Coast of Africa. We've heard today that just prosecuting is not enough, and just providing security is not enough—there needs to be a more holistic approach. Well, it's time to wrap up the program. Hollywood has always glorified piracy. But in today's broadcast of *Talking Foreign Policy*, we've seen that piracy is a scourge that continues to vex the international community. That is the version of piracy that you're going to see in the new Hollywood movie with Tom Hanks, *Captain Phillips*, which should be refreshing. If you want to weigh in on the discussion or suggest a topic for the upcoming broadcast of *Talking Foreign Policy*, please send an email to talkingforeignpolicy@case.edu. Let me thank our outstanding panelists, who have come from far and wide. Again, we have Judge Mutoka, who has come from Kenya; General Dallaire, who has come from Canada; Prosecutor Beekarry, who has come all the way from Mauritius; and from just down the street we have Professor Sterio, from Cleveland State Law School. Thank you all. I'm Michael Scharf. You have been listening to *Talking Foreign Policy*, produced by Case Western Reserve University and WCPN 90.3 ideastream.

Talking Foreign Policy, January 31, 2014 broadcast¹

Participants:

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Shannon French

Mike Newton

Peter Singer

Milena Sterio

SCHARF: Welcome back to *Talking Foreign Policy*. I'm your host, Michael Scharf, interim dean of Case Western Reserve University School of Law. In today's broadcast, we'll be discussing the topic of cyberwar. We'll begin our discussion with Peter Singer, director of the Center for 21st Century Security and Intelligence at the Brookings Institution. Oxford University recently published Peter's new book on cyberwar and cybersecurity. I just finished reading it, and it's an eye opener. Peter, thanks for being with us today.

SINGER: Thank you.

SCHARF: So, Peter, we hear so much about cyberthreats and cyberwar in the news. Where do we stand now?

SINGER: It's interesting, this topic of cybersecurity and cyberwar. It connects issues that are as personal as your privacy or your bank account to as weighty as the future of world politics. Where we stand is that we are definitely in an age of huge cyberdependence—everything from our communications, our commerce, our infrastructure, and, yes, conflict. Ninety-eight percent of military communication runs over the civilian-owned and -operated Internet, so we all depend on this. We live in a digital world, and yet we're also in an era of cyberinsecurity. You can see it in everything from the 97 percent of Fortune 500 companies that have been hacked, and the 3 percent who just don't know it yet, to the over one hundred cybermilitary command equivalents that have been created around the world. There was a poll taken—the first poll of 2014 by PEW—found that Americans are more afraid of a cyberattack than they are of Iranian or North Korean nuclear weapons, or the rise of China or authoritarian Russia, or climate change. So, we've got this combination of massive use of the online world and its rippling effect into the real world via the Internet

1. Transcript edited and footnotes added by Caroline Moore.

of Things.² But also, we're not in a good place, in terms of our discomfort and, frankly, our lack of awareness on just the basics of this topic and that was the point of the book—to try to connect those two together.

SCHARF: I suppose there's a spectrum. On one side, we've got the hacking like we were talking about and then maybe surveillance, but on the other side is this concept of cyberwar, which you also devote several chapters to. How is this cyberwarfare different from conventional war?

SINGER: You hit it exactly. Part of the problem with how we've approached it is we lump together so many different things simply because they take place in the realm of zeroes and ones. A good illustration of this would be General Alexander, who is in charge of *both* Cyber Command and the National Security Agency. You would never see that with other military commands and intelligence agencies, but because it's in this we do. But, he testified to Congress that each day, in his quote "the US military faces millions of cyberattacks," but to get that number of millions, he was combining everything from address scans and probes, to attempts at pranks, to attempts at political protests, to attempts to get inside the network to do data theft and espionage. But, none of what happened, in terms of these millions of attacks, was actually what people think of when they think of cyberwar and what they should think of cyberwar, which is a state of armed conflict politically motivated with violence, just like with regular conflict, with regular war itself. You can see this in the phraseologies of a cyber-9/11 or a cyber-Pearl Harbor. So, we mush lots of things together. I make the parallel that it's a lot like saying that a group of teenagers with firecrackers, a group of political protestors in the street with a smoke bomb, a James bond spy with his pistol, a terrorist with a roadside bomb, and a military with a cruise missile and saying, "Well, these are all the same because they involve the chemistry of gunpowder." Well, no, they're not. And we wouldn't treat them that way, but we do here in cyberwarfare. It's definitely part of why it's important to distinguish what we mean when we say war is that it also allows you to get to the true reality of it. When you're talking about how the military actually uses this technology and the nature of the beast, when you're exploring things like computer operations and the like.

2. See Jacob Morgan, "A Simple Explanation of 'The Internet of Things,'" *Forbes*, May 13, 2014, <http://www.forbes.com/sites/jacobmorgan/2014/05/13/simple-explanation-internet-things-that-anyone-can-understand/>.

SCHARF: And you mentioned, the US now has a cybercommand as part of its armed services. It's not just the sea, land, air, or the outer space anymore. We also have an entire military apparatus for cyberspace. But, surely, Peter, they're not looking at the firecrackers and the little teeny things. They're preparing for all-out war, right?

SINGER: That question of mission and responsibility has been one of the areas that's bedeviled the approach to this space, because of how when you talk about jurisdictions when you talk about national borders, it gets very fuzzy when you move into the online world. You also have an issue of scale. It'd be surprising to a lot of people, but there are actually more folks working in the Fort Meade complex, which is where Cyber Command and NSA are, than there are in the Pentagon itself. This is a huge growth area.

SCHARF: How much money are we spending on that?

SINGER: There are a lot of different ways to cut it. To me, what stands out is not the exact amount that you're spending, but how you're dividing up your resources. And in the US, we spend about ten times as much in the governmental side on Defense Department cyberoperations as we do in the Department of Homeland Security on the civilian side. Also, if you want to know what we are spending on internally, research and development, we're spending—again depending on how you're categorizing it—we're roughly spending two-and-a-half times to four times as much on cyberoffense research and development as we are on cyberdefense research and development. I don't think—I argue that that's not that most strategic approach. It's a lot like, you talked about those teenagers; if you're using a metaphor, it's a lot like being worried about gangs of roving teenagers in your neighborhood, and you're standing there in your glass house and say, "You know what? I ought to go buy a stone-sharpening kit."

SCHARF: Well, some people do say that a good defense is a strong offense, but I want to go back—

SINGER: No, actually, in both sports and in warfare the best defense is a good defense.

SCHARF: Certainly with the Super Bowl coming up that's true. Let me ask you this: so, you mentioned that people are talking about a cyber-Pearl Harbor or a cyber-9/11. What are the possible major consequences that we could see from a cyberattack? What's the worst-case scenario that you can imagine?

SINGER: First, let's caveat all of this by staying within the reality of the real world of what's happening right now, before we get to the potentiality. So, despite the fact that there have been over a half million references in the media and in academic journals to a cyber-9/11 or a cyber-Pearl Harbor or the fact that there have been 31,000 magazine and academic journal articles about the phenomena of cyberterrorism, let's be fundamentally clear that no person has been hurt or killed ever so far by cyberterrorism, by the FBI definition of it. If we want to talk about the power-grid-going-down scenario, squirrels have taken down the power grid more times than in the zero times that hackers have. That's where we are right now. If we want to talk about the actual, now playing out, big national security issues, to me the real world one to worry about is the massive campaign of intellectual property theft that's emanating from primarily China. It's the largest theft in all of human history that's going on and has huge consequences not just for the economy, but for national security in the end. Now, if you want to go to the what-ifs of what could be there in terms of danger, in the last part the book we explore the key trends that are moving forward. And it's the combination of one thing that's happening with the Internet more broadly and one that's happening within cyberwarfare. With the Internet more broadly, it's the shift to the Internet of Things where we're not just using Internet-enabled devices to communicate with one another. It is not just that I email you, but it's devices that range from our cars to our thermostats to our power grid to our refrigerators all being looped in. So, now you've got the real world being connected. And we're doing that for reasons of efficiency, for gains in the environment, there are all sorts of good things out of it, but it also means that there are vulnerabilities there that can be tapped with greater consequence. We've already seen car hacking, we've already seen refrigerator hacking. But, then the second is the development of new cyberweapons, and Stuxnet³ is the game changer here; where it's [a] weapon that in one hand is like at every other weapon in history. It causes a physical change in the world like a stone did or a drone does, but the difference is it's made of zeroes and ones.

SCHARF: This is what the United States and Israel used against the Iranian nuclear reactors right?

3. See Michael Kelly, "The Stuxnet Attack on Iran's Nuclear Plant Was 'Far More Dangerous' Than Previously Thought," *The Business Insider*, November 20, 2013, <http://www.businessinsider.com/stuxnet-was-far-more-dangerous-than-previous-thought-2013-11>.

SINGER: It went after Iranian nuclear research. In particular, they were operating under a SCADA system⁴ to control things like the centrifuges and the like. It damaged both what they were working on and also the systems themselves. And it's a fascinating story that we cover in the book in a lot of different ways. One of [them] showing that this new kind of weapon was causing physical damage through digital means. It's interesting in that it's a weapon that was here, there, and everywhere. It was in twenty-five-thousand-plus different computers around the world. On the other hand, it might have been the first ethical weapon ever created in that it could—it may have been in all these different computers, but it could only cause damage to the one target that it was intended to. So, even if you had the very same brand centrifuges in your basement aligned in the exact same way, it still wouldn't have worked on those. It's fascinating in a lot of different ways, but it's also—one person we interview in the book describes this as Pandora's Box. It opened up a whole new set. So, that combination, to answer your question, now cannot just cause physical damage, but you now have more targets of greater consequence than systems like that can go after.

SCHARF: And, theoretically, that could be used against satellites, it could be used against our aviation, it could really cause physical damage by shutting down—

SINGER: SCADA is used in everything from nuclear research—SCADA, the system that it was going after—everything from nuclear research, to traffic signals, to factories that make anything from jet fighters, to cupcake wrappers. So, the issue here again is all the gains we've got now to digitize systems, but that brings with it vulnerabilities. The key, though, is you can't delude yourself into thinking that you can protect yourself somehow by disconnecting. Some people say, "Oh, I may be using this digital system, but it's not linked to the Internet." Sometimes it's called air gapping.⁵

SCHARF: So, that's not the solution. So, what exactly is the United States, this new Cyber Command, doing to try to protect us from this threat?

SINGER: So, Cyber Command—one of the other things it's playing out right now is this question: what exactly are its responsibilities? Originally,

4. See Anshul Thakur, "SCADA Systems," *Engineer's Garage*, 2012, <http://www.engineersgarage.com/articles/scada-systems>.

5. See Dylan Love, "Hackers Can Infect Your Computer Even If It's Not Connected To The Internet," *Business Insider*, March 5, 2014, <http://www.businessinsider.com/what-is-air-gap-malware-2014-3>.

when it was created, Defense Department officials talked about how it would just be responsible for defending Defense Department networks. Like any other organization, again, whether you're talking about militaries or the March of Dimes, it slowly but surely, actually in this case quickly, took on a wide variety of different roles. So, it's both protecting Defense Department systems—it has set up a series of units that are designed to basically be operative in cyberwar. They're able to be tasked out to the regional commands and the like. Then, there's another part that's about national protection. And there are units that are basically designed to aid in the defensive—not exclusively Defense Department networks but other critical infrastructure out there and the like. This is when you get into the interesting things of legal authorities, budgets, and responsibilities. One of my concerns is that it's quite natural, when you're talking about threats, to say, "Well, why shouldn't the military be responsible for defending us?" But, the problem here is that it causes a shift and causes a sort of sense of complacency. It takes away what responsibility should have. So, think about it this way: you'll sometimes hear people cite incidents where a group might have done a denial of service on banks. There was an incident where a general talked about that. That is why we needed more funding for Cyber Command. If there was a bank that was moving cash to another bank in an armored van and a bunch of protesters stood in the street, and blocked it for two hours and then dissipated, no one would say "Oh, my goodness, where was the US military?" But, change that bank and that money to zeroes and ones, and that's the narrative that we have right now. No, it's also the responsibility of the banks and the like.

SCHARF: That's an interesting insight, and we'll discuss this in greater detail when we come back from a short break. We've been talking to Peter Singer, bestselling author of the book *Cybersecurity and Cyberwar*.⁶ When we come back we're going to bring three leading experts into the discussion to look at the practical, ethical, and legal aspects of cyberwarfare. Stay with us.

SCHARF: Welcome back to *Talking Foreign Policy*, brought to you by Case Western Reserve University and WCPN 90.3 ideastream. I'm Michael Scharf, interim dean at Case Western Reserve University School of Law. We're talking today about cyberwar with Peter Singer of the Brookings Institute, Colonel Mike Newton of Vanderbilt, Professor Milena Sterio of

6. P.W. Singer and Allan Friedman, *Cybersecurity and Cyberwar: What Everyone Needs to Know* (Oxford University Press, 2014).

Cleveland Marshall College of Law, and Dr. Shannon French from Case Western's Inamori Center. Just before the break, Peter Singer was telling us about the US approach to cyberwar. There were some offensive and perhaps not enough defense components, but let's now begin this segment with our military expert, Vanderbilt professor and former JAG Colonel Mike Newton. Mike, is it fair to characterize the situation that's going on between countries in the world of cyberweapons as a kind of arms race?

NEWTON: I guess, in a sense it is. But, it's a different kind of arm. It's really a race for technological supremacy, so the real challenge is the same thing we've had since the invention of the crossbow. How does the law respond? How does national policy respond? The challenges are to our classic conceptions of what we really mean by war and what it means to wage war, and this represents a whole new set of actors that are involved in that. Peter quite correctly points out there's this incredibly vast combination of private actors, public actors, government infrastructure, and persons acting under government influence or, in their minds, to help achieve government purposes. So, it's a very difficult legal conceptual fit to simply take the established law of war and cram it down on to the context of cyberwar.

SCHARF: Now, Mike, you mention that it's really about technology evolving. That evolution happens all the time, but this reminds me of more of a technological leap like the nuclear age. Let me bring in Shannon, an ethicist, into the conversation. Policy makers didn't really understand nuclear weapons, so they let the scientists and the military specialists do all sorts of *Doctor Strangelove*-like experiments, some of which I think brought us very close to losing the ozone layer. Do you see any parallels to what's going on with the exploration of new weapons and means of warfare in cyberspace?

FRENCH: Well, I will first say something I hope to be reassuring. I think we do have better communication going on now in terms of policy makers actually seeking out genuine experts and getting input from them. I would also say that although it is a little bit confusing to many of us, a lot of the world that is this new cyberrealm can be translated better than a lot of the nuclear science, in terms of again speaking directly to policy makers. But, I actually think what's interesting is that there are some strong parallels to what we saw in the Cold War with the arms race and the so-called MAD strategy, which was mutually assured destruction. In the same way that major powers decided, "Well, we really can't nuke one another because everybody loses," you see the same kind of implicit restraint going on with

the use of major cyberattacks with the major powers. Because it doesn't make sense; we're too interconnected, especially economically, for us to attack one another. It is parallel in that, just like in that era, we have now the greater worry being rogue groups. It isn't that we're worried about the major powers attacking one another with their strengths, but we're worried about it more on the level of asymmetric threats.

SCHARF: But, what about China? I read in the news that it's China that's pouring all the money in, other than us, into this area. Peter, can you tell us what your take is on that?

SINGER: There are a couple of things. First, you asked about arms races. One of the other attributes of every arms race in history is that you're a driving forward force, for very good reason, for your security. That's why they're investing in these technologies and you're worried about real adversaries out there, and that's what drives the sides in an arms race. The other hallmark of every single arms race is that the more you spend, the less secure you end up feeling in the end. That's whether you're talking about the arms races of battleships back prior to WWI, the nuclear arms race, or what we're seeing today on the cyber side. The other thing, and this is where I may disagree a little bit, is that there are some parallels to the *Dr. Strangelove*-ian thinking that's out there, and you can see that. One, and some of the kind of hucksterism—people who understand just a little bit about it or even more so stand to benefit from hyping a threat or some kind of silver bullet solution to it. A lot of the discourse in Washington DC, I joke, has the attributes of *Spinal Tap* and turning the volume up to eleven. You can see that there, and that's of concern to me. Another example would be to say that the solution is to create a new, more secure Internet. Well, no, that is not going to happen. To your point about China, I'm not saying this is purely a threat-hyping problem. There are real issues at play here, and there are real capabilities being built. We talked about the US side, but China is just as active in building up its capabilities, both formally within its military, as well as a much wider network, almost like a patriarchic hacker community or a militia community. The difference is almost a quality-quantity aspect to it. There's a description of the Chinese approach towards Internet censorship that's called the "human flesh search engine."⁷ That's in many ways the parallel here of China, where to stay on

7. See Celia Hatton, "China's internet vigilantes and the 'human flesh search engine,'" *BBC News*, January 28, 2014, <http://www.bbc.com/news/magazine-25913472>.

the attack side, there's just a massive amount that's going on. The targets range from the military defense companies, oil companies, to small furniture makers in New England to universities and even my think tank. That's just in the US. In the book we talk about Operation Shady RAT,⁸ which was linked back to China. It hit everything from international organizations that range from trade groups, to the International Doping Agency prior to the Beijing Olympics, to Coca-Cola being hit. It's just a massive scale, and that may be the differentiator here.

SCHARF: Well, let me turn to the legal issue. To start with something that Peter was telling us about earlier, and that is the Stuxnet attack where the United States and Israel actually were able to do a cyberattack on these nuclear facilities that put Iranian construction of nuclear weaponry back about two years, as I understand it. So, when the US attacks another country like that, Milena, doesn't the president have to authorize an attack? Does he need congressional approval? How does this fit into our conventional thinking about warfare?

STERIO: Under any kind of a convention analysis of warfare, normally our president does need congressional authorization to deploy troops. On the other hand, our president has the inherent constitutional authority as our commander in chief to use force. The very difficult constitutional question is really then: under what circumstances can the president act alone without Congress? I think most scholars would agree that the president can act alone if our nation is faced with some kind of a sudden threat. To bring it back to this issue of cyberattacks against Iran, you would have to make the argument that the Iranian nuclear enrichment facilities were producing nuclear material at such a pace where they were about to reach the stage where they were about to produce a nuclear weapon, which then would be—could be a sudden immediate threat to the United States. Under that rationale then you could say our president can use force, but that also assumes that we're conceiving of a cyberattack by the United States as a conventional military attack. And I think that goes back to—

SCHARF: If it's zeros and ones, we shouldn't?

8. See Ellen Nakashima, *The Washington Post*, "Report on 'Operation Shady RAT' identifies widespread cyber-spying," August 2, 2011, http://www.washingtonpost.com/national/national-security/report-identifies-widespread-cyber-spying/2011/07/29/gIQAoTUmqI_story.html.

STERIO: Well, if it's zeros and ones that makes it a lot more difficult. This is what Mike Newton was also talking about earlier. If we're talking about sending a computer worm called Stuxnet over to Iran that doesn't really require the deployment of US troops, which is not going to kill anybody, and might slow down their production of uranium, we're not talking about human lives. Can we really think of it the same way that we think of, for example, sending ten thousand American troops to Afghanistan? I think—

SCHARF: We're talking about the US constitutional view, but what about the international view? If a country's borders are sacrosanct, they're supposed to have under the UN Charter the right of inviolability. What if another country comes in and penetrates you, not physically, but with zeros and ones over the Internet and does damage to them that costs a lot of money and hits at their very national security? Is that a violation of international law?

STERIO: That kind of an act under international law could be viewed as aggression, which is really a use of force by one state against another state or group of other states that doesn't comply with the normal rules of international law. Basically, you can use force only in self-defense or if the United Nations Security Council authorizes you to use force. Here we have to analyze the nature of the cyberattack. Is it just zeros and ones? Are we just talking about slowing down a nuclear plant or are you also taking down an entire power grid? Are you talking about neutralizing an entire infrastructure? All the defense missiles? It really comes back to the scope and nature of the cyberattack.

SCHARF: I want to talk to Shannon about the ethical aspects of this. Let's say you're the expert who was tasked to launch the cyberattack. As an ethicist, what are your thoughts about the psychological and ethical implications on that person, on US personnel who are engaged in cyberwarfare acts?

FRENCH: Well, as an ethicist, you always worry when there's distance and potential detachment. Every time someone has to make a decision that has an impact on the lives of others, the harder it is for them to see and judge that impact, the less likely they are to make the ethical choice and the more callous they are going to be, and that is simply a consequence that we're familiar with. It's interesting—we've actually talked about this on this program in a different context. There's a lot of worry about that with the drones. Actually, it was discovered, to some folks' surprise, and my

own in one stage, that the drone operators were seeing their victims very close up and were actually experiencing high levels of PTSD and having to work through, almost like a sniper, what their relationship was to the people that they were targeting.

SCHARF: But, that wouldn't be true here.

FRENCH: That wouldn't be true here. That very distance that people thought the drone operators would have, the cyber folks really could have. Maybe that worry needs to be revived in this context.

SCHARF: You've said before if you don't have skin in the game you're likely to make mistakes.

FRENCH: But, I do have to put a caveat in here. It actually connects back to something that Peter said. I think we can't lose sight of the potential good here in terms of cyberweapons. Actually, I think he suggested they might be more ethical in some contexts. And I recognize that. If they are more precise and if they actually don't have the kind of collateral damage that we worry most about, if they're not harming vulnerable populations—

SCHARF: If our option was to either do cruise missile strikes on the nuclear weapon facilities in Iran, and there was a lot of collateral damage to civilians, and instead just send the zeros and ones over the Internet and we accomplish the same thing, well, yeah, that makes sense.

FRENCH: And maybe we don't care how callously we feel about that . . . if in fact in the real world—with an outcome of saving a lot of lives and including again vulnerable population lives.

SCHARF: Well, let me then turned to Mike Newton. Mike, you've got a new book about proportionality in the laws of war. Who, by the way, is the publisher of that?

NEWTON: That would be Oxford University Press, and it makes a great Saint Patrick's Day present.

SCHARF: So, Oxford's got this broadcast down. But let me ask you, if the harms caused by a cyberattack would sometimes rise to a physical level that might justify a conventional military response, is that possible?

NEWTON: It's theoretically possible, but this is the issue that Shannon was just edging up to. The entire corpus of the laws and customs of war really is designed to regulate kinetic hostilities, to protect innocent civilians, and to keep the thread of humanity, even in the middle of intense armed

conflict for all commands and for all persons, so at some core, there's a fundamental recognition of basic human dignity and human rights. The problem is in cyberwar that when you begin to talk about taking zeros and ones, as Peter correctly says, and using them to inflict real physical damage, and then talk about applying the laws and customs of war in response to that, that's a paradigm shift in response to the paradigm shift.

SCHARF: But, let me make this more concrete, Michael. What if the cyberattack by the United States didn't just damage the nuclear research that was going on, but actually caused the nuclear reactor to blow up? Now what?

NEWTON: Well, you get two huge problems: one is the problem of causation. Was it caused by private actors or public actors, because of the basic law or principle that all of your activities must be directed at all times against lawful combatants or the participants in the conflict. In the cyber context, it's enormously complex in real time to run that back and figure out exactly in terms of causation because of how broadly that expands.

SCHARF: So, what happens like in the Stuxnet, where a couple months later somebody leaked it out? I don't know if it was the Obama administration bragging about it or if it was someone who's unhappy about it that just leaked it, but these things do leak out. So, let's say the US does the attack in cyberspace, it blows up the nuclear reactor in Iran, and then it leaks out that it was the US and not some nonstate actor that was behind this. Then what?

NEWTON: But, that's one of the attractive beauties of cyberoperations. It's designed not to blow up the nuclear reactor in Iran, and it didn't, in fact. There was no effect on human beings—no effect whatsoever. So, it's a highly theoretical question.

SCHARF: So, you won't take the bait then?

NEWTON: Peter talked about the responsibility of Cyber Command. I think that's the key authority. Immediately as soon as you move into the military context, you have got to articulate what is the mission statement? What is the scope? And from that, the specified tasks?. Precisely what is the military supposed to accomplish, and the implied tasks, the things that are necessarily implied, that have to happen in order to accomplish that?

SCHARF: All right so. . . . Let me switch it around here—

NEWTON: Within the context of cyberwar that is very difficult, if not impossible, to do.

SCHARF: So, Mike, let's switch it around. Let's say it was Iran who does the cyberattack against the United States, and there's maybe a nuclear reactor that blows up. Right? Because you're focusing on the assumption that the US won't do this, but I'm just trying to get to the question of what if some country does it to another. Does that then equate to an armed attack?

NEWTON: In theory, yeah, if you cause—the legal languages that the damages are of the scope, magnitude, and intensity to equate to an armed attack. But, the problem is that by definition these are not armed attacks; they are cyberattacks, or denial of services, or clogging of computer networks. It takes an incredibly—and in fact I would say it would be the worst cyberattack in history if it did actually unintentionally result in some physical damage.

SCHARF: Peter, do you think that there would ever be a cyberattack from one country to another that would result in physical damage? Is this just a hypothetical or is this something that's perhaps possible and more even likely?

SINGER: Well, I mean, it's not a hypothetical because you've been talking about a real-world case where it happened. I mean, Stuxnet was a cyberattack that resulted in physical damage. Now, it was what we would describe as an act of espionage, not war, but you can get back and forth on that and that's reflecting domestic legal concerns. But, to your broader question of when does a cyberattack become an act of war, in the meaningful term of "Oh, it just happened in cyber but it means we've got to go to war." The reality is—so, first, this is not always so clear when you're talking about regular armed warfare. Think about the example where someone fires a weapon, let's say a rifle, at my nation. That's, of course, an act of war. Well, actually, no. We have border disputes all the time. Okay, well, actions that have no weapon use can still be an act of war. For example, if you deliberately flooded your neighbor's entire country and it was a cascade that caused thousands of lives to be lost, no one would say, "Well, goodness, there was no gunpowder there, so it's not an act of war." We judge it by the effects. But, in the book, where I wrestled with this, in the end there's this quote from a guy who puts it best, "In the end, the president's going to decide." And, so it comes down to a human judgment when it's a war,

or when it's a state of armed conflict, or when it's something else. But, it's a human decision. The concern, though, back to one of your prior points where it ties in with drones, is not so much how the operators look at this, but how the politicians look at it. Whether you're talking about a drone or a cyberweapon, it's very seductive to politicians because it seemingly offers an effect without risk. As we've seen with, whether it's drones or cyberweapons like Stuxnet, what you often want to happen is not always the way it plays out. Whether it's physical collateral damage or the fact that this covert operation leaked or the fact that this weapon that was designed only to go after one target in the world popped up in twenty-five thousand other computers around the world, which is not something that would happen with a regular bomb. It's just a complex space. But, again, to me, if we want to worry about the human views of it, it's not so much the operator. It's us. It's the body politic and the politicians.

NEWTON: Michael, this is Mike, just one clarification—

SCHARF: Mike, we need to take another a short break now and then we'll start the conversation back in just a minute. I love it when we can end, and things are hot and heavy because that means the listeners will stay tuned. We'll be right back.

SCHARF: This is Michael Scharf, and we're back with *Talking Foreign Policy*. I'm joined today by Peter Singer in DC, Mike Newton in Nashville, Shannon French and Milena Sterio are with me here at WCPN ideastream in snowy Cleveland. We're talking about cyberwar. Now, just before the break Mike Newton, our colonel from the JAG, wanted to jump in and add something. Mike, here's your chance.

NEWTON: I just want to really clarify, very briefly, one of the things that everybody is alluding to, but I want to say very clearly in legal terms. The big difference between acts, short of an all-out armed conflict in response to a cyberattack or in a cybercontext, is that the law actually only permits the actor to do what's strictly required—what's narrowly tailored only to ameliorate the threat. That's the law of self-defense, the classic law of self-defense, the classic law of countermeasures, and the classic law of embargo short of armed conflict. The point is that that rule and the legal construct and all of the other range of laws and customs of war change dramatically once we recognize we're in the context of an armed conflict. That's why this distinction matters a great deal because in the cyberwar context, it's easy to say we're only allowed to use that degree of force or

cybertechnology necessary and narrowly tailored to strictly eliminate the threat. The problem is it is so incredibly difficult to ascertain precisely what that means in that context.

SCHARF: And that's a great segue for what I wanted to talk about next, which is the question of how international law applies to the conduct of a cyberwar. Let me begin with Shannon. You have written books about this. What was it, the last book? *The Code of the Warrior*.⁹ Is it possible to apply century's old criteria of just war tradition to something so new and different like cyberwarfare, a form of war made possible by advanced technology?

FRENCH: Well, this is a drumbeat of mine. This is something that I try to get out there as much as possible. There is nothing new under the sun in the way that is relevant to changing the just war tradition. What I mean by that is of course we have new technologies, of course we have new forms of weaponry, but the trick is not to then say, "Oh, my goodness, we must create a whole new theory of just war." It's to figure out how to apply these tried-and-true principles to these new advances. For example, we've already been alluding to many of them. The core principles of just war, things like proportionality, discrimination, right authority, all of that is still valid and true. And, it hasn't changed just because we have this new way of doing it. I would just like to emphasize again something that Peter mentioned earlier. It is the job of the just war tradition to try to limit the scope of war and also to hopefully—it seldom actually has succeeded at this—actually to limit the number of wars we get ourselves into. Anything that lowers the bar towards getting into a war is very worrisome ethically. I would also add finally on this point that when we see groups with greater technologies, and especially world powers using them in a powerful way against weaker groups or groups that don't have the same technologies, that asymmetry can create new enemies, as well. So, where it may be appealing to a policy maker, since we didn't put any boots on the ground, we may actually be leading to more deaths, more threats, because we are putting ourselves out there in a way that is going to make more people angry at us as a nation.

SCHARF: And this is a theme that Peter makes in his book as well. Peter, do you want to elaborate on that?

SINGER: Yes, I'd like to mention a couple things. The first, I'm in complete agreement that you shouldn't try to see these discussions as, "Oh, we need

9. Shannon E. French, *The Code of the Warrior: Exploring Warrior Values Past and Present* (Rowman & Littlefield, 2004).

to write a new Geneva Convention for the cyberworld.” One, that doesn’t make sense, and two, it’s completely unworkable. Again, I’m in agreement with the idea to pull from the values that have been tried-and-true. We do need to understand, though, that there are new kinds of challenges that were never contemplated. One is the idea of disaggregating the military versus a civilian. It makes perfect sense when you’re thinking about conventional weapons, but the Internet itself is civilian, so if 98 percent of US military communications go over the civilian-owned and -operated Internet, this is the mashing up of this already. The other, and this is where again there’s a cross with drones, is that it’s not that there’s no decision making. It’s that the locus of decision making is now moving both geographically and now, when you move into both autonomous robotics, but also cyberweapons, chronologically in ways that make it very difficult for older laws to wrestle with. So, Stuxnet was a weapon that, so to speak, was fired, and its effect played out months later. It’s a really interesting space. There are a lot of challenges to it. But, I’m the son of an Army JAG officer and one of the things I’ve learned is that the law is not conclusive. There are huge amounts of arguments on everything from the Geneva Conventions to what the Constitution says about everything from abortion to gun rights. This is a new manifestation of it, so when someone says this is legal or this is not, that’s their interpretation of the law. Unfortunately, the real world is much more difficult to figure out.

SCHARF: Shannon, did you want to add something?

FRENCH: Well, I agree with all of those points. I simply wanted to add that often times the great difficulty, but the important work to be done, is to figure out what is the right analogy. If we have seen different kinds of weapons in the past and we have hopefully figured out how we ought to respond to them, how do we find the analogy with these new forces and then use those laws correctly?

SCHARF: Now, I have to point out that not everybody agrees with the view that the current law is sufficient for this new threat. And, if you go on blogs there are superstar experts in the field who are debating this issue, so let me turn to Milena. How would you make the argument that there needs to be a new Cyber Geneva Convention, and what would be its essential provisions?

STERIO: Sure, so The Hague Law, the Geneva Convention, and the treaties that we have currently were written so long ago before nuclear

weapons, before drones, and certainly before any kind of cyberweapons. The drafters never contemplated anything like what we're seeing today. There is a treaty called the International Convention on Cybercrime which was adopted in 2001 by the Council of Europe, but that convention really falls short of detailing everything that you would want in a comprehensive multilateral treaty.

SCHARF: Let's focus this on low-level cyberattacks, not this giant thing.

STERIO: We're talking about low-level cyberattacks and encouraging member states to prosecute those at the national level. So, if you want to talk about a big multilateral treaty on cyberwar/cyberattacks, first you would want to carefully define what is a cyberattack and what is cyberwar. Then you might want to think about prohibiting certain types of cyberattacks, similar to how certain types of attacks are prohibited under traditional conventions. So, you might want to prohibit cyberattacks on things like hospitals, infrastructure, airlines, and things where you basically think that the civilian suffering is going to far outweigh whatever military objective you're trying to achieve.

SCHARF: And then, you would basically say that any country that did that was the equivalent of someone who commits genocide or crimes against humanity. It's a violation of international law. Their leaders could be potentially prosecuted.

STERIO: Exactly. So then, you would want to somehow tie it into the existing international law and basically say, "Well, then that's an act of aggression that's illegal under international law." And the leaders now face individual international criminal responsibility.

SCHARF: So, Peter, you're against that approach. What do you think is the problem with it?

SINGER: What we push for in the book is the idea of grafting. Grafting is something that studies in international relations have found to be more effective in building international cooperation, but also it's taken from horticulture. And it's the idea that, let's just be blunt, if you tried to create an entirely new Geneva Conventions right now, you'd never get any agreement on it. You would not get any ratification of it by the key states. A good example in the cyberworld is that NATO asked a group of top, really smart minds to come up with a manual for the legal side of cyberwarfare called the Tallinn

Manual.¹⁰ It's in many ways a great document, a lot of interesting stuff in it, and then what happened? The United States, a NATO member, said, "Yeah, but we're not bound by that." So the point is that grafting, instead of trying to plant a new tree, is to build off of what already works effectively. And so, the example that was mentioned there would be the cybercrime treaty that's—there's some trying to bring new members in. What I'm getting at is that I would love the idea of trying to combine legal thinking with real-world politic, and that's the challenge of this space. We need to not approach it in siloed arguments from our own issue areas, but understand what's possible or not possible both on the technical side, on the political side, and also on the legal side, and bring them altogether. One last point, it's sort of a fascinating one that illustrates the kind of cool but crazy aspects of this space. When we have an illustration of what we might want to build into a treaty that would not find its space in a traditional Geneva Conventions approach is when we say, "Okay, there are certain things we don't want to target." In regular national laws we shouldn't target civilians, and there are really important things not to target among civilians, like ambulances, churches, or hospitals. You particularly don't go after those. In cyber, we typically say things like hospitals and the like, but the one that really matters on a huge level that most everyone would agree to is the financial system. The only nation that wouldn't be taken down by an attack on anyone's financial system because of the ripple effects would be North Korea.

SCHARF: Milena, you wanted to add something.

STERIO: Just a very quick note. I definitely agree with Peter that it would be extremely difficult and probably impossible as of now to negotiate a big multilateral treaty. But an approach which may fit under that idea that Peter's talking about is to use soft law instruments to supplement what we already have. It is much easier to negotiate codes of conduct guidelines and things of that sort that can then supplement, for example, the cyberconvention that we already have. And the goal would be that over time, if states then are using that kind of soft law—the guidelines, the codes of conduct—that maybe at some point we'll be closer to a customary norm of law.

SCHARF: As I understand it, the Tallinn Manual that Peter mentioned is something of that sort. Mike Newton, you've studied this. Do you have particular criticisms of any of the provisions of the manual?

10. See "The Tallinn Manual," NATO Cooperative Cyber Defense Centre of Excellence, 2014, <http://ccdcoe.org/tallinn-manual-process.html>.

NEWTON: I think it's good. I agree with Peter. To extend the horticulture metaphor, the fig leaf of law here is really no solution. We feel really good that we've got a new convention, we've got some soft law, and we've got some codes. The problem is that we haven't really dealt with the relevant actors. The big problem in the Tallinn Manual, as well as the ICRC [International Committee of the Red Cross] whole study about when a civilian crosses the threshold into legally participating in conflict to the extent that they can be targeted, the direct participation study, is exactly the same thing as discussions for close to a decade that in the end, there is no real agreement. So, I think this approach that says, "Well, we need more laws" is kind of quixotic. I agree with Peter about the financial system. The other one that I would say that almost everybody would agree with ought not to be messed with is this system that regulates transnational aviation flight. How many flights around the world go down with all kinds of consequences? That's a no-brainer. The problem is that all the things that we want to protect in a real all-out cyberwar become the indirect victims of an all-out cyberwar. There's no real way in an all-out cyberwar when you shut down the electric grid, at least theoretically, to control who that affects and how that affects them. So, that's the core problem with trying to reach any real binding legal code of conduct, if you will.

SCHARF: So let me throw out one other issue that sort of keeps me up at night. And, that is if we're spending all this money, if we have Cyber Command, and we're making it have major military approach to the possibility of cyberwar and cyberattacks, can that be used as a way to erode our own civil liberties and privacy? And I know, Shannon, you've been thinking about this. What would you say?

FRENCH: Well, yes. This is a very big concern because always you do have to balance security against other rights issues like privacy. But, something that Peter mentioned earlier is really important for us to remember, and that is how easily you can hype these kinds of fears. When you think about that survey that Peter mentioned, where people are more afraid of a cyberattack than they are of these very real urgent threats that we are not giving money towards and that are not getting enough attention, focus, or resources to try to address, that's actually quite horrifying. And if you put in front of people in very stark terms, this is how much money you are spending as a nation to prevent this cyberattack, which is in many ways not likely to happen and would be not even in the interests of the groups you're afraid

of, in the end of the day when you could spend that same amount of money and save this many lives if you put it towards cancer research or this much benefit towards education and so forth, it would be very frustrating. And yet, if you scare people enough, they will hand over their privacy incredibly easily. And I'll just add one other point, which is I think this is where the lack of transparency is also a bit terrifying for ordinary civilians, which is that we don't know exactly how much privacy we have already given up.

SCHARF: All right so we're almost out of time. I want to go back to Peter Singer, the author of the book *Cybersecurity and Cyberwar: What Everyone Needs to Know* and say Peter, you've got the last word. Where do you think we're going to be in ten years in terms of this issue? If we're having this broadcast ten years from now, what are we talking about?

SINGER: Well, we'll probably be downloading it into our brains. In all seriousness, the one word that I hope we'll end on at that point is resilience. You can think about resilience in terms of the physiological or the psychological. The physiological is that I hope we have an approach to cybersecurity with what it means more broadly that goes beyond just thinking we can build up higher walls, or we can deter the danger, or we can scare it away. Your body expects that it's going to be in a dangerous world, and so it has layers of defenses, and it does everything from isolate the attack, to it has an internal monitoring system to triage it. There are all different ways, and so we've got to move out of this mentality of just thinking that I can keep it out. The more important meaning of resilience is a psychological side. It's—you can think of the parallel in the British approach to terrorism versus ours—keep calm and carry on. Resilience in a psychological way is saying, “I expect that there will be bad things in the world, but it's all about how I'm going to power through them. And if I get knocked down, how I'm going to get back up rapidly.” That's really where I hope this shifts to. So, the bottom line here is that as long as we are using the Internet, and ten years from now we will be, we will face these threats. And so, therefore we have to work to manage the demands and be more resilient about them.

SCHARF: That's a great final note. On September 15, Case Western Reserve University School of Law is going to be having a day-long symposium on this subject. I invite you to join us live by coming to Case Western, if you're in the Cleveland area, or you can tune in, listen to it, and watch it by webcast anywhere in the world. Meanwhile, if you want to weigh in on

the discussion that we've been having or suggest a topic for an upcoming broadcast, please send an email to talkingforeignpolicy@case.edu. I want to thank again our panel of experts: Peter Singer, author of *Cybersecurity and Cyberwar: What Everyone Needs to Know*, Colonel Mike Newton from Vanderbilt University, Professor Milena Sterio from Cleveland Marshall College of Law, and Dr. Shannon French from the Inamori International Center for Ethics and Excellence at Case Western. I'm Michael Scharf. You've been listening to *Talking Foreign Policy* produced by Case Western Reserve University and WCPN 90.3 ideastream.

