

FOREWORD

THE TIME IS ALWAYS RIGHT TO DO WHAT IS RIGHT

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I. INTRODUCTION

The terms “legal and “illegal” are not synonymous with right and wrong. Law schools generally do not teach how these terms are distinct. This is true as much on Earth as it is in outer space.

When a client asks his attorney, “Can I take a certain action?” they usually are asking, “Is there a law out there preventing me from doing this?” However, that should not be the sole measurement by which one decides to take a certain action or not. The calculation should not be “Will I go to jail if I do this?” But rather, the yardstick should be, “Is this the right thing to do?” In other words, just because something is not forbidden, it does not necessarily mean that it is advisable.

Currently, in the field of Space Law, this happens to be a very timely issue. Numerous recent events have demonstrated the quandary of doing what is legal versus doing that which is right. In fact, Space Law

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has very few explicit legal prohibitions. The Outer Space Treaty (OST)¹ contains a few restrictions (e.g., no installation of nuclear weapons in space, no testing of military weapons on celestial bodies, no harmful contamination of other celestial bodies, no national appropriation of outer space) but, overall, it is permissive. It guarantees that space shall be free for exploration and use, and that activities in space shall be conducted in accordance with international law. That sums up most of its restrictions. This Foreword suggests to current and future space lawyers that, when a client presents a Space Law question, examination of solely the text of the OST and any national statutes and implementing regulations may not be a complete analysis. Rather, serving one's client's interests, as well as those of humankind more broadly, demands a greater duty from an attorney.

This Foreword provides just a few examples of what I call "suboptimal" behavior in outer space. While perhaps not breaking any explicit laws per se, activities as far ranging as intentionally destroying satellites in outer space, launching roadsters or disco balls, or sneaking unauthorized life forms onto spacecraft before launch can all do damage to the space environment. Moreover, they do nothing to foster confidence or exhibit transparency in outer space. After looking at these examples and the relevant applicable law, this Foreword suggests that looking at the law, by itself, should not be the sole criterion for attorneys advising their clients on space activities.

II. A FEW BAD APPLES

A. ASAT Tests

When thinking of improper behavior in space, it can be hard to decide where to start. Nevertheless, a few examples stand out. The intentional destruction of a satellite (and the concomitant intentional creation of orbital debris) serves as one example. In 2007, China intentionally blew up one of its own satellites in outer space by shooting it with a missile. Anti-satellite (or ASAT) tests,² especially ones involving a head-on collision with a "kinetic kill vehicle" as this one did, create space debris that can last for centuries. In fact, the International Space

1. *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, (1968) 610 UNTS 205; (1968) UKTS 10, Cmnd. 3519; 18 UST 2410, TIAS 6347; 6 ILM 386; 61 AJIL 644; in force 10 October 1967.

2. See generally David Koplow, *ASAT-isfaction: Customary International Law and the Regulation of Anti-Satellite Weapons*, 30 MICH. J. INT'L L. 1187 (2008-2009).

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Station³ as well as other NASA satellites⁴ have needed to execute maneuvers in space to avoid being hit by the more than 3,000 pieces of debris from the China ASAT test. These avoidance maneuvers cost satellites fuel and decrease their lifespan. One U.S. State Department official referred to this Chinese ASAT test as “a remarkable incident of irresponsible behavior.”⁵

Unfortunately, the 2007 ASAT test was not the most recent example of poor behavior in outer space. On March 27, 2019, India conducted a similar ASAT test with its “Mission Shakti.” Like China, India used a kinetic kill vehicle, which utilized an infrared target seeking camera to locate and impact the satellite.⁶ The event created debris that threatened human lives on the International Space Station, and the NASA Administrator was quoted as saying, “That is a terrible, terrible thing, to create an event that sends debris in an apogee that goes above the International Space Station.”⁷ After the event, however, India had a different perspective. Prime Minister Modi went on TV, speaking in Hindi: “Our scientists shot down a live satellite 300 kilometers away in space, in low-Earth orbit.” He continued: “India has made an unprecedented achievement today,” adding that “India registered its name as a space power.”⁸ It is disturbing, at best, that a measure of national “power” in outer space is the ability to destroy a satellite and pollute the outer space environment.⁹

3. *Space Station Dodges Debris From Destroyed Chinese Satellite*, SPACE (Jan. 29, 2012), <https://www.space.com/14398-space-station-dodges-chinese-space-junk.html>.

4. *NASA's Terra Satellite Moved to Avoid Chinese ASAT Debris*, SPACE (July. 6, 2007), <https://www.space.com/4038-nasa-terra-satellite-moved-avoid-chinese-asat-debris.html>.

5. Mallory Stewart, Deputy Assistant Secretary for Emerging Security Challenges and Defense Policy, Keynote Address at the Atlantic Council (Jan. 11, 2016).

6. *Why India's ASAT Test Was Reckless*, THE DIPLOMAT (Feb 8, 2020, 3:29 PM) [<https://web.archive.org/web/20190506215045/https://thediplomat.com/2019/05/why-indias-asat-test-was-reckless/>].

7. *India's Anti-Satellite Test Created Dangerous Debris, NASA Chief Says*, SPACE (Apr. 1, 2019), <https://www.space.com/nasa-chief-condemns-india-anti-satellite-test.html>.

8. *Modi hails India as military space power after anti-satellite missile test*, REUTERS (Mar. 27, 2019, 3:26 AM), <https://www.reuters.com/article/us-india-satellite/modi-hails-india-as-military-space-power-after-anti-satellite-missile-test-idUSKCN1R80IA>.

9. It is worth noting that China and India are not the only countries that have intentionally destroyed satellites in outer space. The U.S. and the U.S.S.R. have each undertaken dozens of ASAT tests going back to the 1950's, with the U.S. conducting military operation Burnt Frost as recently as February 2008. See Koplou, *supra* note 2, at 1208–11.

B. *Race Cars in Space*

The quantity of the orbital debris created is also not the sole measure of right or wrong conduct. Pieces of debris need not be counted in the thousands like China's test, or in the hundreds, like India's test—debris can be created one piece at a time. For example, in February 2018, billionaire Elon Musk, creator of SpaceX, launched a Tesla Roadster into outer space.¹⁰ Technically speaking, it was not exactly a “roadster.” The car had no engine—it was primarily the chassis of the Tesla with a steering wheel and a radio. In the driver's seat was a mannequin called “Starman” wearing a spacesuit. As the car zoomed through outer space, SpaceX reported that David Bowie's “Life on Mars?” played on the car radio. (Scientific note: sound does not travel in space. If there is no air in space, then there is no sound in space.) The Tesla had no scientific value, apart from being the first test of SpaceX's Falcon Heavy rocket.¹¹ The Tesla will be in orbit for thousands of years or more.¹²

C. *Disco Balls and Pinballs in Space*

Another example of intentionally creating space debris one piece at a time comes to us from New Zealand. In January 2018, a millionaire arranged for the launch of a giant disco ball into outer space.¹³ He referred to it as the “humanity star,” and he contended that it would bring people together, as we gaze upon “a bright symbol and reminder to all on Earth about our fragile place in the universe.”¹⁴ Unfortunately, not everyone agreed with the beauty that this disco ball created. Some astronomers asserted that it ruined their view of the night sky; some of

10. *Elon Musk Reveals Photos of Tesla Roadster Launching on Falcon Heavy Rocket*, SPACE (Dec. 22, 2017), <https://www.space.com/39195-elon-musk-tesla-roadster-falcon-heavy-photo.html>.

11. For the first test of a new rocket, engineers routinely put ballast aboard the rocket in case it blows up on the pad or en route to outer space. SpaceX needed to use a payload about the same size and weight of a payload that it might eventually launch in the future.

12. See Steven A. Mirmina, *Elon Musk's 'Starman': Is it Really Legal for Billionaires to Launch Their Roadsters into Space?* HARVARD L. REV. BLOG (Apr. 11, 2018), <https://blog.harvardlawreview.org/elon-musks-starman-is-it-really-legal-for-billionaires-to-launch-their-roadsters-into-space/>; see also *infra* Section III.

13. *Shimmering Disco Ball Launched Into Space by a Millionaire Who Is Totally Not Compensating for Anything*, GIZMODO (Jan. 25, 2018, 10:35 AM), <https://gizmodo.com/shimmering-disco-ball-launched-into-space-by-a-millionaire-1822408141>.

14. *A Star for Humanity*, THE HUMAN STAR (Jan. 21, 2020, 6:54 PM) [<https://web.archive.org/web/20180124194707/http://www.thehumanitystar.com/#about>].

them referred to it as “space graffiti.”¹⁵

Disco balls are not the only metallic balls launched into space—in 2019, a Japanese company launched a satellite containing hundreds of steel balls into space in order to release them and create an artificial meteor shower.¹⁶ Astro Live Experiences (ALE), which states that it is in the “space entertainment” sector, uses metallic pellets that burn up in the atmosphere. ALE claims that its meteor showers are better than the real thing, because their meteors last longer and burn brighter, meaning that they can even be seen in cities, over the brightness of normal city lights.¹⁷ While it may sound pretty, “if the idea of manmade spheres hurtling through the atmosphere also sounds alarming, you’re not alone. Some scientists have objections.”¹⁸

D. *Tardigrades*

Pollutants need not be even as big as a car or a pinball to have detrimental consequences to space exploration. In February 2019, Space IL, an Israeli not-for-profit institution, launched a small robotic lander and lunar probe to the Moon’s surface. Its intention was to stimulate careers in math and science, and it was a historic event for the country of Israel. However, there are reports that one of the participants in the mission (the Arch Foundation) snuck small microscopic life forms, known as tardigrades onto the spacecraft.¹⁹ Tardigrades are notoriously good at survival. They can endure extreme heat, cold, radiation, years of dehydration and exposure to the space environment.

15. ‘Space graffiti’: astronomers angry over launch of fake star into sky, THE GUARDIAN (Jan. 26, 2018, 1:03 AM), <https://www.theguardian.com/world/2018/jan/26/space-graffiti-astronomers-angry-over-launch-of-fake-star-into-sky>.

16. *A plan to create artificial meteors*, EARTH SKY (Feb. 5, 2019), <https://earthsky.org/space/1st-artificial-meteor-shower-astrolive-experiences-japan>.

17. *A test rocket for the world’s first artificial meteor shower in 2020 flew over Japan tonight*, FAST COMPANY (Jan. 16, 2019), <https://www.fastcompany.com/90293194/the-worlds-first-artificial-meteor-shower-is-set-to-fly-over-japan-tonight>.

18. *Why Scientists Aren’t Fans Of Creating On-Demand Meteor Showers*, NPR (Mar. 27, 2018, 4:06 PM), <https://www.npr.org/2018/03/27/597390684/why-scientists-arent-fans-of-creating-on-demand-meteor-showers>.

19. *Why Stowaway Creatures on the Moon Confound International Space Law*, THE VERGE (Aug. 16, 2019, 9:00 AM), <https://www.theverge.com/2019/8/16/20804219/moon-tardigrades-lunar-lander-spaceil-arch-mission-foundation-outer-space-treaty-law> (noting that “[a]lmost no one knew ... [the Tardigrades] were on board until a recent report in Wired revealed they had been added to the mission last minute — and without any governmental approval”); *see also A Crashed Israeli Lunar Lander Spilled Tardigrades on the Moon*, WIRED (Aug. 5, 2019, 6:55 PM), <https://www.wired.com/story/a-crashed-israeli-lunar-lander-spilled-tardigrades-on-the-moon/>; *Tardigrades: ‘Water bears’ stuck on the moon after crash*, BBC (Aug. 7, 2019), <https://www.bbc.com/news/newsbeat-49265125>.

Regarding the aforementioned mission, the founder of the Arch Foundation later referred to himself as a “pirate” in an online interview, stating “[w]e didn’t tell them we were putting life in this thing... [s]pace agencies don’t like last-minute changes. So we just decided to take the risk.”²⁰ According to the Space Review, the Arch Foundation “allegedly included tardigrades into the lunar archive in epoxy and into the Kapton tape sealing the archive.”²¹

This alleged deception raises many questions, ranging from whether private entities need increased regulation to the effectiveness of COSPAR’s Planetary Protection guidelines,²² which are intended to preserve the sanctity of scientific investigations of possible extraterrestrial life forms, as well as to protect Earth from potential hazards posed by extraterrestrial matter.

Before leaving the topic of placing objects on the Moon that are not normally found there in nature—if one has old love letters or other sentimental memorabilia that are just too difficult to throw away, fear no more. One company will discard these on the Moon for you. Their website even contains some suggested items a customer may wish to see delivered to the Moon’s surface, including: sand from a favorite beach; a lock of hair; a fraternity pin; a company logo, or a pet tag.²³

III. IS IT LEGAL TO POLLUTE OUTER SPACE?

Unfortunately, yes, subject to very few exceptions. At the moment, there is no international law that explicitly prohibits any of the activities described above. In fact, the majority of them were authorized by the U.S. or other national governments.²⁴ Moreover, there is currently no U.S. law prohibiting those activities either.

20. ‘I’m the first space pirate!’ How tardigrades were secretly smuggled to the moon, MASHABLE (Aug. 8, 2019), <https://mashable.com/article/smuggled-moon-tardigrade/>.

21. Christopher D. Johnson, Daniel Porras, Christopher M. Hearsey & Sinead O’Sullivan, *The curious case of the transgressing tardigrades (part 1)*, SPACE REV. (Aug. 26, 2019), <https://www.thespacereview.com/article/3783/1>.

22. J.D. Rummel, P.D. Stabekis, D.L. DeVincenzi & J.B. Barengoltz, *COSPAR’s planetary protection policy: A consolidated draft*, 30 ADV. SPACE RES. 1567, 1567–71 (2002) (noting that “[o]ne of the duties of COSPAR’s Panel on Planetary Protection is the development, maintenance, and promulgation of a planetary protection policy.”).

23. See *Moon Box Order*, ASTROBOTIC, <https://www.astrobotic.com/moon-box/order> (last visited Feb 23, 2020). The details of their “delivery service to the moon” are available on their website. See *Moon Box Terms*, ASTROBOTIC, <https://www.astrobotic.com/moon-box/terms> (last visited Feb 23, 2020).

24. The only exception here being the activities of the founder of the Arch foundation, which may have provided false or incomplete information to the FAA in the materials submitted as part of the payload review in securing the launch license.

The Outer Space Treaty of 1967 (OST) is the foundational text to examine. The OST says that outer space is “free for exploration and use by all States . . . , on a basis of equality and in accordance with international law.” Article IX of the OST places a duty on States Parties to the OST to “conduct all their activities in outer space . . . with due regard to the corresponding interests of all other States Parties to the Treaty.” Nothing about SpaceX’s Tesla zooming toward Mars into an orbit about 250 million kilometers from the sun seems to impact the interests of other spacefarers—after all, there is no one else out there, and thus, many would contend that no one else has a “corresponding interest” for which SpaceX has to have due regard.²⁵ While there may be no one else operating in that orbit at this time, the Tesla will be an obstacle around which future space travelers will need to navigate.²⁶ Article IX also requires that states conducting exploration of outer space and celestial bodies “avoid their harmful contamination.” One might think that Article IX would have been invoked by a state to protest the Chinese or Indian ASAT tests. Unfortunately, the author is unaware of any states presenting claims or diplomatic protests against the Chinese. Specifically in reference to the China ASAT test, a spokesperson for the

25. It has been difficult historically to establish standing in cases regarding pollution of the global commons. Prof. Malgosia Fitzmaurice queries whether all states, even if not themselves specifically injured, might bring a claim for breach of an obligation to protect the global commons. See Malgosia Fitzmaurice, *Liability for Environmental Damage Caused to the Global Commons*, 5 RECIEL 305, 305–11 (1996). For another creative way to establish standing for claims for damage to a commons, see *Maori River in New Zealand is a Legal Person*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person/> (last visited Jan. 21, 2020) (discussing New Zealand giving the same legal rights to a river as a human).

26. Land mines placed on the ocean’s surface are called naval mines or sea mines. Estonia is still clearing thousands of mines that were laid off its coast during World War II. See *Estonia is still clearing thousands of World War II mines from its waters*, WASH. POST (Oct. 26, 2018, 5:00 AM), <https://www.washingtonpost.com/world/2018/10/26/estonia-mines/>. The U.S. Navy placed approximately 25,000 mines off the coast of Japan in World War II in 1945’s “Operation Starvation.” See *A Terrible Thing That Waits (Under the Ocean)*, POP SCI (May 19, 2014), <https://www.popsci.com/blog-network/shipshape/terrible-thing-waits-under-ocean/>. In fact, more than 500, 000 were laid during World War II. Many mines (thousands around the globe) remain deadly to civilian and commercial fishing vessels. While outside the scope of this Foreword, generally speaking, naval mines are currently a lawful weapon under international treaty law as well as under customary international humanitarian law. See *generally Naval Mines and International Humanitarian Law*, GENEVA CALL, <https://www.genevacall.org/news/naval-mines-and-international-humanitarian-law/> (last visited Jan. 31, 2020). Query whether nonfunctional space objects will be viewed in the future as space mines. As is discussed below, we need to give thought today about the implications of acting in a manner that may compromise the future aspirations of states not yet active in space as well as astronauts and space explorers yet unborn.

United Kingdom was reported as saying: “We don’t believe that this does contravene international law.”²⁷ If the China ASAT test does not violate Article IX’s prohibition on harmful contamination of outer space, then one inevitably queries whether the practice of states has become more in the disregard of Article IX rather than its observation.

While India and China are parties to the OST, one might ask whether private parties need to comply with its terms. The answer is unequivocally yes. Article VI of the OST states explicitly that states parties to the Treaty have a responsibility to assure that activities of their nationals “are carried out in conformity with the provisions set forth in the present Treaty.” The United States fulfills this duty through national licensing regulations. In the case of SpaceX, on February 2, 2018, the Federal Aviation Administration (FAA) issued a license to SpaceX authorizing the launch of the “modified Tesla Roadster” (which they referred to as a “mass simulator”) and required that SpaceX acquire up to \$110 million of insurance for claims resulting from the flight of the Falcon Heavy and an extra \$72 million if an accident occurred during pre-flight operations. In the case of the artificial meteor shower, the launch provider received its FAA launch license on October 9, 2019.²⁸

IV. THAT WHICH IS NOT FORBIDDEN IS . . . ?

There is a principle of Public International Law known as the *Lotus* principle.²⁹ Arising from the holding of a 1927 case between Turkey and France at the Permanent Court of International Justice,³⁰ the *Lotus* principle has been interpreted to state: that which is not forbidden under international law is permitted.³¹ Since the ASAT tests, and the launches of the roadster, disco balls, and pinballs do not seem to have violated any explicit international law prohibitions, then some would contend that under the *Lotus* principle, they would be permissible. On the other hand, other international scholars point out that the

27. *Britain Concerned By Chinese Satellite Shoot-Down*, SPACE WAR (Jan. 21, 2020, 7:39 PM), http://www.spacewar.com/reports/Britain_Concerned_By_Chinese_Satellite_Shoot_Down_999.html [<https://www.webcitation.org/5whITFZTG>].

28. U.S. FED. AVIATION ADMIN., LLO 19-117, ROCKET LAB GLOBAL SERVICES (2019), [https://www.faa.gov/about/office_org/headquarters_offices/ast/licenses_permits/media/LLO%2019-117%20-%20Order%20A%20Rev%201%20-%20Rocket%20Lab%20Global%20Services%20-%20License%20and%20Orders%20\(FINAL%202019-11-27\).pdf](https://www.faa.gov/about/office_org/headquarters_offices/ast/licenses_permits/media/LLO%2019-117%20-%20Order%20A%20Rev%201%20-%20Rocket%20Lab%20Global%20Services%20-%20License%20and%20Orders%20(FINAL%202019-11-27).pdf).

29. See John F. Murphy & Jeff Atik, *International Legal Education*, 37 INT’L L. 623, 626 (2003) (noting that the *Lotus* presumption is recognized as a “[g]roundrule”).

30. *The Case of the S.S. Lotus*, 1927 PCIJ Ser. A, No. 10.

31. See Hugh Handeyside, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT’L L. 71, 72 (2007).

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Lotus principle is often grossly misused, and that there may be some acts not expressly prohibited that are nevertheless still contrary to international law.³²

V. JUST BECAUSE IT'S LEGAL, IT DOESN'T MEAN IT'S RIGHT

This Foreword is intended to give guidance to early career attorneys reading the *Georgetown Journal of International Law (GJIL)*. To those attorneys, I suggest the following: in your careers, you will be asked to provide advice and counsel. Without a doubt, you will need to tell your clients what the law is. That is your job and ethical duty.³³

However, what I contend is something more—that you owe an additional duty to your client, as well as to society at large—in fact, I would go as far as to say that you owe a duty to people still yet to be born.³⁴ It is the duty to do the right thing.

But what is the extent of the attorney's duty to those who are not clients, those whom one does not know and to those one will never even meet?

When I started working, my boss told me that, setting aside “what’s legal” and what’s not, there’s another test to be aware of: The Washington Post test. For those new to Washington, it’s the equivalent of: “What if your Mom found out what you are doing?” Essentially it boils down to public embarrassment and potential humiliation. Even my former boss knew that besides the question of “what’s legal?” there

32. See An Hertogen, *Letting Lotus Bloom*, 26 EUR. J. INT'L L. 901, 901–26; Ole Spiermann, *Lotus and the Double Structure of International Legal Argument*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 131 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999).

33. See MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 3 (AM. BAR ASS'N 1983) (noting that a client should be kept reasonably informed about the substance of the representation); MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 5 (AM. BAR ASS'N 1983) (noting that a client should have “sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued”).

34. Some scholars have called this concept “intergenerational equity.” See, e.g., Edith Brown Weiss, *Climate Change, Intergenerational Equity, and International Law*, 9 VT. J. ENVTL. L. 615, 615–27 (2008). Intergenerational equity is a widely recognized principle of international environmental law that boils down essentially to preserving natural resources and the environment for the benefit of future generations. The UNFCCC enshrines this equity as a fundamental notion. “The Parties should protect the climate system for the benefit of present and future generations of humankind. . . .” See *Intergovernmental Negotiating Comm. for a Framework Convention on Climate Change*, U.N. GAOR 5th Sess., pt. 2, U.N. Doc. A/AC.237/18 (Part II)/Add.1 (1992), 31 I.L.M. 849 (1992). I contend that this maxim applies as much to the space environment as it does to the Earth environment.

are other factors to consider: to him, the standard on which to advise the client was “what’s embarrassing?”

The suggestion that I wish to convey, whether it be in one’s Space Law practice, or in one’s terrestrial work, is that a lawyer’s duty is more than advising on “what’s legal?” A lawyer’s advice should also encompass “what’s the right thing to do?” It is a huge responsibility. Clients look to lawyers the way sick people look to doctors. Clients listen extremely intently to the advice of their attorneys. So, think carefully, before responding. There is a distinction between one’s advice and one’s counsel. Telling clients that they “won’t go to jail” if they take a particular action is only providing them with half of an answer. Apart from answering “is it legal?” attorneys should also advise clients on “is it right?”³⁵ That is, in effect, the most complete answer you can provide them.³⁶

What they choose to do afterwards is up to them.

35. There is a legal aphorism sometimes attributed to Harold Hongju Koh, Sterling Professor of International Law and former dean at Yale Law School and former legal adviser to the State Department, in which he suggests that lawyers must act as a conscience and oppose policies and practices that are “lawful, but awful.” See Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, “The Obama Administration and International Law,” Keynote Speech at the Annual Meeting of the American Society of International Law 3 (Mar. 25, 2010), available at <http://www.state.gov/documents/organization/179305.pdf> [<http://perma.cc/V94-UA8A>].

36. Given that this Foreword is in the *Georgetown Journal of International Law*, I remind the reader of Georgetown Law’s Jesuit heritage and school motto: “*Law is but the means — Justice is the end.*”