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TABLE OF CONTENTS

* The Indiana International & Comparative Law Review regrets that an incorrect version of Jerry Ismail's article, "South Africa's Sunday Law: Finding a Compromise," appeared in Volume 11.3. The correct version of the article appears in this issue and online with Lexis and Westlaw.

SOUTH AFRICA'S SUNDAY LAW: FINDING A COMPROMISE

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Western countries have traditionally prohibited or restricted a variety of activities from occurring on Sundays.[1] This legislation is commonly referred to as "Sunday observance laws." Christians are the majority in such countries and many of them heed the biblical commandment to lay aside their work and observe the Christian Sabbath.[2] Sunday laws, then, correlated with the spiritual convictions of much of the population. Until the beginning of the last century, this practice raised few concerns.[3] Although there was some evidence that these laws were viewed as obstacles to commerce, there was little evidence of general opposition to them on religious grounds.[4]

As the number of nonbelievers and adherents of non-Christian faiths grew in these countries, the practice of Sunday observance laws underwent scrutiny for justification based on principles of religious freedom and neutrality.[5] By then, an additional reason emerged to proscribe Sunday activity: to provide all people, regardless of faith, with a common day of rest.[6] Societal forces largely having nothing to do with religion supported this move. Among the most influential of these forces was the labor movement, which was more concerned with working conditions and the Rights of Man than with religious ideology.[7] Under such influences, the secular idea of the weekend began stealing into the original, religious rationale for the legislation.

As Sunday laws continue in a variety of forms today, the debate is centered not only on the original intent but the continuing purpose of the legislation. Often the State concedes its past association with religion but maintains that the current purpose of the laws provides health, safety, and

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1. *See* DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS 139 (1987).

2. "Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work. But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work." *Exodus* 20:8-10, (King James).

3. *See* WILLIAM ADDISON BLAKELY ed., AMERICAN STATE PAPERS AND RELATED DOCUMENTS ON FREEDOM IN RELIGION 259 (4th ed. 1949).

4. *But see id.*

5. *See, e.g.*, Barbara J. Redman, *Sabbatarian Accommodation in the Supreme Court*, 33 J. CHURCH & ST. 495, 496-503 (1991).

6. *See* LABAND & HEINBUCH, *supra* note 1.

7. *See id.*

welfare benefits for the public.[8] Other observers charge that Sunday laws have not abandoned their religious moorings and continue to be an impermissible combination of religious endorsement and infringement on freedom of belief.[9]

While these competing views at times seem irreconcilable, several approaches have been taken to lessen the overt religious impact of the laws. Over time, many of the main proscriptions have been omitted or decriminalized.[10] Others have gone routinely unenforced. In favor of facilitating commerce, several American states have reduced fines imposed on merchants for selling goods on Sundays. Others have passed exemptions that allow non-majoritarian believers to work on Sundays.[11] In many instances, Sunday laws have withered on the vine and died out of their own accord.[12] However, this is by no means representative of other jurisdictions, where the legislation is still alive and well.[13]

In spite of these attempts at reconciliation, the debate continues over the proper place for Sunday legislation. At stake for the majority is the potential loss of something so natural to its identity, a veritable tradition, that its absence would likely cause a feeling of indignation. On the other side of the debate is the sentiment of those in the minority who view the continuation of Sunday laws as favoring a privileged class to which they do not belong. Additionally, many in this category suffer a loss of earnings capacity as a result of Sunday closing laws should they observe a Sabbath day other than Sunday. To avoid either of these consequences, Sunday-law countries must find a compromise that supports the interests of both sides of the issue.

One country currently dealing with these competing interests is South Africa. This Article analyzes the position of the sole remaining Sunday legislation in South Africa and compares and contrasts it with similar laws in the context of well-known American case law.

South Africa makes for a timely discussion for several reasons. Historically, South Africa has been a closed society – one that has not been open to democratic influences of all of its citizens.[14] Consequently, Sunday laws largely represented the values of a political and social elite. Clear religious consideration buttressed the legislation.[15] With the demise of apartheid, however, the veil of religious entanglement has begun to fall away. Thus, courts now have the opportunity to judge the legislation of the old regime under principles of religious tolerance commonly observed in the West.

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8. *See id.*
9. *See* BLAKELY, *supra* note 3, at 379.
10. *See* Redman, *supra* note 5, at 496.
11. *See id.* at 503.
12. *See id.* at 496.
13. *See id.*
14. *See* Johan D. van der Vyver, *Religion, in* THE LAW OF SOUTH AFRICA 198 (W.A. Joubert & T.J. Scott eds., 1976); *see also* Johan D. van der Vyver, *State-Sponsored Proselytization: A South African Experience* 14 EMORY INT'L L. REV. 779, 781 (2000).
15. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 783-85.

South Africa is also a multi-confessional country, where controversies in church-state relations are likely to occur.[16] Additionally, South Africa makes a good case study because its Constitution encourages the use of foreign precedent in controversies where individual liberties are in jeopardy.[17]

The United States, as the comparison country, was chosen for reasons that have much to do with those cited for the case country. Like South Africa, the United States is a predominantly Christian country and has a considerable representation of religious minorities.[18] The United States also has well-established legal precedent on this subject matter.[19]

These similarities aid in understanding the direction Sunday legislation and jurisprudence are taking in South Africa. A word of caution, however, is in order: the two countries are far from unified in their approach to analyzing issues of religious liberties; some of the thinking that underpins one country's legal opinions may not apply to that of the other. This will be evident in the sections of this paper dealing with the "establishment clause." Consequently, even parallel issues do not always result in precedent applicable to both legal systems.

The central focus of this Article is the recent South African case, *State v. Lawrence*.[20] At issue there was the constitutionality of South Africa's Liquor Act, which prohibited the sale of alcohol in grocery stores on Sunday.[21] The discussion of South African Sunday laws commences with a brief overview of the legislation's history. Religious and secular justifications for its existence are offered. A Statement of the Case follows, providing the procedural and factual background of the main case under consideration. The Article then proceeds to explain and comment on the three opinions produced by the case. Finally, the Article closes with a summary of the main legal arguments and a conclusion as to the holdings in the case.

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16. *See The Land and its People, in* SOUTH AFRICA YEARBOOK 1, 3 (Government Communication and Information System, Delien Burger ed., 2000) [hereinafter S.A. YEARBOOK 2000/01], which quotes 1996 census figures of a population of 40.58 million people, 80% of whom identify themselves as Christians, "with large Hindu, Muslim and Jewish minorities." *Id. See also,* Amanda Gouws & Lourens M. du Plessis, *The Relationship Between Political Tolerance and Religion: The Case of South Africa,* 14 EMORY INT'L L. REV. 657, 668-75 (2000) for an insightful discussion and survey on the relationship between religion and tolerance for the "other" in South Africa.

17. *See* S. AFR. CONST. ch. 2, §39, "Interpretation of the Bill of Rights."

18. *See* STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK 70 (quoting 1990 census figures).

19. *See* Lourens M. du Plessis, *Religious Human Rights in South Africa, in* RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 441, 443 (Johan D. van der Vyver & John Witte, Jr. eds., 1996), where the author states, "South Africa's common-law originated from Roman-Dutch law but has to a large extent been amplified – and in some areas transformed – by English law." *Id.*

20. This controversy is based on three different but related appeals: S v. Lawrence; S v. Negal; and S v. Solberg, 1997 (4) SA 1176, 1997 (10) BCLR 1348 (CC). The Constitutional Court (CC) is uniquely empowered to hear appeals of constitutional questions.

21. Liquor Act 27 of 1989.

This Article concludes that the Liquor Act does not violate the right to freedom of religion contained in the South African Constitution. The legislation is supported by a legitimate secular state interest, it is neutral on its face, and it is generally applied. As such, the law is a valid limitation on a citizen's fundamental rights.

There is, however, a more serious question whether the Act unfairly discriminates against individuals on the basis of religion, in contravention of Section 8 of the interim Constitution.[22] This Article takes the position that the injury complained of need not palpably denigrate, nor exalt, one religion over the other to support a claim of unfair discrimination. It is sufficient that the relevant legislation radiate a clear message of association with believers of one faith over those of others, and that this results in some tangible disadvantage to the protesting party.

As the South African legislation radiates a clear preference for Christianity and unnecessarily places some non-Christians at a financial disadvantage, the Liquor Act is unfairly discriminatory. For reasons that are discussed below, this violation is not redeemed by the State's limitation power. Ultimately, such legislation cannot withstand critical scrutiny under the bedrock notions of the new South African society, an open and democratic society based on human dignity, equality and freedom.

To survive such scrutiny and avoid causing wounds to either side of the debate, the State must rewrite its Sunday legislation in such a way that association with any particular religion is excluded, or significantly reduced. Once this is done, both sides will in a sense prevail.

I. HISTORICAL BACKGROUND OF SOUTH AFRICA'S SUNDAY LAWS

South Africa has been described as a religious nation. Census figures indicate that an overwhelming majority of South Africans identify with a particular religion.[23] Most claim membership in Christian churches, but there are also large Hindu, Muslim, and Jewish communities.[24] To understand the crux of the debate over the purpose underlying Sunday laws today, however, one needs to become familiar with the prevailing religious worldview of the 17th century Europeans who settled in southern Africa.[25] These colonialists brought with them the Roman-Dutch legal system. That system was substantially informed by Catholic and Calvinist dogma,[26] which converged

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22. South Africa was ruled by a transitional constitution from 1993-1997, *see* INTER. CONST. (Act 200 of 1993) [hereinafter interim Constitution]. Chapter 3, Section 8 of the interim Constitution prohibited unfair discrimination by the government on the basis of, among other things, religion. *See id.*

23. *See* du Plessis, *Religious Human Rights, supra* note 19, at 442.

24. *See* S.A. YEARBOOK 2000/01, *supra* note 16.

25. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 783.

26. *See* van der Vyver, *Religion, supra* note 14, at 177.

in their advocacy that the State, as temporal sovereign, had a divine obligation to rule over its subjects according to principles established in biblical scripture.[27]

This imperative was accomplished by developing positive law that most nearly reflected a belief in divinely inspired law.[28] The State, through the use of its sovereign powers, acted as God's trustee for the benefit of mankind.[29] In this relationship, the line between church and state often became completely blurred. The Articles of Faith of the Calvinist church very clearly illustrate this. The State, in partnership with the church, was

> [T]o watch over sacred Church services, to avert and stamp out all idolatry and false religions, to strike down the kingdom of the Antichrist and to promote the Kingdom of Jesus Christ, to permit the gospel to be preached everywhere in order that all would honor and serve God, as His Word commands us.[30]

In carrying out this mandate, the State historically intervened on behalf of the Church in several significant areas. Among these was its effort to compel the population to keep the Christian Sabbath. From 1652 until late into the twentieth century, the South African legislature drafted a number of proscriptions that made it difficult to do anything else on Sundays except observe the Sabbath. These measures included the prohibition of buying goods, working at one's job, hunting, fishing, gardening, and traveling, except to and from services.[31] Many, if not all of these laws, have been repealed or amended.[32] But as one observer familiar with South Africa stated, "The formative years of South African law included a period when religious forces had a definite influence on legal institutions."[33] Moreover, when the State did side with a religion, it always sided with the Christian religion.[34]

Observance laws were not the only area where the State acted as the handmaiden of Christianity. Without regard to religious belief, witnesses in criminal trials were required to swear out an oath adopted for use solely by

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27. *See id.*

28. *See id.*

29. *See id.* The combined Roman-Dutch worldview proposed a transformation of Mosaic Law and the Decalogue into proscriptions of positive legal affirmations. *See id.*

30. *Id.* at 178.

31. *See id.* at 198-200.

32. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 788-90, for examples of how the white-led apartheid government used security measures to repress certain religious organizations, which also furthered its racial policies well into the late 20th Century.

33. van der Vyver, *Religion, supra* note 14, at 176.

34. *See id.* at 198.

Christians.[35] Witnesses in civil proceedings, on the other hand, were permitted to make the affirmation that most effectively bound their consciences.[36] This approach effectively elevated the Christian concept of God over that of others by combining it with the weightier matters of criminal justice and the State.[37]

Another example that illustrates the close association between church and state comes in the form of South Africa's now-defunct[38] blasphemy statute. Under that law, it was a crime to slander only the God of Christianity.[39] Other examples of the comingling of church and state included language used in the preamble of the 1961 Constitution which suggested that God had trinitarian overtones and indicated a special relationship between God and South Africa's European Christians.[40]

Alternative justifications for South Africa's Sunday legislation have been offered. Some commentators have noted that the practice of reserving Sundays for special prohibitions originated with the Emperor Constantine who, at the time, was identified with the pagan religion.[41] Other commentators, recognizing the practice's Christian characteristics, if not origin, have argued that the legislation was never ensconced in a constitutional framework but remained solely statutory in nature.[42] Proponents of this view maintain that this distinction relegated the laws to a mundane status, one that never had much support, and generally went unenforced. Over time, it is said, these laws developed a certain civil quality that made them more ceremonial than consequential.[43]

Additional arguments have been put forth in support of an entirely secular purpose for the laws. The most common justification cited under this

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35. *See id. See also* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 784.

36. *See* van der Vyver, *Religion, supra* note 14, at 198.

37. *See id.*

38. *But see* Nicholas Smith, *The Crime of Blasphemy and the Protection of Fundamental Rights*, 116 S. AFR. L.J. 162, 172-73 (1999), where the author raises the possibility that the offense of blasphemy, which is no longer a crime, could still be punished if a statement containing blasphemous content were held to violate the constitutional prohibition of incitement to hatred or violence based on religion. *See* S. AFR. CONST. ch. 2, §16.

39. *See* van der Vyver, *Religion, supra* note 14, at 199-200; *and see State-Sponsored Proselytization, supra* note 14, at 785.

40. *See* van der Vyver, *Religion, supra* note 14, at 9; *State-Sponsored Proselytization, supra* note 14, at 787, where the author states that when read in the original Afrikaans, the constitutional confession of faith, "die *volk* van . . . Suid-Afrika," has clear ethnic and religious overtones. *Id.*

41. *See* van der Vyver, *Religion, supra* note 14.

42. *See id.* at 149. *But see* Jeremy Sarkin, *The Political Role of the South African Constitutional Court*, 114 S. AFR L.J. 134 (1997), noting that prior to the introduction of a supreme constitution in 1994 that established an independent judiciary, South Africa was ruled by a system that placed supremacy in the power of the legislature and gave only limited powers to the courts to interpret and apply the law within very narrow bounds. There was thus no effective check on legislative power, relegating judges to the status of "mere technicians" in the pursuit of justice. *Id.*

43. *See* van der Vyver, *Religion, supra* note 14.

class is that of a national day of rest for all.[44] In this age of seemingly endless bustle and commerce, the argument is made, the State has decided to provide one day a week during which everyone, regardless of religious affiliation, can rest, enjoy recreation, spend time with family, or engage in reflection. This national day of rest, it is maintained, is meant to improve both the health of the individual and the welfare of the nation.[45]

Even more particularized health-related purposes for the legislation have been offered. For instance, the State maintains that the reason for Sunday-closing laws is to protect the people from harms resulting from alcohol and alcohol-related mishaps.[46] While this may be a concern of the State, critics argue that it is not likely to be the sole, or even the central, justification for the legislation's existence. Detractors from this point of view note that the current South African Sunday law prohibits sales of alcohol only on Sundays and certain Christian holy days.[47] This juxtaposition seems to taint the law's secular credentials, especially as alcohol sales are not prohibited on other public holidays.

In sum, South Africa's Sunday laws have historically been connected to Christianity and the Christian Sabbath. There are also secular reasons for their existence. The critical question today is how much of the original intent of the laws remains in place and, equally, how much of the original effect survives. The case that follows was the first attempt to answer these questions in a post-apartheid legal setting. Above all else, the Constitutional Court engaged these questions against the backdrop of a new South African Society based on "democratic values, social justice and fundamental human rights."[48]

II. STATEMENT OF THE CASE

The factual background of *State v. Lawrence* is relatively simple. Three South African citizens were charged with violating the Liquor Act 27 of 1989 ("the Liquor Act", "the Act"), which in relevant part prohibited the sale of alcoholic beverages by grocers on Sundays.[49] Appellants all worked for a large corporation that operated an international chain of convenience stores. None of the appellants contested the factual charges brought by the State, and each was convicted in magistrate's court. On appeal, appellants argued that the Act violated the Constitution on two grounds. First, they maintained, the

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44. *See id.* at 47.

45. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 53, 95-97.

46. *See id.* ¶¶ 70, 175.

47. *See id.* ¶ 159.

48. S.A. Yearbook 2000/01, *supra* note 16, at 67.

49. *See* Liquor Act 27 of 1989 §§ 88-90. In basic terms, these sections prohibited the sale of alcohol other than table wine by grocers who held wine licenses. *See id.* § 88.1. The law also restricted the hours of the sale of alcohol to 8 p.m. during the week and 5 p.m. on Saturday. *See id.* § 90.1. Most relevant to this discussion is the prohibition of wine sales on Sundays. *See id.*

Act violated Section 26 of the interim Constitution.[50] That Section guaranteed to all South Africans the right to engage in economic activity.[51] Appellants offered an expansive interpretation of this clause, suggesting that it supported their capacity to engage in any economic enterprise they chose, except "innately criminal" activity without being subject to government regulation.[52] The Court roundly rejected this argument.[53]

Second, appellants maintained that the Act violated Section 14, which, among other things, guaranteed freedom of religion.[54] Of the appellants, Ms. Solberg's appeal most directly hinged on Section 14, and it is her appeal that is the subject of much of the Court's decision. Section 14 of the interim Constitution states in part: "(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."[55]

In the main, Ms. Solberg argued that the Liquor Act, by constraining the days on which she could sell alcohol, forced her to observe the Christian Sabbath in violation of Section 14.[56] Appellant argued that even indirect official recognition of one religion's Sabbath over others implied State endorsement.[57] Appellant further maintained that the imposition of Sunday closed-days violated her right to freely exercise the faith of her choice.[58] As such, appellant raised both freedom of religion and establishment challenges to the law.

The State responded by arguing that the Act was decreed for secular purposes, namely to reduce the destructive consequences of drinking alcohol and to promote health and recreation on the one day of the week when most South Africans were off from work.[59] The State, however, provided no answer to the allegation that the Act was tainted by the choice of other, clearly religious closed-days.[60]

Ultimately, six of the nine justices hearing the case agreed with the State's position and rejected appellant's arguments, holding that South Africa's Liquor Act does not violate an individual's right to freedom of religion under Section 14. The Court's ruling, however, was far from unified

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50. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 7, 83. Except where noted, the substance of the interim Constitution is much the same as the final draft in place today.

51. *See id.* ¶ 7. Section 26(1) of the interim Constitution stated "Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory." *Id.* ¶ 26. Section 26 was omitted from the final draft of the permanent Constitution.

52. *See id.* ¶ 27.

53. *See id.* ¶ 29.

54. *See id.* ¶¶ 7, 83.

55. *Id.* ¶ 84. Section 14 is Section 15 in the current Constitution.

56. *See id.* ¶ 85.

57. *See id.* ¶ 86.

58. *See id.* ¶ 85.

59. *See id.* ¶¶ 53-54, 95-96, 115.

60. *See id.* ¶¶ 86-87.

producing three factions: the plurality, led by the President of the Court, Justice Chaskalson; a concurrence, led by Justice Sachs; and a dissent led by Justice O'Regan.[61] Their opinions varied greatly[62] especially on whether the South African Constitution contained an "establishment clause;" and if it did, whether the Act violated that provision.

III. LEGAL ANALYSIS

A. *The Plurality Holding*

1. *Equality and Establishment*

According to the plurality opinion, there is no establishment clause of any kind in the South African Constitution.[63] Appellant had urged that if § 14 did not contain an explicit establishment clause, one was to be implied or constructed out of language contained in other sections of the Constitution. Specifically, appellant argued that when read together, Sections 14(1) and 14(2), created the functional equivalent of an establishment clause.[64] Section 14(2), states: "Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under the rules established by an appropriate authority for that purpose, provided such religious observances are conducted on an equitable basis and attendance at them is free and voluntary."[65]

In declining to adopt appellant's view of a synthesized establishment clause, the plurality held that "equitable basis" was not equivalent to lock-step equality or nonpreference in religion. Rather, it is synonymous with the promotion or inhibition of religion in a "fair and appropriate manner."[66] Thus,

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61. The judgment of the Court included President of the Court, Chaskalson, Langa D.P., Ackermann, J. and Kriegler, J. (That is, four justices.) The concurring opinion was supported by Sachs and Mokgoro, JJ. The dissent consisted of O'Regan, Goldstone and Madala, JJ. *See generally* S v. Solberg, 1997 (10) BCLR 1348 (CC).

62. *See* A.J.H. Henderson, Note, *Diversity of Opinion in a Diverse Society*, 61 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLANDSE REG 348, 351-54 (1999), where the author states that the splintered Court revealed stark philosophical differences in constitutional interpretation, with Chaskalson, P., adopting a narrow, statute-like reading of the Constitution in order to resolve the controversy without unnecessarily opening up the Constitution to the imprint of foreign jurisprudence; and Justices Sachs and O'Regan, former academics, generously relying on American establishment clause decisions to support their theses. *See id.* According to Henderson, Sachs' and O'Regan's approach reflected a "substantive vision of the law" as a direct reaction to the formal approach that characterized much of Apartheid-era South African jurisprudence. *Supra* note 42. Henderson maintains, however, that this approach itself is problematic. *See id.*

63. *See infra* note 74, for text of the American "establishment clause." *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 100-01.

64. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 103.

65. *Id.* ¶ 84.

66. *Id.* ¶ 103.

in situations of prayer in public schools, the Court said, Section 14(2) does not require that accommodation be made for every denomination present at the school.[67] What is required is that school officials give due consideration to the demographic diversity of the population in the institution. Additionally, officials must provide safeguards to protect nonbelievers from being coerced into another's religious observance.[68]

Based on the plurality opinion, it is clear that the South African Constitution envisioned an intertwining relationship between religion and State.[69] According to the holding, the fact that one religion was favored in certain situations did not, in and of itself, support a violation of Section 14(2). To establish such a claim, appellant was required to show that the favoritism took place at a state institution, that the favoritism was inequitable, or that she was in some way coerced into participating.[70]

In support of her claim that the Liquor Act reflected inequitable favoritism, appellant produced evidence showing that the only closed-days chosen in the Liquor Act's legislative history were days of Christian significance: Christmas Day, Good Friday, Ascension Day, and Sunday.[71] In appellant's view, this laid the foundation for the fundamental religious purpose of the Act. However, it was difficult, if not impossible, for appellant to maintain that Sundays were a "state institution" or that she was coerced into taking part in a religious ceremony. Thus, the Court held that Section 14(2) did not provide appellant with relief.[72]

According to the plurality, Section 14 does not envision a high wall separating church and state.[73] This contrasts with the traditional American view where the model has been separation of church and state.[74] An example of how the two systems differ is exemplified by looking at how the courts analyze the issue of reading scripture in public schools. In *Abington Township School District v. Schempp*, the United States Supreme Court held that religious readings at a public school function were unconstitutional.[75] In its view, the test was that the practice put the power and authority of the State

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67. *See id.*

68. *See id.*

69. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 824.

70. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 104.

71. *See id.* ¶ 86.

72. *Id.* ¶ 105.

73. *See id.* ¶¶ 101-04.

74. *See id.*; U.S. CONST. amend. I states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id. See also*, 8 *Works of Thomas Jefferson* 113, where the Founding Father stated, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." *Id.*

75. School District of Abington Township, Pennsylvania, et. al. v. Schempp et. al., 374 U.S. 203, 205 (1963).

behind an activity associated with a particular religion; in doing so, it created the impression of an officially-endorsed religion.[76]

It is difficult to imagine that such religious readings would violate Section 14 of the South African Constitution. So long as "fair and appropriate" safeguards achieved an "even-handed" approach among different faiths, religious readings would be permitted under South Africa's Constitution.[77]

However, the Courts did acknowledge an "equality provision" in Section 8 of the interim Constitution, which provided relief for individuals complaining of unequal treatment in, among other things, religion.[78] Section 8 states in part that "(1)Everyone is equal before the law and has the right to equal protection and benefit of the law. (3)The State may not unfairly discriminate directly or indirectly against anyone on ... [the basis of] religion."[79]

The Plurality held that although Section 8 does not amount to an establishment clause it does provide similar protections.[80] By its very terms, Section 8 prohibits even "indirect" discrimination. Unfortunately, the plurality declined to evaluate this case under Section 8, as that section was not briefed by Appellant.[81] Moreover, the plurality rejected Appellant's approach of incorporating the anti-discrimination provisions of Section 8 into Section 14 which, besides Section 26, was the only section relied upon by appellant in her appeal. The Courts maintained that to do so would give rise to "any number of problems not only in relation to freedom of religion but also in relation to freedom of conscience, thought, belief and opinion, which would go far beyond the difficulties raised by the 'establishment clause' of the United States Constitution."[82]

In analyzing the South African Constitution for evidence of an establishment clause, the plurality correctly concluded that one does not exist.[83] Indeed, it is difficult to reconcile the language of the Constitution, especially Section 14(2), with the American notion of non-establishment. As Section 14(2) expressly allows for religious observances at state institutions so long as they are free, voluntary, and conducted on an equitable basis.

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76. *See id.* at 223-25.

77. *See* Gouws & du Plessis, *supra* note 16, at 683. The formula provided by the plurality seems to invite the conclusion that any accommodation of religion in public life will be permissible so long as the relationship passes the very subjective criteria embodied in § 14(2).

78. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 102. The other factors include race, gender, pregnancy, ethnic or social origin, color, sexual orientation, age, disability, culture, language and birth. *See id.*

79. S. AFR. CONST. ch. 2, § 9. Section 8 of the interim Constitution is Section 9 in the final draft.

80. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 100.

81. *See id.* ¶ 102.

82. *Id.*

83. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 823-24.

official support of religion is undoubtedly permissible so long as such a relationship meets that criteria.

The plurality, however, having gone so far toward admitting Section 8 as the proper grounds for evaluating allegations of unequal treatment allowed an oversight in the pleadings to forestall a firm resolution of this issue. This is a conservative approach, and one certainly open to criticism. However, the Court has signaled to litigants that Section 8 should be considered in future controversies involving religious discrimination.

2. *Freedom of Religion*

Appellant argued that prohibiting her from selling alcohol on a Sunday violated her constitutional right to pursue the faith of her choice, as the law interfered with her ability to take another day off from work to worship without suffering a monetary loss. To demonstrate the impact of Sunday legislation on non-Christian sabbatarians, appellant argued that the South African law was similar to the law implicated in the Canadian case, *Regina v. Big M Drug Mart, Ltd.*[84] In that case, the Canadian High Court held the Lord's Day Act unconstitutional.[85] The Act prohibited a wide range of common activity from occurring on Sundays, including all labor and commerce, fee-based recreation, and the sale and distribution of foreign newspapers.[86] The High Court, in striking down the law, held that the legislation had no neutral purpose and was solely meant to "compel observance of the Christian Sabbath."[87]

The South African Court agreed that the Canadian Act plainly violated freedom of religion and transgressed establishment principles, as well.[88] However, the plurality opinion drew a sharp distinction between the two Acts. While the Canadian Act prohibited engaging in any activity on Sunday other than observing the Christian Sabbath, the South African Act solely restricted the day, time, and type of alcohol that a grocer could sell.[89] It did not prohibit grocers generally from selling products on Sundays. It did not require anyone to open or close his store on Sundays. It did not entirely prohibit the sale of alcohol on Sundays.[90] Moreover, according to the plurality, the Act did not prevent grocers in any way from exercising their religious convictions. They were free to observe the Sabbath on Friday, Saturday, Sunday, or any other day of the week. In essence, what was lacking from the South African Act was

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84. Regina v. Big M Drug Mart, Ltd. (1985) 13 CRR 64.

85. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 87-90 (*quoting* Regina v. Big M Drug Mart, Ltd. [1985] 13 CRR at 93).

86. *See id.* ¶ 88.

87. *Id.* ¶ 92.

88. *See id.* ¶ 90. The plurality was reflecting on the Canadian establishment principles.

89. *See id.*

90. *See id.* ¶¶ 90, 94. Restaurant establishments, for instance, were permitted to sell alcohol under the law, so long as it was consumed on premises. *See id.* ¶ 90.

coercion. Short of a Canadian-styled Act, "the selection of a Sunday for purposes which are not purely religious in nature and do not constrain the practice of other religions would [not] be unlawful simply because Sunday is the Christian Sabbath."[91]

In so holding, the Courts adopted reasoning similar to that announced by the United States Supreme Court in *Braunfeld v. Brown*.[92] In that case, Orthodox Jewish merchants from Philadelphia challenged Pennsylvania's legislation that closed shops on Sunday on the grounds that the law violated their right to freely follow the faith of their choice as guaranteed by the First Amendment.[93] Appellants argued that the law penalized them solely because they practiced a faith other than Christianity.[94] Appellant maintained that closing for an additional day cost the merchants a considerable amount of business solely, in their view, because they were Jewish. This amounted to an involuntary choice between a central tenet of appellants' faith and their livelihoods.[95]

In upholding the constitutional validity of the law, the Supreme Court centered its ruling on the distinction between beliefs and opinions on the one side, and action on the other.[96] The right to hold the former it ruled, is absolute; the latter, it held, is susceptible to restriction when it is "in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion."[97]

The conduct in question in the American case was not demanded by appellants' religion; it was one step removed. That is, it was activity incidental to appellants' religion. The law simply made it more difficult for appellants to practice their faith; it did not prohibit them from doing so, and in no way enjoined them from following the tenets of their faith.[98] The law, thus, imposed only an indirect burden on appellants.

As the number of indirect burdens is nearly limitless, the Court was persuaded to adopt the view that these burdens were presumptively valid because holding otherwise would "radically restrict the operating latitude of the legislature."[99] The plurality in the South African case followed similar logic, except to the extent that it held, that not all indirect burdens would be overlooked, even under a rational basis review. Where the purpose or effect of the legislation is to impede or discriminate against religion, the law is invalid even if the burden is slight.[100] Where, however, the law is neutral on

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91. *Id.* ¶ 89.
92. Braunfeld v. Brown, 366 U.S. 599 (1961).
93. *See id.* at 602.
94. *See id.* at 601.
95. *See id.* at 602.
96. *See id.* at 603-04.
97. *Id.*
98. *See id.* at 605-06.
99. *Id.* at 606.
100. *See id.* at 607.

its face, is generally applied, and has a secular purpose, then the legislature will not be bound.[101]

Similarly, the plurality held that the Liquor Act did not violate the Constitution, as the law was neutral on its face, generally applied, and had a legitimate secular purpose. The fact that the law may have once had religious foundations, it held, was not fatal to this outcome.[102] So long as the religious origins of the statute in question existed alongside economic and social justifications for the law, its origins were not dispositive.[103]

Further, the plurality opined that had the Act demonstrated an interference with appellant's freedom of religion, such interference might be permissible under the State's constitutionally-provided limitation powers.[104] The Court avoided making this decision, however, thereby leaving open the possibility that something more than a "reasonable limitation" but less than an all-out prohibition on Sunday activity, as envisioned by the Canadian Act, could tip the scale toward an impermissible violation of the right to freedom of religion.[105] The plurality simply did not find that the facts in this case warranted such an examination.

Appellant's case suffered from two major defects. First, it is clear that appellant was not a religious victim of the Act. She — and more to the point, her employer — were adversely affected economically by the law.[106] The law made it somewhat harder for them to make a profit on Sundays. On this point, it is important to note that appellant's religious convictions are completely absent in the judicial record. Although the Court readily admitted appellant's right to bring a claim challenging a statute under religious liberty, the language of the decision suggests that her economic motives had much to do with the outcome of the case.[107]

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101. *See id.*

102. *See* S v. Solberg, 1997(10) BCLR 1348 (CC), ¶¶ 89, 156. *See also* McGowan v. Maryland, 366 U.S. 420, 426, 434 (1961).

103. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 89, 156.

104. *See id.* ¶ 98. Under § 33, the legislature could limit fundamental individual rights so long as the limitation was "reasonable, justifiable, and necessary." "Necessary" was removed from the final draft.

105. *See id.* ¶ 93, where the President of the Court remarked that he is not "unmindful of the fact that constraints on the exercise of freedom of religion can be imposed in subtle ways." *Id.*

106. *See id.* ¶ 97. *See also* Michele Havenga, *Corporations and the Right to Equality*, 62 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLANDSE REG 495, 497 n. 10 (1999), where the author makes the argument that had the corporation been charged instead of its employees, it should have been able to avail itself of the same defenses used by appellants, namely that the Act violated its "Freedom of Religion." *Id.*

107. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 140; *see also id.* ¶ 8, where the Court notes that the only group that entered an appearance on behalf of appellant as an amicus curiae was the South African Liquor Store Association! *See id.*

The Court dealt with this case in a near-total religious vacuum.[108] There were no briefs filed with the Court by religious organizations, and there was a dearth of evidence in the record on the financial impact to non-majoritarian believers subject to the Act. In the absence of an establishment clause, it proved very problematic for a non-religious defendant to prevail against a general law by utilizing mostly free exercise arguments.

The second deficiency in appellant's case is based on her reliance on the Canadian case. In arguing that the two Acts were similar, appellant's case was weakened from within. The effect of the South African law paled in comparison to the sheer coercion present in the Canadian Act. As such, appellant's choice gave the Court a radical benchmark against which to judge the South African law. The result was that the Liquor Act appeared less harmful to religious sensitivities than otherwise might have been the case. Such an outcome might have been avoided had appellant focused on a stronger choice of cases or a passionate appeal to the disparate impact on nonbelievers occasioned solely by their convictions.

B. The Concurring Opinion

In a separate opinion, two justices concurred with the plurality. Their opinion dealt solely with the *Solberg* appeal. The justices posed the question: does the prohibition of wine sales by grocers on Sundays violate appellant's religious rights?[109] They found two instances where the Act might do so under Section 14: a disparate impact on non-Christians solely occasioned by their choice of belief systems; and the appearance of a favored religion.[110] Essentially, the first instance is a question of freedom of religion; the second is a question of establishment.

1. Freedom of Religion

The notion of disparate impact was difficult for the concurring justices to escape, especially when they considered the realities of the grocer's trade. In competing with one another, shopkeepers seek as many advantages over their competitors as they can in order to gain the public's business. A law that mandates closed days may amount to such an advantage.[111] In its barest form, the issue faced by the concurrence was reduced to this: if a non-Christian grocer observes sabbath on any other day than Sunday, all other things being equal, he is at twice the disadvantage of his Christian competitor, at least in

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108. *See* Gouws & du Plessis, *supra* note 16, at 681,where it is noted that the absence of legal briefs from faith-based organizations helped ensure that this case was evaluated as one of commercial and not religious importance.

109. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 138.

110. *See id.* ¶¶ 137-38.

111. *See id.* ¶ 155.

terms of business resulting from the sale of alcohol. While the Christian grocer has the potential to sell alcohol six out of seven days, the non-Christian has the potential for only five.[112] In the words of the concurring Justices, the Sabbatarian shopkeeper is "subjected to an invidious choice between following her religion or pursuing her trade."[113]

However, given the lack of evidence in the record supporting the Act's impact on appellant's religious freedom, the concurrence concluded that appellant did not suffer anything more than a slight economic disadvantage as a result of the Act.[114] As in *Braunfeld*, the law had a legitimate purpose, was neutral on its face, and was generally applied to all concerned. Therefore, while recognizing the law's unequal effect on appellant, as compared to professed Christians, the effect amounted to no more than an "incidental burden."

The concurring Justices avoided viewing the constitutionality of Section 14 in a wider context. Although often stating that appellant had the right to challenge the Act whatever her motives, the concurrence seemed singularly focused on appellant's lack of religious credentials. This focus made it difficult for it to conclude that the purpose or effect of the Act was to inhibit non-Christian belief.[115] That the Act might have adversely affected many other individuals who were subject to the impact of the law in all its manifestations was only considered as an afterthought.

In essence, the concurrence maintained that appellant's case was built not so much on a religious liberty foundation but on an economic freedom model. As the Court unanimously rejected that part of Solberg's appeal, she was left to make religious arguments for why her conviction should be overturned. The concurring opinion reflected and, in some ways, exacerbated this imperfect approach.

2. *Establishment*

The concurring justices took for granted that which occupied much of the plurality's evaluation of the Constitution, namely, that Section 14 contains an establishment clause.[116] In the concurrence's view, it was not necessary to

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112. *See id.* ¶ 154.

113. *Id.*

114. *See id.* ¶¶ 154-55. *But see id.* ¶ 158, where it appears that Justice Sachs would not have reached a different conclusion had appellant been a true religious casualty of the Act.

115. In support of this position, the concurrence pointed out that South Africa's Sunday law regime has been eradicated, leaving the Liquor Act as the sole Sunday prohibition law in the country. *See id.* ¶¶ 149-51. However, the concurrence did not venture to offer a reason why this Act, which had clear religious motivations, should have survived in its present form.

116. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 141-48. While offering a multitude of textual references to support this point of view, it is a conclusion lacking in substance and analysis. *See id.*; *see also* van der Vyver, *State-Sponsored Proselytization*, *supra* note 14, at 827.

show that there was coercion at State-funded religious observances or official imposition of the Christian Sabbath to make out an establishment violation. Rather, what was required was a showing that there was an intertwining relationship between church and State, and that the comingling was impermissible under the State's limitation power.[117] The justices concluded that such an entanglement existed because religious symbolism was inherent in all the Liquor Act's closed-days: "[A]lthough part of the objective might have been purely secular, the means used, namely the selection of religiously-based days as closed days, was intended to acknowledge and comply with the sentiments of those Christians who regarded these days as days requiring special observance."[118]

The Act, the concurrence opined, would not have been suspect on this basis had the list of closed-days included other, non-religious days, such as public holidays, which would have neutralized the religious effect of the Act.[119] The plurality stated that evidence of the close relationship between religious holidays and closed-days showed that Christians were still viewed with favor.[120] Accordingly, the appellant established that there was a facially inappropriate endorsement of religion.[121]

With this established, the concurrence was obligated to evaluate the endorsement under the State's Section 33 limitation powers.[122] To be permissible, the limitation was required to be slight, "reasonable, justifiable and necessary."[123] In applying this formula, the concurrence accepted that when the State adopts the habits of a particular religion, even for non-religious reasons, it gives the impression to the public that it prefers that religion.[124]

However, the concurrence maintained, this favoritism must be weighed against the State's objectives. In doing so, the justices contrasted the Liquor Act with Canada's Lord's Day Act. The Canadian law, it stated, was clearly intended to compel Sunday observance, and no legitimate state interest could be found to support the Act. Conversely, the concurrence held, the Liquor Act was part of a health, safety, and welfare regime that did not seek to generally control what people did on Sundays.[125] The effect of the law simply limited the sale of alcohol to the public on Sunday. At worst, the concurrence

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117. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 158-60.

118. *Id.* ¶ 159.

119. *See id.*

120. *See id.* ¶¶ 160, 163.

121. *See id.* ¶ 164.

122. *See id.* ¶ 165.

123. *Id.* The concurring justices interpret "necessary" as "not [being] made the subject of rigid definition, but rather regarded as implying a series of interrelated elements in which central place [is] given to... the means used to achieve a pressing and legitimate public purpose." *Id.* at n.152. The term was removed from the final draft.

124. *See id.* ¶ 170.

125. *See id.* ¶¶ 174-77.

maintained, the Act led to a case of indifferent favoritism.[126] Furthermore, the justices were of the opinion that the religious closed-days were not purely religious anymore.[127]

Applying a rational basis review, the justices concluded that the State's objectives were legitimate.[128] The law was drafted, in their opinion, to prohibit the sale of alcohol on Sundays at grocery stores – not to close down shops or ban alcohol consumption entirely. As such, it was restricted in scope, the intrusion on appellant's religious rights was slight, and the means were reasonably related to that end. The remaining question was whether the means used to achieve the end were "necessary."

The final draft of the South African Constitution deleted "necessary" from the limitation clause, in part because of the difficulty in defining the term.[129] However, since the prosecutions in this case occurred when the interim Constitution was in force, the Act must satisfy that requirement among others. Assuming "necessary" means "required," in the sense that no less restrictive means were available to bring about the stated ends, the terms of the Act arguably were not necessary.

At the time of appellant's violation, South Africa had twelve public holidays, only two of which were designated closed-days: Christmas Day and Good Friday. These days were the only patently religious days of the twelve.[130] Their inclusion called into question the motivation behind the Act and made the addition of Sunday appear dubious. When Sundays are counted, the total number of closed-days amounts to, at most, fifty-four days per year. The concurring justices concluded that the inclusion of these days were "necessary" to bring about the State's objective, namely, tranquility and a reduction in alcohol abuse by the public.[131]

Two other approaches, however, appear to be as effective as that approved by the concurrence, while at the same time significantly reducing the suggestion of an endorsement of Christianity. The first restricts alcohol sales to Sundays only; it would remove Christmas Day and Good Friday from the list of closed-days.[132] Since the Court upheld as legitimate the need for the State to set aside a day of rest for the benefit of all its citizens, Sunday arguably makes the most sense based on prevailing social structure, current practice, and tradition. Removing the holy days would leave a statute in effect that has far less religious association and more secular purpose, without tangibly diminishing the effectiveness of the Act.

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126. *See id.* ¶ 172.

127. *See id.* ¶ 173.

128. *See id.* ¶ 175. The concurrence pronounced the State's health and welfare argument to be "powerful and legitimate." *Id.*

129. *See id.*

130. *See id.* ¶ 125.

131. *See id.*

132. *See id.* ¶ 164. The other patently religious closed-days were omitted from the interim and final Constitutions.

The second approach would add to the current closed-days all other South African public holidays, such as New Year's Day, Human Rights Day, and Family Day.[133] While this actually increases the number of closed-days by about ten per year, it also strengthens the health, safety, and welfare thrust of the Act. These additions would also make the Act appear more secular by reducing the transparent associations with religion present in the law.

The concurrence stated that it could not engage in speculation about the efficacy of the means used by the State to implement its laws.[134] While this is true in cases of a *prima facie* review of a statute, that was not the situation presented to the Court. Once the Justices determined that there was an infringement, it was obligated to inquire into the merits of the means used by the legislation.[135] Based on the concurrence's own findings that a constitutional infringement had occurred, it was required to determine if less restrictive means were available. As the two examples above illustrate, there are less restrictive means available for use that would accomplish the State's goal while reducing or eliminating the infringement on religious liberty. Adopting either of these approaches would signal to nonmajoritarian believers that the government sees them as equal citizens.

C. *The Dissent*

Three justices dissented from the Court's decision. They agreed with the plurality that there is no establishment clause in the Constitution, yet the dissent ultimately found establishment clause protections implicit in the language of Section 14. [136] Like the approach used by the concurrence, this was accomplished by incorporating provisions from other constitutional sections into a "contextual reading" of Section 14. In the dissent's view, since official participation in religious observances is permitted under the Constitution, there must exist some limited establishment clause inherent in Section 14 to ensure fairness in the process.[137]

Foremost among the dissenters' concerns was the ability of the State to pressure religious minorities into observing officially sanctioned religious activity: "When the power, prestige and financial support of the government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." [138] Specifically, the dissent was bothered by the possibility

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133. *See* SOUTH AFRICA YEARBOOK 2000/01, *supra* note 16.

134. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶¶ 164, 176.

135. *See id.* ¶ 133 (O'Regan, dissenting), citing § 98(5) of the interim Constitution.

136. *See id.* ¶ 116.

137. *See id.* ¶¶ 120-21.

138. *Id.* ¶ 120, (quoting Engel v. Vitale, 370 U.S. 421 (1962)) *see supra* note 62, for a discussion of how Justice O'Regan's efforts to read "establishment protections" into Section 14 allowed her access to American Supreme Court establishment decisions that seem somewhat incongruent in the South African context.

that government power was being used to promote one religion over others and, in so doing, coerce religious minorities into conforming to the prevailing norms promoted by the State. By taking this approach the dissent, in effect, merged together its freedom of exercise and establishment analyses.

The dissent also noted that Sundays were chosen as closed days alongside other plainly religious holidays. Justice O'Regan argued that there was a strong likelihood, that religious favoritism informed this choice, giving a "legislative endorsement to Christianity, but not to other religions."[139] The religious purpose of the statute seemed stronger still when the dissent recalled that ten other secular holidays were not included as closed-days.[140]

The dissent was also troubled by the law's existence after the fall of the old regime. This was especially true, in its view, given the preamble's proclamation that democracy, freedom, and human dignity would govern the new South Africa with a view toward rectifying past social injustices.[141] In the dissent's opinion, legislation associated with the most objectionable practices of the old order would, per se, violate this proclamation. Accordingly, the Liquor Act constituted an infringement on appellant's Section 14 rights.

Having established that an initial infringement had occurred, the dissent applied a limitations analysis under Section 33 to determine if this infringement was dispositive.[142] Section 33 permitted government limitation of fundamental rights only if such restrictions were reasonable, justifiable, and, most importantly, necessary. In defining the boundaries of that inquiry, the dissent adopted the approach used in *S. v. Makwanyane,*[143] in which the Court held that legislation limiting fundamental rights was necessary if and only if it was accomplished by the least restrictive means available.[144]

In applying this standard, the dissent was troubled by the lack of evidence regarding the exact purpose the State hoped to achieve through enforcement of the legislation.[145] This vacuum caused the dissent to engage in speculation as to the purpose of the law, which it ultimately accepted as being a restriction on the sale of alcohol to curb public consumption.[146]

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139. S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 125.

140. *See id.*

141. *See* van der Vyver, *State-Sponsored Proselytization, supra* note 14, at 825.

142. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 130.

143. S v. Makwanyane, 1995 (6) BCLR 665 (CC).

144. *See id.* The *Makwanyane* Court stated, "it will need to be shown that the ends sought by the legislation cannot be achieved sufficiently and realistically by other means which would be less destructive of entrenched rights." S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 130.

145. *See* S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 130. Justice O'Regan stated that the lack of such evidence on the part of the State inevitably makes it much more difficult to justify the infringement. *See id.* Note how this comment demonstrates a view of legislative interpretation that is diametrically opposed to the solicitous view afforded the State's reasoning by Justice Sachs.

146. *See id.* ¶ 132. The dissent did not adopt the view that the Act intended to create a common day of rest for all South Africans, as it did not require shops to shut down on that day. *See id.* ¶131.

However, given the holes that existed in such an approach to curbing consumption – namely, that consumption itself was not prohibited and that alcohol was still sold on other public holidays – the dissent was not impressed with the necessity or effectiveness of the means used by the State to achieve its desired end.[147] When considered against the backdrop of the religious importance of the selected closed-days, the legitimacy of the State's means became slighter still.[148]

Having failed this balancing test, the dissent declared the Liquior Act unconstitutional to the extent that it prohibited sale of alcohol on closed-days associated only with Christianity. [149]

While the dissent correctly concluded that the State was unjustified in limiting appellant's fundamental right to freedom of religion, its conclusion is flawed because it conducted its evaluation on the basis of Section 14. Section 14 prohibits religious observances only when the observances are conducted on an inequitable basis, or there is coercion, and the activity takes place at a state institution.[150] While it is likely that the Act benefited and paid tribute to Christianity, this was not a case involving violations that occurred at a state institution. Nor was there any evidence of coercion. As such, the dissent's reliance on Section 14's inequity analysis is misplaced.

Section 8 provided a much better platform on which to view this law. Under Section 8, all citizens are to be treated equally and "unfair discrimination" by the State based on religion is grounds for striking down a statute, irrespective of the involvement of a state institution. Section 8 also provided a lower threshold for proving a violation of unequal treatment than does Section 14, as it permitted a case to be built on indirect discrimination.[151]

While the appellant did not demonstrate a strong case of direct State discrimination against her, there was enough evidence in the record to permit the Justices to decide that the law, in an indirect way, placed non-Christians at an unfair disadvantage. Under a Section 8 analysis, the infringement caused by the law would only be permissible if it satisfied Section 33's limitation requirements.[152] Under Section 33, the law in question must be "reasonable, justifiable and necessary."[153] As previously noted, there are less restrictive means available to accomplish the State's secular aims.[154] Therefore, the legislation, as written, is not "necessary."[155] However, for all the dissent's efforts to incorporate American establishment jurisprudence into its *ratio*

147. *See id.* ¶ 132.
148. *See id.*
149. *See id.* ¶ 133.
150. *See* INTER. CONST. § 8.
151. *See id.*
152. *See supra* note 123.
153. S. AFR. CONST. ch. 2, § 33.
154. *See supra* note 135 and accompanying text.
155. *See id.*

decidendi, it failed to avail itself of the one section that offered the most natural and reasonable resolution to the problem under consideration.[156]

IV. SUMMARY AND CONCLUSION

State v. Lawrence unfortunately did not produce a clear precedent. Partially as a result of appellant's use of religious defenses as a last resort to her criminal conviction the Court was forced into a middling set of opinions. Often the factions split along philosophical lines, using constitutional provisions as shorthand for their own policy beliefs.

The plurality held that there was no establishment clause in the South African Constitution but that appellant's correct avenue of challenging the law lay in Section 8's Unfair Discrimination clause. The plurality chose not to conduct this review because it was not briefed. However, the plurality remained faithful to the idea that South Africa was the product of a unique historical experience that mandated an approach to constitutional jurisprudence that significantly differed from other well-known legal traditions.[157]

The concurrence held that there was an establishment clause in the Constitution and that it was violated by the Act. However, it held the violation was permissible since the State's secular interest in keeping the law was reasonable and "necessary." This conclusion resulted from a balancing test where the secular purposes proffered for the legislation were weighed against the harm done to appellant's religious rights without regard to the efficacy of the State's means in achieving their desired aim. In coming to this conclusion, the concurrence meandered along a tortuous analysis of Section 14.

The dissent stated that there was no establishment clause in the Constitution, then proceded to find one.[158] Moreover, the dissenters seemed intent on making public policy fit inside a constitutional box that would not warmly receive it. More than the concurrence, the dissent sweepingly incorporated American establishment clause theory into its holding, even when such an approach strained the credible meaning of the sections under consideration. At the same time, an adequate section existed in the South African Constitution that could have accomplished the same result. Outside of this anomaly, however, the dissent adhered more loyally to the spirit of the new Constitution than did the other factions.

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156. S v. Solberg, 1997 (10) BCLR 1348 (CC), ¶ 129, where O'Regan J states, "It is not necessary, in view of my conclusion, to consider whether section 90 would constitute a breach of that constitutional provision [§ 8] as well; *see also supra* note 63, at 353-54.

157. *See* Christof Heyns & Danie Brand, *The Constitutional Protection of Religious Human Rights in Southern Africa*, 14 EMORY INT'L L. REV. 699, 759 n.147 (2000).

158. *See* Gouws & du Plessis, *supra* note 16, at 681, where the authors indicate that although there was a majority of justices (6/9) voting to dismiss appellant's claim, another majority (5/9) held that there was an establishment clause in Section 14. *See also supra* note 14, at 755; *but see infra* note 159.

Given the Court's inability to provide clear guidance on issues of religious importance,[159] another approach needs to be taken by South Africa to ensure protection of fundamental constitutional rights. Instead of further clouding these issues in future cases, where incompatible philosophical differences will likely eclipse sound legal decision making, attention should shift away from the Court to the legislature. As that body now reflects all its constituencies, it is in a better position to address the problems inherent in apartheid-era laws. In undertaking such a task, due regard must to be given to striking a balance between traditional Christian deference and the modern reality of a diverse, pluralistic nation.[160]

159. *See* Christof Heyns, Proselytism in Southern Africa (April 1997) (unpublished manuscript on file with Johan van der Vyver at Emory University School of Law). The author argues that since no majority was reached on any single legal issue, the case itself serves as but shaky precedential value. *See id.*

160. *See* Gouws & du Plessis, *supra* note 16, at 681.

THE MEANING OF "STATES" IN THE MEMBERSHIP PROVISIONS OF THE UNITED NATIONS CHARTER

Frederick Tse-shyang Chen*

"Statehood" is an element of membership in the United Nations. The two provisions of the Charter on membership are quite clear on this requirement:

> Article 3. The original Members of the United Nations shall be the *states* which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.[1]
>
> Article 4. (1.) Membership in the United Nations is open to all other peace-loving *states* which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.[2]

However, the Charter does not define the term "states" nor do the two advisory opinions of the International Court of Justice concerning membership of the United Nations.[3] In practice, the decision-makers seem to have followed a number of criteria and have given a wide variety of meanings to the term. First, they have applied a traditional definition of states in international law which regards an entity as a state if it possesses "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[4] The entities found to fit this definition, however, have

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1. U.N. CHARTER art. 3 (emphasis added).

2. *Id.* art. 4, para. 1 (emphasis added).

3. Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57 (May 28); Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (Mar. 3).

4. Convention on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 165 L.N.T.S. 19, U.S.T. 881. The Restatement defines state in similar terms: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW

displayed great variances among them in the degree of conformity to the four qualifications. Secondly, the decision-makers have on occasion ignored the traditional definition and followed other criteria of decision. This practice has occurred mainly in two situations. In founding the United Nations, the participants at the San Francisco Conference rightfully exercised the prerogatives afforded founders of international organizations and decided to define states as entities that did not possess all of the commonly understood requirements of statehood and enshrined their decision in Article 3 of the Charter. The decision-makers also ignored the traditional definition when they acted on the applications for admission of entities newly independent from colonial or other forms of non-self-governing rule, some of whom were not really independent or self-governing.[5] Thirdly, in cases involving the so-called "divided-states," the decision-makers have restricted the operation of the traditional definition by attaching an extrinsic condition to further a policy of favoring the reunification of these states. The condition imposed was an agreement between the two entities on unification or separation. Until there was an agreement, each entity's statehood would be questioned regardless of its actual qualifications as a state under the traditional definition.

The result is that the term states in the above Charter provisions has not been given one uniform meaning but instead a number of plainly discordant meanings. An entity may appear to fall short of statehood in one or another important respect yet be held a state eligible for membership. Conversely, an entity may appear to be well-qualified as a state yet be refused the status of statehood remaining ineligible for membership. Under this practice, states can mean a full-fledged independent sovereign entity, a political subdivision, an overseas possession of a state, a mandated territory, an entity with a dubious degree of independence, an entity with a government controlled in varying degrees by another government, an entity without a government, an entity with a disputed territory, and so on. The term seems to possess "metaphysical attributes."[6] Are all these meanings of state "lawful?" The answer seems to depend on the conception of law influencing the person giving it. If "law" is regarded as a body of absolute and autonomous rules that have fixed or plain and ordinary meanings, and if the process of application is no more than

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OF THE UNITED STATES §201 (1987). *See generally* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (1979).

5. Describing the entities that were admitted to membership in the 60's, Professor Reisman wrote: "Many had economic, customs, nationality and monetary ties which linked them closely if not inextricably to a larger state. Many had defense arrangements with larger states which were extremely one-sided. Many had virtually no foreign policy apparatus. *Almost none of these points was raised in debate.*" W. MICHAEL REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION, A REPORT FOR THE CONFERENCE ON PUERTO RICO AND THE FOREIGN POLICY PROCESS, 60 (1973).

6. "If Guyana, Barbados and Lesotho were states and the D.D.R. was not a state, the word 'state' plainly had some mystical metaphysical attributes requiring serious scholastic inquiry." *Id.* at 59-60.

logical derivation, then, with the traditional definition on the books, many of the meanings mentioned above would seem to be inconsistent with the law. But this conception places too much faith in language, over-emphasizes "authority" to the neglect of "control," and over-emphasizes "perspectives" to the neglect of "operations." A more balanced conception would regard law, not merely as rules, but as a process of authoritative decision, including a continuing process of ascription of meaning to legal concepts such as states, and would emphasize control as well as authority, operations as well as perspectives.[7] Under this understanding, a decision to give a particular meaning to states will be regarded as lawful if it is made by an established decision-maker and in accordance with established criteria. A decision-maker or criterion is "established" if such is maintained by those who hold effective control in the community and supported by community expectations of how decisions in that community ought to be made. The wide variety of meanings given to the word states in the practice of the United Nations would all appear lawful when reviewed under this perspective.

In the following pages, I first elaborate on the record of practice, which has yielded these facially inconsistent meanings, provide illustrations where appropriate, and then discuss the legality of these meanings. At the outset, I should stipulate the temporal reference of my discussions. The critical time used to test statehood in this paper is the time at which an entity became or failed to become a member. Thus, for original members, the relevant time was the time when each of them became an original member in accordance with Article 3, and for subsequent members, when a decision on recommendation or admission was rendered or refused by the appropriate organ. This paper is not concerned with changes in the attributes of statehood occurring after an entity has become a member, including the attainment of statehood.

I. PROLIFERATION OF THE MEANING OF "STATES"

A wide range of meanings for the term "states" has come about from the application of the traditional definition, the sidelining of this definition followed by the application of other criteria of decision, and the restriction of the operation of the definition with an extrinsic condition.

A. Application of the Traditional Definition

In the practice of the United Nations, the traditional definition has been followed. For example, the Security Council was reported to take the following factors into account when acting on membership applications:

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7. I subscribe to the teachings of the New Haven school of jurisprudence and am indebted to its founders, the late Professors Myres S. McDougal and Harold D. Lasswell. Their theory about law appears in HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992).

> In connexion with the statehood of the applicant, reference has been made to such matters as the following: The possession or lack of settled frontiers; the mode of the establishment of the State; the bearing of a General Assembly decision; . . . relations with a former sovereign; . . . the necessity of ratification of peace treaties with ex-enemy applicants; disabilities resulting from the Second World War; the legitimacy of statehood obtained through aggression and conquest; defence arrangements with other powers; the *de jure* or *de facto* status of the applicant and its Government; recognition of the applicant by Members of the United Nations; the maintenance of diplomatic relations with other States.[8]

However, if one were to believe that the traditional definition had given the term states in the Charter a set of uniform and consistent meanings, that belief would be belied by the facts. Such a belief rests on an unwarranted assumption that the technical concepts of law comprising the definition have a fixed and plain meaning. People may think that the United Kingdom is a state under the traditional definition. But do they think that the United Kingdom is a state because it meets the definition of state or that the United Kingdom meets the definition of state because they think it is a state? The record indicates, first, that the decision-makers within the United Nations have applied the definition differently from those outside the United Nations. Secondly, within the United Nations, applications of the definition have been flexible showing the exercise of substantial discretion. The result is that the term has acquired a set of flexible meanings displaying inconsistencies. As early as 1948, a respected authority on international law and then Deputy Representative of the United States to the Security Council, Philip Jessup, made the following observation on uniformity:

> It is common knowledge that, while there are traditional definitions of a State in international law, the term has been used in many different ways. We are all aware that, under the traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second, there must be a territory; third, there must be a government; and, fourth, there must be capacity to enter into relations with other States of the world. . . . [But] the term 'State', as used and applied in Article 4 of

8. U.N. Dep't of Pol. & Security Council Affairs, Repertoire of the Practice of the Security Council, 1946-1951, 272-73 (1954) (hereinafter "RPSC").

> the Charter of the United Nations, may not be wholly identical with the term 'State' as it is used and defined in classic textbooks of international law.[9]

The point of flexible applications and meanings within the United Nations has been admirably discussed.[10] Following are the more glaring illustrations found in connection with the application of the criteria of government and the capacity to enter into foreign relations.

(1) A Permanent Population:

Applications for admission have rarely been challenged for lack of a permanent population. However, the "makeup" of an applicant's population has been raised to challenge its statehood, but the challenges did not seem to get anywhere. The question of makeup was probably raised on the thinking that foreigners residing in a claimant state, being there on sufferance, were not part of its permanent population. The decision implied that as long as an applicant had a permanent population, whether it constituted a minority or a majority of all those living in its territory, it satisfied the requirement of statehood. An illustration is the application of Kuwait. When Kuwait applied in 1961, the representative of Iraq discussed the issue of the constitution of the applicant's population in the Security Council as follows:

> The whole territory has a population of approximately 250,000 inhabitants, of whom more than 60 percent live in the town of Kuwait itself. The population outside the town is composed mainly of nomads who habitually roam the extensive deserts stretching from the southernmost reaches of Iraq to the heart of the Arabian peninsula. In the town of Kuwait itself, which is the only center of population in the territory controlled by the Sheikh, the majority of the inhabitants are considered by the Sheikh himself to be foreigners, and are therefore denied the rights and privileges normally accorded to citizens.[11]

The Soviet Union vetoed Kuwait's application on the ground of the latter's failure to meet the requirement of statehood. Kuwait reapplied two years later, and this time the Security Council voted unanimously to recommend admission. Since there was no indication in the record that the makeup of

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9. U.N. SCOR, 3rd Sess., 383rd mtg. at 10 (1948).

10. *See* ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS, Part I (1963); REISMAN, *supra* note 5, at 53-62.

11. U.N. SCOR, 16th Sess., 984th mtg. at 5, U.N. Doc. S/PV.984 (1961).

Kuwait's population had undergone any significant change since the first application, it must be the case that Kuwait could be held to have satisfied the requirement of a permanent population even though its nationals constituted only a minority of its residents. If Kuwait was a state in 1963, it must have been one in 1961.[12] In sum, "a permanent population" seems to mean a permanent population which may be no more than a minority of all those living in the territory of a claimant state.

(2) A Defined Territory

A notable case is the application of Israel. A resolution of the General Assembly proposed the establishment of an Arab state and a Jewish state in Palestine by partitioning this then-British mandate over the objection of Arab and other Islamic states on the ground of self-determination.[13] At the time, the population of the mandated territory was two-thirds Arab and one-third Jewish. The General Assembly's resolution had not been implemented. On May 14, 1948, one day before the announced termination of the mandate, a

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12. The irrelevancy of the makeup issue to statehood seemed obvious to many on the Security Council. Without any known significant changes in Kuwait's demography between 1961 and 1963, the representative of Ghana said, "Kuwait possesses all the attributes of an independent State." The representative of Venezuela said, "In the case of Kuwait all the conditions for admission to membership of the United Nations laid down in Article 4 have been met . . . . [Venezuela] [b]ases its support for the admission of Kuwait on the relevant legal principles." The representative of the Philippines said, "We are satisfied that Kuwait meets the exacting requirements for membership of the World Organization as set forth in Article 4 of the Charter." For these and other statements, *see* U.N. SCOR, 18th Sess., 1034th mtg., U.N. Doc. S/PV.1034 (1963).

The makeup of an applicant's population also has been raised as an ostensible issue when the opposition to the application was really based on a different reason. An illustration is the statement of the representative of Syria in 1948, which questioned the makeup of Israel's population but was obviously meant to impugn Israel's "legitimacy." The statement is as follows:

> We must also consider the people living on the land. The people in the area over which the Jews claim that they exercise *de facto* authority are not all Jews. The majority are not Jews. The majority of the population in that area is Arab. If the entire population of that area is taken into consideration, it can be seen that the majority of the people are against the formation of this State. If they were to be consulted, and if a plebiscite were held, we would find that the majority of the Arabs reject the idea of the formation of such a State. I do not speak now of all of Palestine, but of that area where the Jews claim to be exercising *de facto* authority. They have gained certain advantages over the Arabs simply by terrorism and armed force. Furthermore, they have expelled the Arab population, massacred the people, looted their property and oppressed them to such an extent that they have been compelled to leave their own country. Under such circumstances, we cannot consider that they have authority over people who are enjoying a democratic way of life, or who are living peacefully and in conditions of friendship and neighbourliness with others.

U.N. SCOR, 3rd Sess., 385th mtg. at 5 (1948).

13. G.A. Res. 181(II), U.N. GAOR adopted Nov. 29, 1947, 1947-48 U.N.Y.B. 247, U.N. Sales No. 1949.I.13.

State of Israel was proclaimed. Later in the same year Israel applied for admission. While the General Assembly's First Committee was discussing the future of Palestine, the Security Council acted on Israel's application. Questions were raised regarding Israel's territory. The representative of the United States characterized the issue as one of "undefined frontiers" only, which would not violate the requirement of a defined territory, and not one of "undefined territory", which would violate it, and explained:

> One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. . . . The formulae in the classic treaties somewhat vary, one from the other, but both reason and history demonstrate that the concept of territory does not necessarily include precise delimitation of the boundaries of that territory. The reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit. Historically, the concept is one of insistence that there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement.[14]

The representative of the Soviet Union argued that it was incorrect to question Israel's territory as undefined, since "[i]ts territory is clearly defined by an international decision of the United Nations, namely by the resolution adopted on 29 November 1947 by the General Assembly."[15]

On the other hand, the representative of the United Kingdom, the former mandatory of Palestine, clearly felt that Israel's situation raised an issue of undefined territory, stating: "The ultimate fate or at least the ultimate shape of the State of Israel remains yet to be determined and is not yet known."[16] The representative of Syria felt the same way, stating: "The State of Israel has no territory which is not contested. The Arab States and all the neighbouring States of the Near East contest the existence of that State; it is not only its frontiers that they contest, but the existence of the State itself."[17]

In any event, Israel was admitted into the United Nations the following year, 1949, after it had declared its readiness to comply with a General Assembly resolution on the internationalization of Jerusalem and on Arab refugees resulting from a war between Israel and five Arab states in 1948.[18]

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14. U.N. SCOR, 3rd Sess., 383rd Mtg. at 11 (1948).
15. *Id.* at 22.
16. *Id.* at 16.
17. U.N. SCOR, 3rd Sess., 385th mtg. at 3 (1948).
18. 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1461 (Rudolf Bernhart ed., 1995).

A remark that the criterion of defined territory "has never been interpreted very strictly"[19] certainly is apposite if the specter of "a defined territory" is no more than a spirit, even an embodied one, inhabiting some portion of the earth's surface.

In sum, a defined territory seems to mean an arguably undefined territory.

(3) Government

Similarly, the criterion of "government" has not been interpreted very strictly. An interesting illustration is the case of the application of the Principality of Monaco. The principality's territory totals 1.95 square kilometers. Of an estimated total population of 31,693, as of July, 2000, the ethnic composition was 40 percent French, 16 percent Monegasque, 16 percent Italian, and 21 percent other. Under a treaty with France in 1918,[20] Monaco, in exchange for France's protection, undertook to limit both the constitution and the operation of its government. Monaco's measures concerning the exercise of a regency or succession to the throne are always the subject of prior consultation with France, and the throne can only pass to a person of French or Monegasque nationality. While the Prince is the Head of State, the head of government is the Minister of State, who is appointed by the Prince from a list of three French nationals selected by the French government. Among the three Councilors of Government, the Councilor of the Interior is required to be a French national. Regarding the operation of the government, Monaco is required to exercise its sovereignty in complete conformity with the political, military, naval and economic interests of France. Monaco's measures concerning its international relations are always the subject of prior consultation with the French government. The French government may, on its own motion, send military or naval forces into the territory of Monaco for the maintenance of the security of the two countries.

Under the treaty regime, Monaco's government and governance are clearly subject to substantial control by France. Thus, the principality seems to enjoy a dubious degree of statehood.[21] Yet, in 1993, while the 1918 treaty

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19. HIGGINS, *supra* note 10, at 20. The learned author discussed other cases in *id.* at 18-20.

20. Treaty Establishing the Relations of France with the Principality of Monaco, July 17, 1918, France-Monaco, 981 U.N.T.S. 359 (1975).

21. Professor Crawford remarked: "The inclusion of Monaco in the category of protected States is probably a result *not of any indisputable qualifications for statehood* but of its widespread recognition and acceptance as a State." CRAWFORD, *supra* note 4, at 194 (emphasis added). 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE (H. Lauterpacht ed., 8th ed. 1955) obfuscated on the statehood of Monaco: "The present status of Monaco is not easy to classify. . . . [But meanwhile] it seems preferable to regard Monaco as an independent State in close alliance with France." *Id.* at 193, n. 5.

regime remained basically intact,[22] Monaco's application for admission was recommended by the Security Council without a vote[23] and approved by the General Assembly by acclamation.[24] The official records indicate no discussions of the issue of statehood.[25]

In sum, government seems to mean government constituted with or without foreign influence and more or less self-governing.

(4) Capacity to Enter into Relations with Other States

In 1948, the representative of the United States remarked:

> In so far as the question of capacity to enter into relations with other States of the world is concerned, learned academic arguments can be and have been made to the effect that we already have, among the Members of the United Nations, some political entities which do not possess full sovereign freedom to form their own international policy, which traditionally has been considered characteristic of a State. We know, however, that neither at San Francisco nor subsequently has the United Nations considered that complete freedom to frame and manage one's own foreign policy was an essential requisite of United Nations membership.[26]

In light of the time at which this remark was made, the phrase "some political entities" was probably in reference to some of the original members who were not sovereign states. Many subsequent members also show a lack of complete freedom in determining and implementing their foreign policies. Professor Reisman described the situation as follows:

> Most of the states admitted in the '60s had a number of common features. Virtually all were small. . . . Many were poor, in resource and technological senses. . . . Many had economic, customs, nationality and monetary ties which

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22. In 1963, France and Monaco concluded a *Convention Fiscale*, an agreement on taxation, which did not alter the 1918 treaty regime. *See* Convention Fiscale, May 18, 1963, France-Monaco, 658 U.N.T.S. 393 (1969).

23. S.C. Res. 829, U.N. SCOR, 48th Sess., 3219th mtg., U.N. Doc. S/PV.3219 (1993).

24. G.A. Res. 47/231, U.N. GAOR, 48th Sess., 104th mtg., U.N. Doc. A/47/PV.104 (1993).

25. Equally if not more intriguing is the admission in 1993 of Andorra, a feudal remnant whose co-princes are the French president acting in his non-governmental personal capacity and the Bishop of Urgel, Spain. S.C. Res. 848, U.N. SCOR, 48th Sess., 3251st mtg., U.N. Doc. S/PV.3251 (1993); G.A. Res. 47/232, U.N. GAOR, 47th Sess., 108th mtg., U.N. Doc. A/47/PV.108 (1993).

26. U.N. SCOR, 3rd Sess., 383rd mtg. at 10 (1948).

> linked them closely if not inextricably to a larger state. Many had defense arrangements with larger states which were extremely one-sided. Many had virtually no foreign policy apparatus. *Almost none of these points was raised in debate.*[27]

The states Professor Reisman referred to were basically newly independent states admitted during the period of acceleration of the decolonization movement. Both the original members the representative of the United States had in mind in 1948 and the subsequent members Professor Reisman talked about come more appropriately in the category of admission decisions that were made without regard to, rather than in the flexible application of, the traditional definition. Nevertheless, these cases reveal the meager role the criterion "capacity to enter into relations with other states" has played in the membership practice of the United Nations.

For an illustration of the flexible application of this criterion to an applicant that is neither an original member nor a newly independent state, we may conveniently revert to the above-discussed case of Monaco. Under the same treaty regime established in 1918, it is plain that Monaco does not enjoy sovereign rights in both the making and the implementation of its foreign policies. This prompted an observation that if Monaco were to have applied for admission in 1961 its application would have failed on the ground of lack of statehood.[28] However, Monaco was admitted without debate in 1993, although little had changed by way of Monaco's capacity to conduct its foreign affairs between 1961 and 1993.

In sum, capacity to enter into relations with other states seems to mean capacity, more or less limited, to enter into such relations.

II. TRADITIONAL DEFINITION SIDELINED: STATEHOOD OF ORIGINAL MEMBERS

Article 3 of the Charter provides:

> The original Members of the United Nations shall be the states which, having participated in the United Nations

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27. REISMAN, *supra* note 5, at 60.

28. The observation was made by Dr. Rosalyn Cohen, now Judge Rosalyn Higgins of the International Court of Justice. She wrote that:

> an examination of practice before the General Assembly and Security Council reveals that the lack of ability of a state to conduct its own foreign relations has been regarded as significant, and in no case of virtually total limitation upon sovereign rights in this regard has an entity been admitted to membership in the United Nations.

In an accompanying footnote, she cited Monaco as one of the examples of virtual total limitation upon sovereign rights to conduct foreign relations. Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1127, 1150 (1961).

> Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

But not all participants in the San Francisco Conference or signatories to the Declaration by United Nations were states under the traditional definition. Some of them were not states even at the time the Charter came into force.

The Declaration by United Nations[29] was a document signed by the U.S.A., the U.K., the U.S.S.R., and China as well as a number of other nations that were at war with the Axis powers, among them India. By its own terms the Declaration was open for adherence by "other nations which are, or which may be, rendering material assistance and contributions in the struggle for victory over Hitlerism."[30] It was adhered to by, among others, the Philippines, Syria and Lebanon. The Declaration formed a "wartime coalition" by these United Nations.[31] On October 30, 1943, the governments of the United States, the United Kingdom, the Soviet Union, and China issued a Declaration of Four Nations on General Security in Moscow.[32] In this document, the four nations recognized "the necessity of establishing at the earliest practicable date a general international organization based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security."[33] After they laid down the major contours of the international organization they had in mind in the Dumbarton Oaks Proposals,[34] the four governments, acting as "sponsoring powers," invited the entire wartime coalition[35] to the United Nations Conference on International Organization at San Francisco, as referred to in Article 3, for the purpose of completing the drafting of the Charter of the United Nations. During the conference, four additional participants, including the Byelorussian S.S.R. and the Ukrainian S.S.R., were invited on account of their contribution to the war effort.[36] The sponsoring powers had always

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29. Declaration by United Nations, January 1, 1942, E.A.S. 236 (1942).

30. *Id.*

31. *See* RUTH RUSSELL, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 50-56 (1958).

32. *See* Declaration of Four Nations on General Security, October 30, 1943, DEP'T ST. BULL. IX, 1943, at 308.

33. *Id.* at 309

34. Proposals for the Establishment of a General International Organization, October 8, 1944, DEP'T ST. BULL. XI, 1944, at 368.

35. Except Poland, whose provisional government of national unity was not yet formed at the time and which therefore could not participate. To make sure that Poland would be eligible for original membership upon formation of the provisional government, the otherwise redundant precondition, "having previously signed the Declaration by United Nations," was added to Article 3. THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 156 (Bruno Simma ed., 1995).

36. *See* Doc. 42, P/10, 1 U.N.C.I.O. Docs. 344-359 (1945).

contemplated that the United Nations was to be established "with our allies."[37] Thus, when the invitation to the San Francisco Conference was presented to these allies, the Secretary of State of the United States issued a statement saying, "The responsibility for the establishment and maintenance of a peaceful world order is the common responsibility of all the United Nations."[38] There was a shared expectation among the wartime allies that not only victory in the war but also the securing of future peace and security was their joint responsibility and undertaking. Accordingly, the participants at the San Francisco Conference assumed this responsibility by making themselves the original members of the United Nations.

However, at the time of this conference, all the named entities in the above paragraph were not states within the traditional definition. This was known to all the participants.[39] In fact, it was suggested, though not acted upon, that the looser word "nations" be used in place of "states" in the Charter to refer to the original members.[40] A conference report mentioned that the membership of the original members was "considered as acquired by right," and explained that "the definition adopted [in Article 3] would serve to calm

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37. The Report of the Crimea Conference of February 12, 1945 stated:

> We are resolved upon the earliest possible establishment *with our allies* of a general international organization to maintain peace and security. We believe that this is essential, both to prevent aggression and to remove the political, economic and social causes of war through the close and continuing collaboration of all peace-loving peoples.

Report of the Crimea Conference, February 12, 1945, 12 DEP'T ST. BULL., 1945, at 213, 214 (emphasis added).

38. Statement by the Secretary of State, March 5, 1945, 12 DEP'T ST. BULL., 1945, at 395, 396.

39. At the 5th plenary session of the San Francisco Conference, Mr. Molotov, the chief delegate of the U.S.S.R., stated:

> We have at this Conference an Indian Delegation. But India is not an independent state. We all know that the time will come when the voice of an independent India will be heard, too. Nevertheless we share the view held by the British Government which suggested that representatives of India should be granted a seat at this Conference, imperfect though her status is. We have at this Conference a Philippine Delegation. But the Philippines are not an independent country. We know full well that the time will come when we shall be able to hear the voice of independent Filipinos, too. But we have agreed with the United States Government, which suggested that the Philippines have a voice even with their present status.

Doc. 42, P/10, 1 U.N.C.I.O. Docs. 4-5 (1945).

The Soviet attitude on the status of Byelorussia and Ukraine was interesting. Before Yalta, Ambassador Gromyko suggested that most of the sixteen Soviet republics were much more important than Liberia or Guatemala, but when asked if they were independent, he gave an emphatically positive answer with a caveat that they also were "very intimately connected as members of a federation." RUSSELL, *supra* note 31, at 509. At Yalta, Mr. Molotov explained that on the independence status of the Soviet republics, "his Government was prepared to follow the example of the British dominions, which had approached independent international status *gradually*." *Id.* at 533 (emphasis added).

40. THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 157. Actions taken at San Francisco on this issue were summarized in RUSSELL, *supra* note 31, at 927-29.

the fears of certain nations participating in our deliberations which, properly speaking, are not *States* and which for this reason might be denied the right of membership in the Organization."[41] The record is, therefore, clear that the traditional definition was deliberately sidelined at San Francisco. When the Charter came into effect on October 24, 1945, India was still a non-self-governing entity under the rule of the United Kingdom,[42] the Philippines was an overseas possession of the United States,[43] Lebanon and Syria were mandated territories under the administering authority of France,[44] and Byelorussia and Ukraine were constituent republics of the Soviet Union.[45]

In sum, under Article 3, "states" seems to mean not only states under the traditional definition but also territorial bodies politic that failed to comply with this definition.

III. TRADITIONAL DEFINITION SIDELINED: STATEHOOD AND DECOLONIZATION

The impact of decolonization on membership practice has been succinctly summarized:

> The 'radicalization' of the principle of self-determination of peoples . . . in favor of a speeding up of decolonization . . . led to a broadening of the spectrum of statehood and to new types of states, inducing a new practice and adaptation of the application of Art. 4. Leaving aside exceptional cases . . . the admission of states which had gained their independence in the course of decolonization as a rule took place without even mentioning the criteria referred to in Art. 4(1). The admission of new member states thus became a mere procedural formality, permitting the automatic admission of even micro-states . . . . The UN having thus reached its status

41. *Report of the Rapporteur of Committee* I/2., 7 U.N.C.I.O. Docs. 325 (1945).

42. India became a self-governing dominion on August 15, 1947.

43. The Philippines became independent on July 4, 1946.

44. Although independence for Lebanon was proclaimed by France on November 26, 1941, it was subject to a treaty to be concluded, and France continued to exercise authority in Lebanon. It was not until December 31, 1946 that the treaty was signed and France withdrew its troops from Lebanon.

As to Syria, the French *Troupes Speciales du Levant*, stationed in Syria to maintain security, did not completely leave until April 15, 1946 when France voluntarily complied with a proposed resolution which failed adoption on account of a veto. On the Security Council's actions on the Syria and Lebenon question, see 1946-7 U.N.Y.B. 341-45, U.N. Sales No. 1947.I.18.

45. *See supra* note 40.

> of quasi-universality, the practical relevance of Art. 4 of the Charter has become more or less reduced to solving special cases and problems.[46]

Thus, in the admissions of newly independent states, the traditional definition was not merely subjected to flexible applications but given short shrift or sidelined.

Indeed, when an application was from an entity newly emerged independent from colonial or other forms of non-self-governing rule, the "deliberations" in the Security Council were uniformly ceremonial. The members would take turns to speak, and the former metropolitan power, if not a member, would be invited to speak first. The speeches fell into a pattern and would typically include: orations of satisfaction on the successful worldwide movement of self-determination and at the peaceful achievement of independence by the applicant; expressions of warm welcome to an applicant willing and well-qualified to shoulder the heavy responsibilities of membership in light of its history, human and natural resources; expressions of best wishes for a prosperous and successful future; tributes, usually by Western representatives and their friends, to the former metropolitan power for a job well done in guiding the applicant to independence; and sympathies, usually from the representatives of Soviet Union and Eastern-bloc states, for the lengthy subjugation and the difficult road to independence endured by the applicant. The question of the statehood of the applicant, when mentioned occasionally, was usually subsumed in a cursory and perfunctory statement that the speaker's government considered the applicant qualified under Article 4(1) of the Charter. No representative seemed to seriously care about the traditional definition at all. The Committee on Admissions became virtually irrelevant. The General Assembly was no less, if not more, welcoming. Hence, it did not matter if the applicant relied heavily on the former metropolitan power for finance, defense and security, continued to have troops from the latter stationed on its territory, was politically and structurally integrated with it, or, in a glaring case summarized below, did not even have a government.[47]

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46. THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 161.

47. The General Assembly seemed to be well aware of the fact that some newly independent states would be less endowed and developed in resources and institutions. Since colonialism was taken to be "contrary to the Charter of the United Nations and . . . an impediment to the promotion of world peace and co-operation," the General Assembly not only declared that "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence," but also adopted resolutions to express the opinion that these newly independent states should be admitted forthwith upon attaining independence. The quoted passages appear in Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A.Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4686 (1960). *See also* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028

The Congo (Leopoldville) attained independence from Belgium on June 30, 1960. Within one week, its national *force publique* mutinied against its officers who were Belgians. On July 7, the Security Council voted to recommend its admission to membership at the United Nations.[48] The dispatch by Belgium of paratroopers to protect Europeans and to restore order rekindled strong local anti-colonial feelings. A violent civil war was also raging, involving several political factions respectively led by Joseph Kasavubu, Joseph Mobutu, the followers of Patrice Lumumba, Antoine Gizenga, and Cyrille Adoula, all of whom attempted to seize political control of this newly independent country. The United Nations became deeply involved in peace-keeping in the Congo. In spite of the actual conditions then prevailing in the Congo,[49] the General Assembly adopted by acclamation a draft resolution sponsored by Tunisia to admit it on September 20.[50] It was the practice of the General Assembly that, following the declaration of the admission of a new member by the President of the General Assembly, the delegation of the new member would be escorted to its place in the Assembly hall. In the case of the Congo, because of the state of "civil war"[51] or "political anarchy,"[52] no

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(1971) (hereinafter Declaration on Friendly Relations).

48. U.N. SCOR, 15th Sess., 872nd mtg. at 1-18, U.N. Doc. S/PV.872 (1960).

49. In addition to the phenomenon of competing governments, the Congo was faced with the attempted secession of the provinces of Katanga and South Kasai. On July 22, 1960, the Security Council adopted a resolution calling for the speedy withdrawal of Belgian paratroopers, which contained this language in the preamble: "the Security Council recommended the admission of the Republic of the Congo to membership in the United Nations as a unit." The phrase "as a unit" was explained by a co-sponsor of the resolution as follows:

> In the situation that exists in the Congo at the present time, it is well for us to bear in mind the fact that the Security Council agreed to recommend the Republic of the Congo for admission to the United Nations as the Congo that existed on 7 July 1960, as the Congo composed of the several provinces of which it is constituted, and the Congo for which was established a central government . . . when we speak of the Congo, we mean the Congo as the Republic of the Congo – the whole unit, including all its provinces . . . when we recommended the Republic of the Congo for admission, we had no idea of any separate parts of the Congo, . . . and therefore, this Council can take no cognizance of any position that the Congo is divided or that it is now no longer the same Congo which we, on 7 July 1960, recommended for membership in the United Nations.

1 Repertory of Practice of United Nations Organs, Report by the U.N. Secretary-General, Supp. No. 3, at 185-86 (1972).

50. U.N. GAOR, 15th Sess., 864th plen. mtg. at 6 (1960).

51. Donald McNemar, *The Postindependence War in the Congo, in* THE INTERNATIONAL LAW OF CIVIL WAR 244 (Richard Falk ed., 1971). The author wrote: "A civil war is defined here as a violent struggle over political control of a state occurring entirely within the geographic boundaries of that state. The Postindependence War in the Congo fulfills these requirements and is here analyzed as an example of a civil war." *Id.* at n. 1.

52. In his address delivered upon the opening of the General Assembly's meeting of September 20, 1960, Temporary President Belaundo, referring to the Congo, said: "The Congo crisis has also been dealt with as a regional matter. An appeal had to be made to the solidarity of the African peoples, who were concerned to save the young Republic from *political anarchy* and economic chaos." U.N. GAOR, 15th Sess., 864th plen. mtg. at 2 (1960) (emphasis added).

delegation took its place in the Assembly hall. The remarks of the President of the General Assembly, which turned the case from one of "lack of government" into one of mere "proper credentials," were most revealing:

> As Members of the Assembly are aware, the situation in the Congo has been the subject of much discussion in the United Nations within recent weeks and even within the past few days, and the constitutional and political position in that country still remains, unhappily, far from clear. In these circumstances, we are faced with a difficulty as regards the implementation of the resolution we have just adopted. The difficulty is one for the Assembly itself, and I would suggest to the Assembly that the best solution of this would be to refer it to the Credentials Committee. As I hear no objection to this proposal, it will be considered as adopted.[53]

Even though the Security Council had recommended admission just before the government in the Congo collapsed, the General Assembly was entitled and obligated to exercise its own judgment.[54] The General Assembly plainly ignored the criterion of "government" in the traditional definition.

In sum, "states" seems to mean a territorial body politic newly freed from colonial or other non-self-governing rule and more or less independent.

IV. STATEHOOD AND THE "DIVIDED STATES"

In the context of the United Nations, the term "divided states" has been used to describe the division of Germany, Korea and Vietnam after World War II as a part of the larger East-West conflict.[55] It has not been used to refer to the situation that has been prevailing in China since 1949, which has been rightly or wrongly but at any rate officially treated as a case involving the question of representation only.[56] With respect to the divided states, it would seem that each in every pair was clearly qualified as a state under the traditional definition, at least in comparison with some of the members of the

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53. *Id.* at 6.

54. There certainly was no lack of precedent for the General Assembly to take into consideration post-recommendation events and make an independent judgment accordingly. Thus, the General Assembly decided, on September 20, 1960, to postpone action on the application of the Federation of Mali, which became separated into Mali and Senegal after Security Council's recommendation of June 28, 1960. Repertoire of the Practice of the Security Council Supp. 1959-1963, at 141.

55. *See* THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 166-67.

56. In 1963, Dr. Higgins wrote that the situation in China did not present a "problem of statehood *stricto sensu*, but rather a problem of the representation of an undeniably existent state, that of China. It is, of course, quite possible to approach the problem with the view that by now two separate states of China may exist." HIGGINS, *supra* note 10, at 42.

United Nations. But, for each, compliance with the traditional definition of statehood was not enough for it to qualify as a state for the purpose of membership, and the status of statehood of each, to be acceptable, was made conditional upon an agreement with the other entity of the same pair. The two might agree either to separate or to reunify, and their agreement would be respected. But, until agreement, an application for admission by either was certain to be blocked by the cold-war allies or friends of the other by a control over the number of votes or by a veto. The blocking was usually justified in part by the assertion that the applicant was not a state but a mere "zone of occupation," "puppet regime," and the like. A unilateral move to apply without the needed agreement, even accompanied by a proposal that the other in the pair be simultaneously admitted, would still be doomed to failure. Thus, as aptly summarized, "Divided states were in fact admitted to the UN only after the conflicting claims of the two sides had been formally adjusted, either in favour of division . . . or in favour of reunification."[57]

This extrinsic requirement of agreement led to a stalemate, which could not be broken until an agreement was reached. For a long time, none of the parts of divided states was able to secure admission. An agreement was first reached between the two Germanys in favor of division. This was made possible during a period of detente by the success of Chancellor Brandt's *Ostpolitik* which brought about a Basic Treaty between the "two German states in one German nation" in 1972.[58] The treaty paved the way for admission of both Germanys in 1973.[59] In 1991, the two Koreas were admitted after a "South-North Basic Agreement" had defined the two sides as forming a "temporary special relationship" toward eventual reunification. In the case of Vietnam, the unification of the whole nation by the Socialist Republic of Viet Nam rendered the divided-state issue moot, and the Socialist Republic was admitted in 1977.

In sum, "states" did not mean an entity in a divided state, no matter how qualified it might be as a state in comparison with some members, until the other entity in the pair consented to its statehood.

V. LEGALITY OF ALL MEANINGS

The proliferation of meanings, reviewed above, may have given the impression that decisions on statehood are an unprincipled and promiscuous affair, and that it is all a matter of power politics. Professor Reisman once observed:

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57. THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 166.

58. *See* MARY FULBROOK, THE DIVIDED NATION: A HISTORY OF GERMANY 1918-1990, at 207-210 (1992).

59. Information on the year in which a member state is admitted to the United Nations is available on line at http://www.un.org/Overview/growth.htm.

> In practical application, Article 4(1) really says little more than that those applicants will be admitted which the Security Council and the General Assembly (or in more political terms, the effective elites of the world) think ought to be admitted, a conclusion which the International Court appears to have obliquely and perhaps reluctantly reached. . . .[60]

But the key is the language, "think ought to be admitted." Neither the Security Council nor the General Assembly enjoys absolute unfettered freedom to "think" what it "ought" to do. Both organs are made up of and act through their respective members, who are naturally expected to act so as to maximize their own positions in power and other values. The bearings of the members' perceived interests, including their common interests in law and order, upon the decision processes of the two organs disciplines the thinking and actions of these organs.

I submit that the decisions on statehood in the practice of the United Nations are generally lawful. A decision is lawful if it is made by an established decision-maker and in accordance with established criteria. A lawful decision is always supported by enough "effective control" in order to be put into effect, and a decision without the support of effective control is little more than mere illusion or pretended authority. All of the decisions I discussed were made by the holders of effective power in the world power process: the victorious wartime coalition which at the time formed the majority of the states of the world and the members of the Security Council and of the General Assembly who alone could vote on applications for admission in their respective organs. Power politics not only did not render the decisions unlawful but also was an indispensable component of their legality. It is control enjoyed by the power elites that guarantee the effective implementation of decisions. But effective decision-makers cannot claim legality for their decisions if they act capriciously or whimsically. Lawful decisions need to be supported also by "formal authority" if they are not to be displays of naked power. The effective decision-makers were expected by the community to be the decision-makers with regard to the membership decisions they made. Furthermore, they made their decisions in accordance with community expectations as to how decisions on membership should (and should not) be made and as embodied in a number of rules and principles of international law, which display perspectives of authority. Since both control and authority were present in all the decisions reviewed above, they are lawful. It is convenient to elaborate separately with reference to original members and subsequent members.

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60. REISMAN, *supra* note 5, at 54.

1. Original Members As States

Decision-Makers

The founders of the United Nations were the decision-makers on who should constitute the original members of the organization, and they made themselves the original members. Each of them became an original member upon its ratification of the Charter. Under Article 3, the ratification must be in accordance with Article 110, which requires a deposit of ratification, but this latter provision is ministerial and does not prescribe substantive qualifications for original membership.[61] Of course, a ratification made before the Charter comes into force cannot operate to make the ratifying state an original member until the Charter comes into force and the organization comes into existence. A ratification made after the Charter is in force operates to make the ratifying state an original member upon deposit of the ratification.[62] The Charter entered into force on October 24, 1945, upon the deposit of ratifications by, among others, Byelorussia and Ukraine. Before that date arrived, the Philippines, Lebanon, and Syria had already deposited their ratifications. Thus, for these five entities, original membership status commenced on October 24, 1945. As already mentioned, on that date, Byelorussia and Ukraine were constituent units of the U.S.S.R., the Philippines were still an overseas possession of the U.S.A., and Lebanon and Syria were under the mandate of France. India deposited its ratification and became an original member on October 30, 1945, when it was under the British raj. Therefore, none of these six original members on the relevant date fit the traditional definition of statehood known to international law, and yet the founders, including the six themselves, decided to call themselves officially "states."

Criteria of Decision

International law defers to the judgment of founders of international organizations on who should be their members. It is the founders that set the purpose of an organization and are uniquely interested in ensuring its effective functioning. Therefore, where the founders have explicitly specified the conditions for membership in the constitutive document, their specifications are respected and unalterable.[63] Where a question pertaining to eligibility for

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61. See THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 1191-95. The suggestion that Article 110(4) is a substantive provision on the criteria of original membership is a doubtful one. *See id.* at 1194. Article 3 deals with "membership," and Article 110(4), only with "signing and ratification." *Id.*

62. *See* U.N. CHARTER arts. 110, paras. 3 & 4.

63. *See* Conditions of Admission of a State to Membership in the United Nations, 1948 I.C.J. 57 (May 28).

membership is not explicitly covered in the constitutive document, it is likely to be resolved in the interest of the effective functioning of the organization, by considering the ability of a candidate to comply with the obligation of membership or to participate in the normal activities of the organization.[64] The founders of the United Nations, including the above-mentioned six in question, either formed a part of the wartime coalition or contributed significantly to the war effort and the final, complete victory. They were united in common purposes and enterprises. It was their shared conviction that the maintenance of public order in the world community after the war would require an international organization as they envisioned. At the time of the founding of the United Nations, they held the effective power in the world community. In undertaking the responsibility of founding the United Nations, they echoed the general expectations then prevailing in the world community relative to the securing of international peace, security and abundance after the war.[65] Their actions indicated support of effective control and formal authority. In Article 3, they concluded that the original members of the United Nations should include all of the founders, including the six in question. To borrow from the International Court of Justice, "[F]ifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law,"[66] to decide who should be its original members.

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64. Thus, under the regime of the Treaty of Versailles, Poland was in charge of the conduct of foreign relations of the Free City of Danzig, and in connection with its foreign relations the Free City was not entitled to call upon Poland to take any step opposed to the latter's interest. The Permanent Court of International Justice was requested to render an advisory opinion as to whether the Free City, under this special legal status, could become a member of the International Labor Organization. Since membership in the ILO would unavoidably obligate the Free City to take steps that would fall within the sphere of its foreign relations, which could be objected to by Poland on the basis of Polish policy, the Court was of the opinion that this special legal status rendered the Free City unqualified for membership. Free City of Danzig and International Labor Organization, 1930 P.C.I.J. (ser. B) No. 18, at 1 (Aug. 26). The Court explained:

> The Free City as a Member of the Labor Organization could not take any such steps itself. It would be obligated to use the Polish Government as its intermediary . . . [and] the Polish Government would be entitled to refuse to take these steps on behalf of the Free City if they were prejudiced to important interests of the Polish State.
>
> The Court has not found any provision in Part XIII [of the Treaty of Versailles] which absolves a Member of the Labor Organization from complying with the obligations of membership or excuses it from participating in the normal activities of the Organization if it cannot first obtain the consent of some other Member of the Organization. . . . [T]he Court considers that the Free City of Danzig could not participate in the work of the Labor Organization.

Id. at 15-16. Obviously, the compliance with the obligations of membership and the participation in the normal activities by its members are indispensable to the effective functioning of an international organization.

65. These expectations are articulated in the Preamble to the Charter and were asserted by the governments of the original members when they ratified the Charter.

66. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, at 185 (Apr. 11).

The document that was adopted in San Francisco is a treaty. The participation by the six in the conclusion of a general treaty of overriding importance conceivably could raise an issue of competence.[67] It should be pointed out, however, that the participation of the six was on the motion of the U.S.A., U.K., U.S.S.R., and France,[68] the very states that enjoyed sovereignty or administering powers over them. Furthermore, in San Francisco, the founders, including these four sovereign or administering powers, were fully aware of the meaning of "states" under the traditional definition and the nonconformity of the six with that definition. Nevertheless, they chose to ignore the traditional definition and to refer to the six, as well as all other founders, as "states." That they acted knowingly and deliberately is beyond doubt. For in so acting, they actually forsook a suggested alternative of masking this nonconformity with a more ambiguous word, "nations." Under international law, parties to a treaty are entitled to adopt special meanings and conclude a treaty accordingly.[69] Where a special meaning has been adopted, it will override the ordinary meanings that may be obtained under general rules of interpretation.[70] In San Francisco, the founders explicitly agreed that "states" included the six in question and confirmed this by their ratifications of the Charter. Consequently, the term "states" in Article 3 lawfully means mandated territories, overseas possessions, constituent units as well as states within the traditional definition of international law.

2. *Subsequent Members*

Decision-Makers

Article 4(2) provides: "The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly

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67. 1 L. OPPENHEIM, INTERNATIONAL LAW, supra note 21, states:

> A State possesses the treaty-making power only so far as it is sovereign. States which are not fully sovereign can become parties only to such treaties as they are competent to conclude. It is impossible to lay down a hard and fast rule defining the competence of all not-full sovereign States. . . . Thus, again, it depends upon the special relation between the suzerain and the vassal how far the latter possesses the competence to enter into treaties with foreign States.

Id. at 882.

68. Although not a sponsoring power, France did "request" that invitations to the San Francisco Conference be sent to Lebanon and Syria upon being informally consulted after the four sponsoring powers had already agreed to invite the two entities. RUSSELL, *supra* note 31, at 627-28.

69. For a contemporary formulation, *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 8 I.L.M. 679.

70. 1 L. OPPENHEIM, INTERNATIONAL LAW, *supra* note 21, at 951:

> "In regard to interpretation given by the parties themselves, and which overrides general rules of interpretation, there are different ways open to them. They may either agree informally upon the interpretation, and execute the treaty accordingly . . . ."

upon the recommendation of the Security Council." Accordingly, the decision-makers, regarding the applications for subsequent membership, are the Security Council, whose recommendation is indispensable,[71] and the General Assembly, whose decision effects an admission. Without the recommendation of the Security Council, because of either a negative vote or inaction, an application cannot go forward to the General Assembly and is "dead" for all practical purposes until the Council again takes it up. Since a negative decision of the Security Council is not subject to review, it is in that sense "final." Thus, every time the Security Council declines recommendation to an applicant on the ground of lack of statehood, that decision officially gives final meaning to the term "states" in Article 4. But a positive decision of the Security Council to recommend, which necessarily includes a favorable finding on statehood, does not control the General Assembly, which is entitled to make its own "decision" on the statehood of the applicant. Between the two organs, the General Assembly has shown itself to be more willing to admit an applicant for membership than the Security Council. The General Assembly has many times requested the Security Council to reconsider applications that the latter had refused to recommend and passed resolutions to express a favorable opinion on individual applicants prior to their consideration by the Security Council. It was the General Assembly's frustration over a deadlocked Security Council, which as a consequence made no recommendations for admission, that precipitated an attempt to bypass the latter and eventually an advisory opinion of the International Court of Justice.[72] The Court, in its opinion, stated that

> the admission of a State to membership in the United Nations, pursuant to paragraph 2 of Article 4 of the Charter, cannot be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend.[73]

Criteria of Decision

In passing on the statehood of applicants, the two organs of the United Nations appear to have honored a number of authoritative criteria of decision. Of course, the traditional definition of international law is one. Even when it was subjected to flexible applications, it was still followed. This is because

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71. Efforts to bypass the Security Council ended in failure. *See* Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4 (Mar. 3).

72. For the history of this long deadlock, see CASES ON UNITED NATIONS LAW 55-91 (Louis B. Sohn ed., 2nd rev. ed. 1967). The advisory opinion is at 84.

73. *See id.* at 88.

the traditional definition, like all other rules of law, is not absolute and autonomous. The technical concepts that comprise that definition, including that of "state," are but words, and words do not have fixed meanings. They point to no absolute and constant referents and can take on variant meanings.[74] The specific meaning a decision-maker may give on a particular occasion is a function of many predispositional and environmental variables. The great hodgepodge of meanings of "states" thus ascribed by decision-makers over a period of half a century through flexible applications of the traditional definition is clearly inevitable.

One principle that has lent legitimacy to the practice of loose interpretations of legal concepts and of liberal admission decisions is that of universality. Although the Charter does not provide for automatic universal membership, but only for conditional admission, the principle of universality has never ceased to surface in deliberations on membership matters and has received widespread support. However, actual practice indicates that this support has been limited. Thus, while the principle has appeared in the preamble of resolutions, it has never been included in the operative part of any resolution. Draft resolutions that have included the principle in their operative parts either had to be withdrawn upon a perception of a failure to pass because of the inclusion or were passed only after the reference to the principle had been deleted by amendment.[75] The steadfast adherence to placing the principle only in the preamble and not in the operative part is significant. Preambles state reasons for and the purposes of resolutions, including supporting perspectives of authority; only operative parts prescribe policies and make dispositions, including decisions of admission. The principle of universality is comprised of a "demand" for universal membership and the "expectation" that it is not a binding rule but a standing expression of authority with considerable support in the community. Such a principle, when invoked by those in effective control without objection, would seem to lend legitimacy to

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74. The following remarks in a contracts case under municipal law, are apposite generally:

> A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry, and it may take on values from the words and ideas with which it is associated. Words are the product of history and their meaning may change with time, place and social group. As expressed by Mr. Justice Holmes . . . "A 'word' is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Pearson v. State Soc. Welfare Bd., 353 P.2d 33, 39 (Cal. 1960)(quoting Towne v. Eisner, 245 U.S. 418, 425).

75. I RP 173-74. Verbal support for the principle likewise has not been all out. For example, when the Secretary-General indorsed the idea that the United Nations should be "as universal as possible," an idea on which, according to him, "there has never been a serious difference of opinion," he nevertheless confined his support to the pending applicants only. He stated, "in my capacity as Secretary-General of the United Nations, I wish to support the admission to membership of all the States *which are applying today*." *Id.* at 173 (emphasis added).

decisions that would otherwise have been mere exercises of naked power. Thus, a decision of admission based on the principle of universality is both controlling and authoritative.

The principle of universality can reinforce legality in two types of cases. First, sometimes a flexible application of the traditional definition may appear to exceed the proper limits of flexibility, and the principle of universality could provide a needed reinforcement. A case in point is the admission of Monaco, whose statehood had for long been doubted by scholars and who once filed but then withdrew an application for admission to the League of Nations. As the United Nations was becoming almost universal, membership for Monaco, an entity that was already a member of a number of international organizations and generally recognized by other states, became more understandable in the light of the principle of universality.[76] Secondly, the principle gave added, though not really needed, credence to all the admissions decisions rendered without regard to the traditional definition but in accordance with the principle of self-determination.[77] In fact, the principle was frequently mentioned in the speeches in support of those decisions. The case of the admission of the Congo by the General Assembly illustrates both types of cases.

The principle of self-determination has supported the admission of about two-thirds of all subsequent members. It is included in Article 1(2) of the Charter as one of the purposes of the United Nations.[78] It is not necessary to get involved in the argument on whether self-determination, as stated in the Charter, is a binding legal prescription or a mere political prescription specifying a program of action for the organization. "Over the years," as one respected publicist observed, "Member States of the UN gradually turned that standard into a precept that was also directly binding on States."[79] This process depicts member states exercising their effective power to lend support to the broad concept of self-determination to the extent of one or another specific subject of concern, thus transforming, to that extent, a vague standard, even if still largely political, into a binding legal prescription. The subject that first became thus conjoined by control and authority was that of decolonization.[80] Self-determination in the sense of decolonization has been

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76. *See* CRAWFORD, *supra* note 4, at 193-94.

77. For some random examples of actual invocation of the principle for support of decisions in favor of admission, see statement of the representative of Yugoslavia on the application of Morocco, U.N. SCOR, 11th Sess., 731st mtg. at 6 (1956); statement of the representative of Cuba on the application of Sudan, U.N. SCOR, 11th Sess., 716th mtg. at 8 (1956); respective statements of the representatives of Argentina and Ecuador on the application of Malagasy, U.N. SCOR, 15th Sess., 870th mtg. at 11 (1960).

78. U.N. CHARTER art. 1, para. 2 : "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

79. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL APPRAISAL 43 (1995).

80. The gradual development of self-determination as a political postulate into binding

regarded as not merely a legal norm but perhaps even a peremptory one as well.[81] When admissions decisions in favor of entities newly independent from colonial or other non-self-governing rule were judged in the light of this principle, their legality was scarcely open to question. Flexible application of the traditional definition and the principle of universality could provide useful justifications for these admissions decisions, but they are hardly necessary, since self-determination could provide a direct and independent justification for them. Also unnecessary are such doctrines as "sovereignty in abeyance"[82] and "inherent sovereignty,"[83] which are highly ambiguous.[84] They make one wonder whether newly independent entities should be held to be states because they enjoyed sovereignty in abeyance or whether they enjoyed sovereignty in abeyance because they should be held to be states. On the other hand, the proposition that, under the Charter, the territory of a colony or other non-self-governing territory has a status separate from that of the administering state forms a part of the binding norm of self-determination.[85]

A policy in favor of reunification of the divided states prevailed in the United Nations to govern the status of statehood of the two divided parts. This policy was implicitly indicated in 1947 in a resolution of the General Assembly concerning the independence of Korea.[86] It was expressly stated in 1948 in a follow-up resolution on Korea in which the General Assembly referred to the unrealized objective of "unification of Korea" and "call[ed] upon Member States to refrain from any acts derogatory to the results achieved and to be achieved by the United Nations in bringing about the completed

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treaty and customary norms is surveyed in *id.* Pts. I & II.

81. "[T]he principle of equality and that of non-discrimination on racial ground which follows therefrom, both of which principles, like the right of self-determination, are imperative rules of law." Barcelona Traction, Light and Power Company (Belg. v. Spain), 1970 I.C.J. 3, 304 (Feb. 5) (separate opinion of Judge Ammoun). *Cf.* CASSESE, *supra* note 79, at 133-40.

82. "Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new State." International Status of South West Africa, 1950 I.C.J. 128, 150 (July 11) (separate opinion of Judge McNair).

83. "Sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore did not cease to belong to the people subject to mandate. It had simply, for a time, been rendered inarticulate and deprived of freedom of expression." Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 68 (June 21) (separate opinion of Vice-President Ammoun).

84. For a brief elaboration of these doctrinal formulations, see REBECCA WALLACE, INTERNATIONAL LAW: A STUDENT INTRODUCTION 57-60 (1986).

85.

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter [of the United Nations], a status separate and distinct from the territory of the State administering it; and such separate and Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Declaration on Friendly Relations, *supra* note 47.

86. G.A. Res. 112, U.N. Doc. A/519, at 16-18 (1947).

independence and *unity* of Korea."[87] In 1955, in the famous "package deal" resolution, the General Assembly explicitly reiterated this preference.[88] A policy in favor of reunification of divided states can also draw support from the important General Assembly Declaration on Friendly Relations,[89] which has been held as representing customary international law by the International Court of Justice.[90] The Declaration, even as it proclaimed and elaborated on the principle of equal rights and self-determination of peoples, took care to add: "Every State shall refrain from any action aimed at the partial or total disruption of the *national unity* and *territorial integrity* of any other State or country."[91] It should occasion no surprise that such a policy would exist in an organization made up of states, all of which are naturally interested in national unity and territorial integrity. Under that policy, statehood of each in a pair was deferred until an agreement on the issue was reached between the pair. If the pair agreed that they should each be a state or that they should reunify into one state, their agreement would be respected. If one were to go by the traditional definition, each divided entity in every pair would seem to easily qualify as a state.[92] Cold-war politics, however, made sure that an application from an entity in a divided state, acting unilaterally and without the requisite agreement, would be met with either a failure to receive a sufficient number of affirmative votes or a veto in the Security Council. Thus, a unilateral application was abhorrent to those in effective control. But a unilateral application also contravened community expectations as expressed in the policy of favoring reunification. The record of practice has been succinctly summarized as follows:

> With regard to states divided as a consequence of the East-West conflict, the issue of the admission of one or both states

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87. G.A. Res. 195, U.N. Doc. A/810, at 25-27 (1948) (emphasis added).

88. G.A. Res. 918 (X), U.N. GAOR, 10th Sess., Supp. No. 19 (1955), U.N. Doc. A/3079, 1955 U.N.Y.B. 30, U.N. Sales No. 1956.I.20.

89. Declaration on Friendly Relations, *supra* note 47.

90. In Military and Paramilitary Activities in and Against Nacaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), the International Court of Justice said: "The effect of consent to the text of such resolutions [as the Declaration on Friendly Relations] . . . may be understood as an acceptance [as customary international law] of the validity of the rule or set of rules declared by the resolution by themselves." *Id.* at 100. The Declaration was adopted without a vote, i.e., by consensus.

91. Declaration on Friendly Relations, *supra* note 47 (emphases added).

92. On the opposition of the D.D.R.'s (East Germany's) application by the U.S.A., the U.K. and France in 1966 on the ground of, inter alia, statehood, Professor Reisman remarked: "If Guyana, Barbados and Lesotho were states and the D.D.R. was not a state, the word 'state' plainly had some mystical metaphysical attributes requiring serious scholastic inquiry. The opposing states themselves apparently changed their minds in 1973, withdrawing their objections to the D.D.R.'s admission to the United Nations. The case is instructive. Where state elites wish to bar an applicant for reasons of *realpolitik* they draw on complementary attributes of 'statehood' not otherwise used. Effective power must be considered when attempting to predict admission decisions." Reisman, *supra* note 5, at 59-60.

> to the UN presented itself for one side as a means of reinforcing a claim to independent statehood which was otherwise questioned. For the other side, it meant the loss or, at any rate, limitation on the option of reunification. In Res. 918 (X), December 8, 1955, the GA expressed an explicit preference for the reunification of divided states, which led to the exclusion of the two Koreas and Vietnams from the 'package deal' (applications by the two German States were not pending at the time). In fact, it was only this express preference which made the 'package deal' possible at all.

Divided states were in fact admitted to the UN only after the conflicting claims of the two sides had been formally adjusted, either in favour of division (in the view of one side possibly only on a provisional basis) or in favor of reunification.[93]

IV. CONCLUSION

The two provisions on membership of the Charter used the term "states." Over a period of half a century, that term has been interpreted and given meaning in connection with applications for admission to the United Nations. If it ever had a certain meaning in the belief of any person, it was his "own linguistic education and experience"[94] that gave him that belief. "This belief," however, in the words of Justice Traynor, "is a remnant of a primitive faith in the inherent potency and inherent meaning of words."[95] The decision-makers, with their divergent linguistic and other predispositions and acting in different contexts, have given the term a splendid array of apparently incongruous meanings. These meanings reflect varying combinations of authority and control and hence law.

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93. THE CHARTER OF THE UNITED NATIONS, *supra* note 35, at 166 .

94. 3 CORBIN ON CONTRACTS §579 (1960 ed.& Supp. 1964).

95. Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 643-44 (Cal. 1968).

PUNISHMENT FOR VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: AN ANALYSIS OF SENTENCING AT THE ICTY AND ICTR

Andrew N. Keller*

TABLE OF CONTENTS

I. INTRODUCTION

Imposing a just penalty for violations of international criminal law is fundamental to the purposes of the International Criminal Tribunals for the former Yugoslavia ("ICTY") and Rwanda ("ICTR"). The United Nations Security Council created these Tribunals to prosecute international crimes committed in the two regions. The creation of the Tribunals represents an effort to end impunity for the perpetrators of the crimes and to promote peace

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and reconciliation within the former Yugoslavia[1] and Rwanda.[2] Success in achieving these goals is possible only if the Tribunals impose appropriate sentences for crimes committed within their respective jurisdictions.

Determining an appropriate penalty that contributes to peace and national reconciliation is a difficult task. Perpetrators of heinous crimes and their victims will almost never agree on a just sentence. Likewise, members of the perpetrator's nationality or ethnic group will usually not agree on the appropriateness of a sentence with members of the victim's nationality or ethnic group. In addition, the international and domestic military tribunals set up in the aftermath of World War II left few sentencing guidelines to help the ICTY and ICTR.[3] Finally, the sentencing provisions in the Tribunals' Statutes do not add much guidance.

Even so, in light of their difficult task, the ICTY and ICTR have each developed a fledgling sentencing practice. This Article analyzes the sentencing practices of these Tribunals. Part II details the relevant provisions of their Statutes and Rules of Evidence and Procedure. Part III briefly summarizes the punishment philosophy of the Tribunals and how this philosophy relates to the sentences handed down thus far. Part IV analyzes the following specific areas of the Tribunals' sentencing practices: the use of aggravating and mitigating circumstances in the determination of a sentence and the elimination of a separate sentencing hearing from their procedures. The discussion of these issues reveals several areas in which the Tribunals should make adjustments to their sentencing practices.

II. RELEVANT PROVISIONS OF THE STATUTES AND RULES OF PROCEDURE AND EVIDENCE OF THE ICTY AND ICTR

Articles 23 and 24 of the ICTY Statute govern the pronouncement of sentences and imposition of penalties at the ICTY. Article 23 reinforces the purpose of the creation of the Tribunal by declaring that the "Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law."[4] Article 24 provides the following minimal guidelines to the Trial Chambers regarding the imposition of penalties:

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1. *See* UN Sec. Council Res. 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc. S/RES/827 (1993).

2. *See* UN Sec. Council Res. 955, UN SCOR, 49th Sess., 3453rd mtg., UN Doc. S/RES/955 (1994).

3. *See* William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461, 461 (1997).

4. Statute of the International Criminal Tribunal for the former Yugoslavia Art. 23(1), *in* Report of the Secretary General Pursant to Paragraph 2 of UN Sec. Council Res. 808, UN Doc. S/25704 (1993) [hereinafter ICTY Statute].

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.[5]

Almost identical provisions in the ICTR Statute provide the basis for sentencing by the Rwanda Tribunal.[6]

Under their powers to create rules of evidence and procedure,[7] the Judges of the ICTY and ICTR have added to the sparse provisions for sentencing in the Tribunals' Statutes. Rule 101 of the ICTY Rules of Procedure and Evidence ("Rules") states:

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
  (i) any aggravating circumstances;
  (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
  (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
  (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the

5. *Id.* at Art. 24.

6. *See* Statute of the International Criminal Court for Rwanda, Article 23, *in* UN Sec. Council Res. 955, UN SCOR, 49th Year, Res. And Dec., at 15, UN Doc. S/INF/50 (1994) [hereinafter ICTR Statute].

7. ICTY Statute, Article 15 states: "The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters." *See* ICTY Statute, *supra* note 4, at Art. 15. Article 14 of the ICTR Statute gives the judges of the Rwanda Tribunal identical powers. *See* ICTR Statute, *supra* note 5, at Art. 14.

same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.[8]

Through the implementation of the above principles, the judges of both Tribunals have created a basic sentencing practice for violations of international criminal law.

III. THE SENTENCES AND SENTENCING PHILOSOPHY OF THE ICTY AND ICTR

To date, twenty-six defendants at the ICTY and eight defendants at the ICTR have been convicted of crimes over which the Tribunals have jurisdiction, including genocide, crimes against humanity, grave breaches of the Geneva Conventions, and war crimes.[9] ICTY sentences have ranged from

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8. Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rule 101, March 14, 1994, as amended [hereinafter ICTY Rules]. Rule 101 of the Rwanda Tribunal is almost identical. *See* Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 101, July 5, 1995, as amended [hereinafter ICTR Rules].

9. *See* http://www.un.org/icty (last visited Dec. 7, 2001) Prosecutor v. Tadic, Case No. IT-94-1-T, Sentencing Judgement, July 14, 1997 [hereinafter Tadic Sentencing Judgement]; Prosecutor v. Erdemovic, Case No. IT-96-22-T*bis*, Sentencing Judgement, Mar. 5, 1998, [hereinafter Erdemovic Sentencing Judgement]; Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, Dec. 10, 1998, [hereinafter Furundzija Judgement]; Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, Nov. 16, 1998 [hereinafter Delalic Judgement]; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, June 25, 1999; Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgement, Dec. 14, 1999; Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement, Mar. 3, 2000 [hereinafter Blaskic Judgement]; Prosecutor v. Kupreskic, Judgement, Case No. IT-95-16-T, Jan. 14, 2000 [hereinafter Kupreskic Judgement]; Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, Feb. 22, 2001; Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgement, Feb. 26, 2001; Prosecutor v. Todorovic, Case No. IT-95-9/1-S, Sentencing Judgement, July 31, 2001; Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, Aug. 2, 2001 [hereinafter Krstic Judgement]; Prosecutor v. Sikirica et al., Case No. IT-95-8, Sentencing Judgement, Nov. 13 2001; Prosecutor v.Kvocka et al., Case No. IT-98-30/1, Judgement, Nov. 3,2001; Prosecutor v. Kupreskic et al., Case No.IT-95-16-A, Judgement, Oct. 23, 2001. *See* http://www.ictr.org (last visited Dec. 7, 2001) Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgement and Sentence, Dec. 6, 1999 [hereinafter Rutaganda Judgement and Sentence]; Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Sentence, Oct. 2, 1998 [hereinafter Akayesu Sentence]; Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, Sept. 4, 1998, [hereinafter Kambanda Judgement and Sentence]; Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, Feb. 5, 1999 [hereinafter Serushago Sentence]; Prosecutor v. Kayishema and Ruzindana, Case No. ICTR-95-1-T, Judgement and Sentence, May 21, 1999 [hereinafter Kayishema Judgement and Sentence]; Prosecutor v. Musema, ICTR-96-13-T, Judgement and Sentence, Jan. 27, 2000 [hereinafter Musema Judgement and Sentence]; Prosecutor v. Ruggiu, Case No. ICTR-97-32-I, Judgement and Sentence, June 1, 2000 [hereinafter Ruggiu Judgement and Sentence].

five[10] to forty-six years imprisonment,[11] while ICTR sentences have ranged from twelve years[12] to life imprisonment.[13]

The Trial Chambers of the ICTY and ICTR have given various justifications for the punishment of crimes within their respective jurisdictions. Each of the traditional justifications for punishment – retribution, deterrence, isolation from society, and rehabilitation – has been mentioned as an important objective.[14] Several judgments suggest that of these four justifications, deterrence and retribution are the main purposes of punishment at the Tribunals.[15] However, several of the penalties that have been imposed suggest that the Judges consider rehabilitation to be an equally important goal in the punishment of those convicted of serious violations of international law.[16]

IV. SENTENCING ISSUES AT THE ICTY AND ICTR

A. *The Use of Aggravating and Mitigating Circumstances*

The Statutes and Rules of the ICTY and ICTR do not elaborate on the use of aggravating and mitigating factors for sentencing purposes. They merely require the Trial Chambers to take into account the gravity of the crime, the individual circumstances of the accused, and any relevant aggravating and mitigating factors.[17] The jurisprudence of the Tribunals, however, gives the Trial Chambers full discretion to consider any other aggravating and mitigating circumstances, and to give "due weight" to those factors in the determination of an appropriate punishment.[18] As illustrated by the case discussions below, the Trial Chambers' discretion is perhaps too broad and should be limited by general sentencing guidelines.

i. Kambanda

a. Facts of the Case and Aggravating and Mitigating Circumstances

Jean Kambanda pleaded guilty to genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in

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10. *See* Erdemovic Sentencing Judgement, *supra* note 9, at para. 23; Kvocka Judgement, *supra* note 9, at para. 757.

11. *See* Krstic Judgement, *supra* note 9, at para. 727.

12. *See* Ruggiu Judgement and Sentence, *supra* note 9.

13. *See* Kambanda Judgement and Sentence, *supra* note 9, at Verdict; Akayesu Sentence, *supra* note 9; *See* Musema Judgement and Sentence, *supra* note 9; Kayishema Judgement and Sentence, *supra* note 9, at para. 32; Rutaganda Judgement and Sentence, *supra* note 9.

14. *See generally* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 409-18, 461-63, 814-17 (2000).

15. *See* Kupreskic Judgement, *supra* note 9, at para. 848.

16. *See* Schabas, *supra* note 3, at 503-05.

17. *See* ICTY Statute, *supra* note 4, at Art. 24; ICTY Rules, *supra* note 8, at Rule 101; ICTR Statute, *supra* note 6, at Art. 23; ICTR Rules, *supra* note 4, at Rule 101.

18. *See* Blaskic Judgement, *supra* note 8, at para. 767.

genocide, and crimes against humanity, including murder and extermination.[19] In his role as the Prime Minister of the Interim Government of Rwanda, between April 8, 1994 and July 17, 1994, he was intimately involved with the murder of Tutsi civilians.[20] For example, he exercised control over government ministers and military leaders involved in the genocide, issued directives encouraging the murder of Tutsis, distributed arms and ammunition to groups involved in murdering Tutsis, and gave speeches and made radio broadcasts inciting massacres against the Tutsi population.[21]

In determining an appropriate sentence for Kambanda, the ICTR Trial Chamber considered at length the gravity of his crimes, all of which were aggravating circumstances, and the relevant mitigating factors. Not surprisingly, the Trial Chamber found that Kambanda had committed crimes of the utmost gravity. It explained that the intrinsically heinous nature of genocide and crimes against humanity and the enormous magnitude of his crimes both served as aggravating factors.[22] Furthermore, through his personal participation in the genocide as Prime Minister, Kambanda "abused his authority and the trust of the civilian population."[23] Finally, he "committed the crimes knowingly and with premeditation," and failed to take steps to prevent the genocide or punish perpetrators.[24]

In mitigation, the Trial Chamber found that Kambanda had cooperated with the Prosecutor, was willing to do so in the future, and had pleaded guilty.[25] It held, however, "that the aggravating circumstances surrounding the crimes committed by Jean Kambanda [negated] the mitigating circumstances, especially since [he] occupied a high ministerial post, at the time he committed the said crimes."[26] It sentenced Kambanda to life imprisonment, which is the most severe sentence that an accused can receive under the Statute.[27] The Appeals Chamber later upheld Kambanda's life sentence.[28]

b. The Decision to Impose a Life Sentence

Despite the existence of mitigating factors and certain policy arguments in favor of a more lenient sentence, life imprisonment is an appropriate punishment for Kambanda's crimes. Nonetheless, some critics of the *Kambanda* Judgement argue that a life sentence was unduly harsh, in light of

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19. *See* Kambanda Judgement and Sentence, *supra* note 9, at para. 40.
20. *See id.* at paras. 39-44.
21. *See id.* at para. 39.
22. *See id.* at para. 42.
23. *Id.* at para. 44.
24. *Id.* at para. 61.
25. *See id.* at paras. 46-62.
26. *Id.* at para. 62.
27. *See id.* at Verdict; *See* ICTR Statute, *supra* note 6, at Art. 23.
28. *See* Kambanda v. Prosecutor, Case No. ICTR-97-23-A, Judgement, Oct. 19, 2000, para. 126.

Kambanda's voluntary guilty plea and substantial cooperation with the Prosecutor. First, as the Trial Chamber noted, a guilty plea is considered a mitigating circumstance in most national jurisdictions, including Rwanda, as well as at the ICTR and ICTY.[29] Here, the guilty plea likely saved the Prosecutor and the Trial Chamber substantial amounts of time and money. Instead of having to devote resources to investigating and prosecuting Kambanda, the Prosecutor could use them towards the prosecution of other persons accused of committing similar atrocities in Rwanda. The guilty plea allowed the Trial Chamber to efficiently dispose of Kambanda's case and move on to try other accused.[30]

As mentioned above, besides pleading guilty, Kambanda substantially cooperated with the Prosecutor. He provided "invaluable information" about the atrocities in Rwanda and those responsible and agreed to testify for the Prosecutor in the trials of others.[31] This cooperation, which is also considered a mitigating factor in most national jurisdictions, is incredibly useful to the Prosecutor. In addition to saving investigation resources, it gives the Prosecutor an unparalleled view into the workings of the Rwandan government and the planning and execution of the atrocities. Such evidence can be used effectively in prosecuting other accused.

Critics of the *Kambanda* Judgement argue that imposing a life sentence upon an accused who has pleaded guilty and cooperated with the Prosecutor demonstrates a lack of concern for the policy constraints that affect the ICTR and ICTY.[32] Judicial economy and budgetary constraints, while significant concerns to any court, are particularly important to the operations of the Tribunals. After all, ICTR Trial Chambers have sentenced only eight defendants during the seven years of the Tribunal's existence,[33] while over twenty others await the beginning of their trials.[34]

Because judicial economy benefits greatly from guilty pleas, both Tribunals should encourage those rightfully charged to plead guilty. Many people argue, however, that by imposing the harshest possible penalty upon Kambanda, the ICTR Trial Chamber failed to encourage this behavior. After *Kambanda*, critics contend, "lawyers practicing before the ICTR have less motivation to encourage defendants to plead guilty if there is the possibility that the sentence will be the same as that received following a trial."[35]

Furthermore, because both Tribunals must rely on the co-operation of

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29. *See* Kambanda Judgement and Sentence, *supra* note 9, at paras. 53, 61; ICTR Statute, *supra* note 6, at Art. 23; ICTY Statute, *supra* note 4, at Art. 24.

30. *See* Schabas, *supra* note 3, at 496.

31. *See* Kambanda Judgement and Sentence, *supra* note 9, at para. 47.

32. *See* Mary Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 383-86 (2000).

33. *See* ICTR List of Detainees, http://www.ictr.org, (last visited Dec. 7, 2001).

34. *See id.*

35. *See* Penrose, *supra* note 32, at 384.

other authorities to arrest and detain indictees,[36] the Tribunals should do everything in their power to encourage indictees (and those who have committed atrocities but have not yet been indicted) to come forward, confess their crimes, and co-operate with the Prosecutor. The Trial Chamber, many argue, also diminished this goal by imposing the harshest possible sentence on Kambanda.

Nevertheless, despite the policy considerations that point to a more lenient sentence, the Trial Chamber's sentence of life imprisonment for Kambanda was appropriate. One need only look to the sentence that Kambanda would have received had he been tried in Rwanda, the gravity of his crimes, his position of power, and the sentencing goals of both Tribunals to justify the life sentence imposed.

Although ICTR Trial Chambers are not bound by the sentencing practice of Rwanda, the Statute and Rules of the ICTR do require that they take into account the country's sentencing practice. In doing so, the Trial Chamber in *Kambanda* noted that had Kambanda been tried and found guilty in Rwanda, he would have been included in the most serious category of offenders and would have received the death penalty.[37] If the Trial Chamber had given Kambanda anything other than a life sentence, it would have demonstrated a lack of comprehension of the magnitude and seriousness of his crimes. Such a decision could have strained the relationship between the ICTR and the Rwandan government and caused the Tribunal to lose legitimacy in the eyes of the Rwandan people.

Assuming the Trial Chamber had not given Kambanda a life sentence, it would be difficult to imagine the kind of perpetrator deserving of such a sentence. After all, Kambanda held the highest position in a government that systematically planned, instigated, and carried out the murder of hundreds of thousands of people. Kambanda not only knew of the atrocities and failed to take any action to punish the perpetrators, but he voluntarily participated in the

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36. *See generally* Paolo Gaeta, *Is NATO Authorized or Obliged to Arrest Persons Indicted by the ICTY?*, 9 EMORY J. INT'L L. 174, 174-81(1998); *see* Susan Lamb, *The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, 70 BRIT. Y.B. INT'L L. 165, 165-244 (1999).

37. *See* Kambanda Judgement and Sentence, *supra* note 9, at para. 18. The Trial Chamber based this discussion on Organic Law No. 8/96, the Rwandan Organic Law on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity, committed since Oct. 1, 1990. *See id.* The most serious offenders fall into Category 1 (of 4) and, if found guilty, are punished by death. *See id.* Persons in Category 1 include the following: "a) persons whose criminal acts or those whose acts place them among planners, organizers, supervisors and leaders of the crime of genocide or of a crime against humanity; b) Persons who acted in positions of authority at the national, prefectural, communal, sector or cell, or in a political party, the army, religious organizations, or militia and who perpetrated or fostered such crimes; c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) Persons who committed acts of sexual violence." *Id.*

effort to exterminate all Tutsis. The crimes alone are of the utmost gravity, but are rendered even more shocking by Kambanda's leadership position.

Furthermore, Kambanda's sentence coincides with the twin goals of deterrence and retribution that have served as the prime justifications for the Tribunals' sentencing judgments. By sentencing Kambanda to life imprisonment, the ICTR Trial Chamber both warns future Rwandan leaders that they will be held accountable for their behavior and expresses the shock and outrage of the international community. Any sentence less than life imprisonment would not have sufficiently served these goals.

ii. Serushago

On December 14, 1998, Omar Serushago pleaded guilty to genocide and crimes against humanity, including murder, extermination, and torture.[38] He was a leader of the *interhamwe*[39] in Gisenyi and commanded a group of militiamen during the atrocities in Rwanda. He personally killed four Tutsis and ordered militiamen under his command to execute thirty-three other Tutsi and moderate Hutu.[40] The ICTR Trial Chamber considered the following aggravating factors in determining Serushago's sentence: that he committed extremely serious offenses and ordered his subordinates to do so as well, that he played a leading role and participated in the planning of the fate of the Tutsis, and that he committed crimes voluntarily, knowingly, and with premeditation.[41]

The Trial Chamber additionally found substantial mitigating circumstances. For example, Serushago cooperated with the Prosecutor, resulting in the arrest and detention of several high-ranking officials suspected of committing crimes during the genocide, and he agreed to testify as a prosecution witness in other trials before the ICTR.[42] Furthermore, he voluntarily surrendered, even though he had not been indicted by the ICTR and was not on the list of persons wanted by the Rwandan government, and he pleaded guilty.[43] Other mitigating factors included Serushago's highly politicized upbringing, his lack of formal military training, the assistance he gave to certain potential Tutsi victims, his individual circumstances, including his six children and his age of thirty-seven years, and his public expression of remorse and contrition.[44] The Trial Chamber believed that these mitigating circumstances demonstrated a possibility of rehabilitation for Serushago and

38. *See* Serushago Sentence, *supra* note 9, at para 4.

39. The interhamwe was a Hutu youth militia that participated in the genocide in Rwanda. See PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 93 (Picador USA 1998).

40. *See* Serushago Sentence, *supra* note 9, at paras. 25-29.

41. *See id.* at paras. 27-30.

42. *See id.* at paras. 31-33.

43. *See id.* at paras. 34-35.

44. *See id.* at paras. 36-42.

sentenced him to a single term of fifteen years imprisonment.[45] The Appeals Chamber subsequently upheld this sentence.[46]

iii. Erdemovic

Drazen Erdemovic pleaded guilty to murder as a crime against humanity on May 31, 1996 and was sentenced to ten years imprisonment.[47] However, in his appeal against the Sentencing Judgement, the Appeals Chamber held that his guilty plea was not informed, and directed that he be allowed to replead.[48] In the new hearings in front of the Trial Chamber, Erdemovic pleaded guilty to a violation of the laws and customs of war and was sentenced to five years imprisonment.[49]

As a member of the 10th Sabotage Detachment of the Bosnian Serb Army, Erdemovic participated in one of the many massacres of Muslim men that occurred during the fall of Srebrenica.[50] Busloads of Muslim civilian men, who had surrendered to the Bosnian Serbs, were transported to a collective farm where Erdemovic and the other members of his unit awaited them.[51] As the Muslim men arrived, Erdemovic and other soldiers lined them up and executed them by shooting them in the back with automatic rifles.[52] The killings lasted through July 16, 1995 and resulted in the deaths of over one thousand Bosnian Muslim men.[53] Erdemovic personally killed between seventy and one hundred of these men.[54]

In arriving at a sentence of five years, the ICTY Trial Chamber found few aggravating circumstances and myriad mitigating factors. In aggravation, it considered "the magnitude of the crime and the scale of [Erdemovic's] role in it," as well as the fact that Erdemovic continued to kill throughout most of the day of the massacre.[55]

In mitigation, it cited positive factors relating to Erdemovic's personal circumstances, his character, his admission of guilt, his remorse, his cooperation with the Prosecutor, and the duress under which he committed the

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45. *See id.* at paras. 39, Verdict.

46. *See* Serushago v. Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgement, Apr. 6, 2000, para. 34.

47. *See* Erdemovic Sentencing Judgement, supra note 9, at paras. 5-6.

48. *See id.* at para. 7. The Appeals Chamber found that Erdemovic's guilty plea was not informed because he pleaded guilty to murder as a crime against humanity instead of murder as a war crime, without knowing that the Trial Chamber would consider murder as a crime against humanity a more serious crime. *See id.*

49. *See id.* at paras. 8, 23.

50. *See id.* at para. 13.

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.* at paras. 13-15.

55. *Id.* at para. 15.

crime. The Trial Chamber believed Erdemovic to be ripe for reform.[56] It found his youthful age (of twenty-three years) at the time of the commission of the crime, his lack of command authority in the crime, and his pacifist and anti-nationalist beliefs all demonstrated a likelihood for successful rehabilitation.[57] It further held that Erdemovic's genuine remorse for his crimes and his admission of guilt were considerable mitigating factors.[58] The Trial Chamber rationalized that the admission of guilt encourages others to come forward and confess to the Tribunal, which saves it valuable time and resources.[59]

The Trial Chamber also found that Erdemovic's substantial cooperation with the Prosecutor justified considerable mitigation. Erdemovic gave the Prosecutor valuable information regarding the killings at Srebrenica and the Bosnian Serb Army. Moreover, he testified in a Rule 61[60] hearing against Karadzic and Mladic and expressed willingness to testify in the future.[61] Finally, the Trial Chamber acknowledged that Erdemovic participated in the massacre under duress. He initially protested against shooting the prisoners, but his superiors threatened to kill him if he did not participate. Thus, although duress could not be a complete defense to Erdemovic's crime, the Trial Chamber considered it a mitigating circumstance.[62]

a. Sentences of Five and Fifteen Years

The Trial Chambers in the *Erdemovic and Serushago* Sentencing Judgements placed excessive emphasis on relevant mitigating factors and, as a result, imposed exceedingly lenient terms of imprisonment. Prison sentences of five and fifteen years, respectively, do not reflect the gravity of the crimes committed and do not further the goals of deterrence and retribution.

Such light prison sentences for genocide, crimes against humanity, and war crimes are inconsistent with the sentencing practices of several national jurisdictions, including Rwanda, the former Yugoslavia, and the United States, as well as the sentencing practice of the ICTR. While the Tribunals are not bound by the sentencing practice of any national jurisdiction, punishments that are completely out of line with domestic sentencing practice are suspect.

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56. *Id.* at para. 16.

57. *See id.*

58. *See id.* Erdemovic came forward voluntarily and confessed to the Tribunal before his involvement in the massacre was known to any investigating authorities. *See id.*

59. *See id.*

60. Rule 61 sets out a detailed procedure in case of failure to execute a warrant for arrest for a person indicted pursuant to the jurisdiction of the ICTY. *See* ICTY Rules, *supra* note 8, at Rule 61.

61. *See* Erdemovic Sentencing Judgement, supra note 9, at para. 16. Erdemovic was also a prosecution witness in *Prosecutor v. Krstic*, Case No. IT-98-33-T. *See id.*

62. *See id.* at para. 17.

For example, Chapter 16 of the former Socialist Federal Republic of Yugoslavia ("SFRY") Criminal Code, entitled "Criminal Offenses Against Humanity and International Law," penalized genocide, crimes against humanity, and war crimes. Articles 141-144 covered crimes analogous to those brought against Erdemovic and direct punishment "by no less than five years in prison or by the death penalty."[63] Although Erdemovic did not deserve the maximum sentence because of significant mitigating circumstances, sentencing him to the minimum term of imprisonment possible in the former Yugoslavia is inexplicable, considering the magnitude of his crimes.

Serushago's sentence appears to be similarly inadequate in comparison to the sentence he would have received had he been tried in Rwanda. Under Rwandan law, Serushago would have been most likely tried as a Category I offender and would have received the death penalty if convicted.[64] In the unlikely event that he would have been tried as a Category II offender, he would have received a sentence of life imprisonment upon conviction.[65] Serushago's punishment, therefore, suggests that the ICTR Trial Chamber completely ignored Rwandan sentencing practice.[66]

Likewise, Erdemovic and Serushago would have likely received significantly higher sentences had they committed their crimes in the United States. Under federal law, a conviction for genocide or war crimes resulting in death carries with it a serious fine and/or life imprisonment.[67] A court may also impose the death penalty upon conviction for either of those crimes.[68]

Furthermore, Serushago's punishment is inconsistent with ICTR sentencing judgments issued both before and after Serushago's sentence. In addition to Serushago, the ICTR has convicted six persons accused of genocide. Five of them received sentences of life imprisonment while the other received a sentence of twenty-five years imprisonment.[69]

Even after considering the substantial mitigating factors, it remains difficult to justify Serushago's sentence of fifteen years in light of the sentences that others have received for committing genocide and crimes against humanity. For example, similar to Serushago, Musema was not a de

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63. SFRY Penal Code, Arts. 141-144; *See* Furundzija Judgement, *supra* note 9, at para. 285 (citing Art. 142 and Tadic Sentencing Judgement, *supra* note 9, at para. 8).

64. *See supra* note 37.

65. *See* Kambanda Judgement and Sentence, *supra* note 9, at paras. 18-19.

66. The Trial Chamber was obviously aware of Rwandan sentencing practices; however, this is not reflected in the final sentence. *See* Serushago Sentence, *supra* note 9, at paras. 17, Verdict.

67. *See* 18 U.S.C.A . § 2441 (2001).

68. *See Id.*

69. Kambanda, Akayesu, Kayishema, Rutaganda, and Musema were sentenced to life imprisonment. *See* Kambanda Judgement and Sentence, *supra* note 9, at Verdict; Akayesu Sentence, *supra* note 9; Kayishema Judgement and Sentence, *supra* note 9, at para. 32; Rutaganda Judgement and Sentence, *supra* note 9; Musema Judgement and Sentence, *supra* note 9. Ruzindana was sentenced to twenty-five years imprisonment. Kayishema Judgement and Sentence, *supra* note 9.

jure official.[70] Both men acted with the intent to destroy the Tutsi in Rwanda, but Musema was sentenced to life imprisonment[71] while Serushago received a sentence of only fifteen years. Pleading guilty, cooperating with the Prosecutor, and demonstrating remorse are all significant mitigating factors; however, they do not justify the difference between life and fifteen years imprisonment in these cases.

Both Serushago and Erdemovic committed heinous crimes. They were each responsible for the deaths of defenseless civilians. Erdemovic personally killed between seventy and one hundred people and participated for hours in a massacre that resulted in the deaths of possibly 1,200 people, while Serushago killed and commanded others to kill with the intent to destroy the Tutsi. The Trial Chamber consequently held that in committing genocide, Serushago committed the "crime of crimes" and should be sentenced accordingly. [72] Thus, the sentences of five and fifteen years that Erdemovic and Serushago received, respectively, appear grossly disproportionate to the gravity of their confessed crimes.[73]

Additionally, the two sentences are completely inconsistent with the goals of retribution and deterrence. Even though these defendants confessed their guilt and expressed remorse, they should be punished accordingly for committing such horrendous crimes. The damage resulting from the crimes is not limited to the victims who lost their lives. It also includes the effect of the crimes upon the victims' families and their communities. Although both Tribunals may recognize that an accused must receive due punishment[74] and that they "must not lose sight of the tragedy of the victims and the sufferings of their families,"[75] the sentences imposed upon Erdemovic and Serushago do not adequately reflect the retributive aspect of punishment.

If the Trial Chambers correctly surmised that both defendants were remorseful for their actions, then a lengthy prison sentence seems unnecessary for the purpose of specific deterrence. Arguably, these defendants understand and regret the serious and heinous nature of their crimes and would refrain from committing similar acts in the future.

However, as discussed above, general deterrence is possibly a more significant goal of sentencing for international criminal crimes than specific deterrence. The sentences imposed as punishment for international crimes must be sufficiently severe to deter potential perpetrators from committing

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70. Musema was the Director of the Gisovu Tea Factory. *See* Musema Judgement and Sentence, *supra* note 9, at para. 12.

71. *See* Musema Judgement and Sentence, *supra* note 9, at Sentencing. The Appeals Chamber recently affirmed Musema's sentence of life imprisonment. *See* Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement, Nov. 16, 2001.

72. Serushago Sentence, *supra* note 9, at para. 15.

73. *See* Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L.J. 123, 134-37 (1997).

74. *See* Serushago Sentence, *supra* note 9, at para. 20.

75. Erdemovic Sentencing Judgement, *supra* note 9, at para. 21.

such acts. Unfortunately, neither Erdemovic's nor Serushago's prison sentences "communicate the appropriate disgust or intolerance necessary to dissuade" potential perpetrators in the Balkans or Rwanda from massacring other innocent civilians.[76] In her criticism of the Erdemovic sentence, Mary Penrose comments: "The level of hate still festering in the Former Yugoslavia may encourage men and women to sacrifice five years of their respective lives to 'settle a score.'"[77] Sentences at the ICTY and ICTR should demonstrate that "no one is permitted to engage in ethnic cleansing, rape, genocide, torture, murder, or any other crime against humanity."[78] Unfortunately, Erdemovic's and Serushago's sentences do not adequately fulfill this goal. General sentencing guidelines, which place certain limits on a Trial Chamber's discretion with regard to aggravating and mitigating circumstances, can help Trial Chambers make more appropriate sentencing determinations in the future.

B. The Lack of a Separate Sentencing Hearing

i. The Change in Procedure

Both the ICTY and ICTR formerly held separate sentencing hearings and issued separate sentencing decisions in their initial cases. The Rules of Procedure and Evidence of both Tribunals implied this distinction, although neither their Rules nor their Statutes specifically mandated a sentencing hearing distinct from the trial.[79] Under Rule 100 (Pre-Sentencing Procedure), the Prosecutor and Defense could submit information that would be relevant to the Trial Chamber in determining an appropriate sentence after a defendant had pleaded guilty or the Trial Chamber had rendered a guilty verdict.[80] The original version of Rule 85, which governed the presentation of evidence at trial, did not include evidence pertaining to sentencing in the types of evidence that were appropriate to present at trial.[81]

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76. Penrose, *supra* note 32, at 382.

77. *Id.* at 382-83.

78. *Id.* at 383.

79. *See* William A. Schabas, *Article 76: Sentencing*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 980, 981 (Otto Triffterer ed., 1999).

80. The Nov. 12, 1997 version of Rule 100, entitled "Pre-sentencing Procedure," stated: "If the accused pleads guilty or if a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence." Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.12 (1997).

81. The Nov. 12, 1997 version of Rule 85, entitled "Presentation of Evidence," stated: (A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the prosecution; (ii) evidence for the defence; (iii) prosecution evidence in rebuttal; (iv) defence evidence in rejoinder; (v) evidence ordered by the Trial Chamber pursuant to Rule 98. (B) Examination-in-chief, cross-examination and re-

In practice, the Trial Chambers refused to hear evidence relevant only to sentencing before rendering a verdict. [82] For example, in the *Tadic* case, the ICTY Trial Chamber held as follows:

> [N]o information that relates exclusively to sentencing should be presented by a witness during the trial as to the guilt or innocence of the accused. So, if a witness is testifying about guilt or innocence of the accused, that witness should not be able at the same time to offer evidence exclusively as to sentencing.[83]

Pursuant to this policy, the Trial Chambers in both *Tadic* and *Akayesu* held sentencing hearings after they had already determined the guilt of the accused.[84]

The separation of the guilt or innocence phase of the proceedings from the sentencing hearing is characteristic of several common law jurisdictions. Criminal trials held in Canada and England, as well as those held in the federal courts of the United States include a sentencing hearing that is distinct from the part of the trial in which the judge or jury determines the guilt or innocence of the defendant.[85]

The Tribunals' practice of holding a separate sentencing hearing after an accused had been found guilty ended in July 1998. The Judges abandoned the common law approach and modified the Rules to conform with the civil law approach to sentencing. The Judges eliminated any suggestion of a separate sentencing phase from the Rules and added language requiring that the guilt or innocence and sentencing phases occur as part of the same proceeding.[86] Rule 85 currently allows the Prosecutor and Defense to present "any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the

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examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness. (C) If the accused so desires, the accused may appear as a witness in his or her own defence. Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.12 (1997).

82. *See* Schabas, *supra* note 79, at 981.

83. Tadic Sentencing Judgement, *supra* note 9, Transcript of Trial, May 3, 1996 (*cited in* Schabas, *supra* note 79, at 981).

84. *See* Tadic Sentencing Judgement, *supra* note 9; Akayesu Sentence, *supra* note 9.

85. Section 720 of the Canadian Criminal Code states: "A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed." Martin's Annual Criminal Code (2000); *See also* Archbold, Chapter 5, Section I "Procedure Between Verdict or Plea and Sentence" (2000) for sentencing procedures in England; *See also* FED. R. CRIM. P. 32 for sentencing procedures in the United States.

86. *See* Schabas, *supra* note 79, at 981; *See* Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 92 (1999).

indictment."[87] Rule 86 states that the parties shall "address matters of sentencing in closing arguments."[88] Finally, Rule 87 requires the Trial Chamber to determine the penalty to be imposed if it finds the accused guilty of the charge or charges against him or her.[89]

The motivation behind this change in procedure is not entirely clear because the Judges do not publish the reasoning behind their decisions to change the Rules of Evidence and Procedure. However, this change was probably an effort to save time and money by having only one proceeding instead of two. For example, following the change in the Rules, a witness who was a victim of atrocities in the Balkans could testify about the guilt of the accused and about the effect of the injury during the same proceeding. This avoids the need to have a break between the guilt or innocence phase and the sentencing hearing and allows the Prosecutor and Defense time to prepare their sentencing submissions. It also eliminates the administrative hassle of scheduling and holding a second proceeding, thereby freeing the Trial Chamber to move on to other cases.

Furthermore, the change can be cost-effective with regard to particular witnesses. If the victim considered in the above example still lived in the Balkans, he or she would have to come to The Hague twice – once to testify regarding the guilt of the accused and a second time to testify about the impact of the injury on the victim. Two trips are both more costly to the Tribunal and more disruptive to the victim's life. The Judges eliminated this problem by amending the Rules.

Nevertheless, the Judges may have compromised the fairness of the trials through their efforts to save time and money. Their decision to eliminate a distinct sentencing hearing from the Tribunals' proceedings could put an accused at a serious disadvantage by limiting possible strategies for his defense.[90] Furthermore, this change could jeopardize an accused's right to be tried by neutral and objective Judges. Thus, the risks involved in conducting only one proceeding heavily outweigh any savings of time and money.

The elimination of a separate sentencing hearing may limit the tactical decisions that an accused can make at trial. "As a general matter, an indictee who has pleaded not guilty may not wish to present evidence relevant to sentencing prior to a conviction, so as not to prejudice the outcome on the merits . . ."[91] After all, there is a certain lack of logic in having an accused present evidence on an appropriate sentence for crimes to which he pleaded not guilty and has not yet been convicted.

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87. *See* ICTY Rules, *supra* note 8, at Rule 85.
88. *See id.* at Rule 86.
89. *See id.* at Rule 87.
90. *See* Schabas, *supra* note 79, at 981.
91. Murphy, *supra* note 86, at 92.

Furthermore, this change diminishes a defendant's right to silence at trial.[92] Article 21 of the ICTY Statute and Rule 85 of the ICTY Rules give an accused the right to testify in his own defense, but protects him from being "compelled to testify against himself or to confess guilt."[93] A defendant "may be in a position to submit relevant evidence in mitigation of sentence, for example concerning the individual's specific role in the crimes vis-à-vis accomplices, or efforts by the offender to reduce the suffering of the victim."[94] Unfortunately, the "only way to introduce such evidence may be for the accused to renounce the right to silence and the protection against self-incrimination."[95]

Finally, the rule change may negatively impact the fairness and legitimacy of trials at the Tribunals beyond the tactical disadvantages to the accused discussed above. It may undermine the right of a defendant to be presumed innocent until proved guilty,[96] as well as his right to a fair trial.[97] Without a separate sentencing hearing, evidence that is often relevant only to sentencing, such as victim-impact testimony, must be heard at trial. This evidence is often poignant and extremely disturbing. It has minimal probative value concerning the primary issue of guilt or innocence, and the danger of unfair prejudice to an accused is substantial. Therefore, the presentation of sentencing evidence during the guilt and innocence phase may endanger the integrity of the judicial process at the Tribunals.

ii. The Krstic Trial

The trial of General Radislav Krstic demonstrates the negative impact that the presentation of sentencing evidence during the trial can have on the perception and possibly the reality of the fairness of the proceedings. General Krstic was the Chief of Staff and Commander of the Drina Corps of the Bosnian Serb Army,[98] which was responsible for "crimes committed following the take-over of Srebrenica."[99] He was tried for genocide, crimes against humanity, and war crimes for his role in the events that occurred in Srebrenica in July 1995.[100] The Prosecutor contended that Krstic was responsible for the murder of over seven thousand Muslim men and the deportation of Muslim women and children from the Srebrenica enclave to Bosnian government held

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92. *See* Schabas, *supra* note 79, at 981.

93. *See* ICTY Statute, *supra* note 4, at Art. 21(g); ICTY Rules, *supra* note 8, at Rule 85.

94. Schabas, *supra* note 79, at 981.

95. *Id.*

96. *See* ICTY Statute, *supra* note 4, at Art. 21(3) (stating that the "accused shall be presumed innocent until proved guilty according to the provisions of the Statute.").

97. *See id.* at Art. 21(2) (stating that the "accused shall be entitle to a fair and public hearing....").

98. *See* Krstic Judgement, *supra* note 9, at para. 3.

99. *Id.*

100. *See Id.*

territory, specifically Tuzla.[101] General Krstic pleaded not guilty to the charges against him and argued that a parallel chain of command, under the control of General Mladic, planned and carried out the atrocities that occurred during and after the fall of the enclave.[102] ICTY Trial Chamber I, consisting of Presiding Judge Almiro Rodrigues, Judge Fouad Riad, and Judge Patricia Wald, heard the case and found General Krstic guilty of genocide, crimes against humanity, and war crimes.[103]

The Prosecutor ended its case against Krstic by calling three victim impact witnesses to testify. One of these witnesses, witness DD,[104] was a Bosnian Muslim woman who had been deported from Srebrenica to Tuzla by the Bosnian Serbs.[105] The other two witnesses were a psychologist and therapist, who worked with the women and children in Tuzla that comprised the remnants of the Bosnian Muslim community of Srebrenica.[106]

These witnesses gave intensely moving and emotional testimony about the disastrous effect that the massacres have had on the surviving Muslims of Srebrenica. Witness DD gave the following testimony regarding her youngest son who was taken away by a Bosnian Serb soldier and is presumed dead:

> As a mother, I still have hope. I just can't believe that this is true. How is it possible that a human being could do something like this, could destroy everything, could kill so many people? Just imagine this youngest boy I had, those little hands of his, how could they be dead? I imagine those hands picking strawberries, reading books, going to school, going on excursions. Every morning I wake up, I cover my eyes not to look at other children going to school, and husbands going to work, holding hands.[107]

She then concluded her testimony by imploring the Judges to ask General Krstic to give her information on her missing child, asking if he is still alive and if he will return.[108] Next, Witnesses Zecevic and Ibrahimefendic described at length the patriarchal nature of the Muslim community that

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101. *See* Amended Indictment, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001 [hereinafter Krstic Amended Indictment].

102. *See* Trial Transcript, Oct. 16, 2000, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001; *See also* Krstic Judgement, *supra* note 9, at para. 308.

103. *See* Krstic Judgement, *supra* note 9, at paras. 687-89, 727.

104. "DD" is a pseudonym given to the witness as a protective measure to keep the witness' identity from becoming public. *See* Trial Transcript, July 26, 2000, at 5742, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001 [hereinafter Krstic Trial Transcript I].

105. *See* Krstic Trial Transcript I, *supra* note 101, at 5744.

106. *See id* at 5769-803; *See also* Trial Transcript, July 27, 2000, at 5804-60, Prosecutor v. Krstic, Case No. IT-98-33-T, Aug. 2, 2001 [hereinafter Krstic Trial Transcript II].

107. Krstic Trial Transcript I, *supra* note 101, at 5761.

108. *See id.* at 5769.

existed in Srebrenica. They explained that because of this phenomenon, the surviving women have had major difficulties adjusting to life without their husbands, sons, fathers, and brothers. They also testified as to the impoverished conditions in which the Srebrenica Muslims live and the difficulties that they have had in adjusting from their rural life in Srebrenica to city life in Tuzla.[109]

The Judges' reaction to this testimony shows that they are not immune from such powerful images. In response to Witness DD's testimony, Judge Riad told her that "we understand and feel for your pain, but there is a life ahead of you, and the whole world is on your side."[110] Judge Riad's consolation of this witness is commendable; however, stating that the "whole world" is on the side of a prosecution witness is, at the same time, troubling because the Judges have a duty to remain neutral and objective throughout the trial.

Furthermore, when Witness DD finished testifying, Judge Wald thanked her and said that her testimony "will help us in making our decision."[111] The potential implications of Judge Wald's comment are disturbing when one considers that Witness DD's testimony was relevant only to sentencing. One interpretation is that Judge Wald meant that the testimony would help the Trial Chamber determine guilt or innocence. If so, evidence relevant only to sentencing colored the Judges' analysis of the evidence pertaining to guilt or innocence. A second interpretation is that Judge Wald believed that the testimony would help the Judges decide on an appropriate sentence for General Krstic. When one considers that only those defendants that have been found guilty are sentenced, this interpretation suggests that Judge Wald had already found Krstic guilty. This result is particularly troubling because the General had not yet begun his defense. Most likely, neither of the above interpretations is correct, and Judge Wald made the comment merely out of politeness to the witness. Regardless, her statement demonstrates the danger that the elimination of a separate sentencing hearing poses to the perception of justice at the ICTY.

Many observers argue that the current system does not adversely affect the quality of justice at the ICTY. They claim that the Tribunal, like courts in civil law countries, is staffed by "professional judges." After years of training and experience, these judges supposedly can isolate the effect of the victim impact testimony and insure that it only affects their sentencing determination and not the determination of guilt or innocence.

These arguments are unpersuasive for several reasons. First, trial judges in civil law systems normally do not handle cases involving crimes of the same magnitude, complexity, and shocking nature as those attributed to General

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109. *See id.* at 5769-803; *See also* Krstic Trial Transcript II, *supra* note 103, at 5804-60.
110. Krstic Trial Transcript I, *supra* note 101, at 5763.
111. *Id.* at 5768.

Krstic. A civil law judge, judging a defendant accused of committing a single murder, will preside over a shorter trial with less witnesses and exhibits. In theory, therefore, it is easier for such a judge to guard against evidence relevant only to sentencing from improperly affecting his or her determination of guilt or innocence.

In contrast, *Prosecutor v. Krstic* was massive, both in terms of the crimes charged in the indictment and the trial itself. As discussed above, the Prosecutor charged Krstic with individual and command responsibility for the deportation of between 17,000 and 35,000 Bosnian Muslim women and children and the murder of approximately 7,500 Bosnian Muslim males.[112] The trial lasted ninety-eight days, and the Trial Chamber heard testimony from over 110 witnesses and examined approximately 1,000 exhibits.[113] Accordingly, the potential for victim-impact testimony to impede an objective analysis of the evidence relevant to guilt or innocence is significantly greater in *Prosecutor v. Krstic* than in a typical criminal case in a civil law system.

Furthermore, the background of judges in civil law jurisdictions is different from the background of the judges at the Tribunals. A lawyer in a civil law jurisdiction usually must undergo extensive judicial training and testing before he or she becomes a judge. After becoming a judge, he or she will routinely make decisions concerning both law and fact because most civil law jurisdictions do not rely on juries to make decisions of fact.

In contrast, the judges at the Tribunals often are not "professional judges" in the civil law sense. Although some of them were judges in their respective national jurisdictions prior to arriving at the Tribunals, many of them had no prior experience on the bench. Of those that had prior judicial experience, it was often in common law countries, where juries, not judges, make factual determinations.

Examining the background of the Judges in the *Krstic* trial highlights these differences. Judge Almiro Rodrigues, the Presiding Judge, took a one year training course before becoming a judge in Portugal in 1982.[114] This course reflects his only judicial experience prior to working at the ICTY.[115] Afterwards, he worked as a prosecutor in Portugal and taught law at the university level.[116] Similarly, Judge Fouad Riad had not had any experience as a judge before arriving at the Tribunal. His legal career was almost exclusively in academia.[117] On the other hand, Judge Patricia Wald had extensive judicial experience before arriving at the Tribunal. She served as a justice on the U.S. Court of Appeals for the D.C. Circuit for twenty years prior

112. *See* Krstic Amended Indictment, *supra* note 98.
113. *See* Krstic Judgement, *supra* note 9, at para. 4.
114. *See* ICTY Yearbook (1998), at 38.
115. *See id.*
116. *See id.*
117. *See id.* at 37.

to assuming her position at the ICTY.[118] Her experience, however, was completely different from that of a civil (or common law) judge at the trial level. As an appellate judge, her work did not consist of listening to highly emotional witness testimony, and she dealt primarily with questions of law, not fact. Therefore, even though Judge Wald has many years of experience on the bench, she does not have the relevant trial experience that would make her comparable to a trial judge in a civil law system. The Judges' backgrounds consequently reveal that they have not had extensive experience with lengthy and emotional trials such as *Prosecutor v. Krstic*.

The separate sentencing phase enhanced the perception of justice even if, as some people argue, it did not enhance the reality of justice. Present-day observers and tomorrow's historians will perceive the ICTY and ICTR as legitimate institutions only if the proceedings are eminently fair. Unfortunately, the elimination of a separate sentencing hearing jeopardizes the perception of fairness at the Tribunals in return for mere marginal increases in operating efficiency.

iii. The Rome Statute of the ICC

The Judges of the ICTY and ICTR should look to the Rome Statute of the International Criminal Court (ICC)[119] for guidance on the issue of a separate sentencing phase. Article 76 of the Rome Statute states, "the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence."[120] Commentators on the ICC explain that this provision "creates a strong presumption in favour of a distinct sentencing hearing following conviction."[121] Therefore, in a lengthy, complex, and highly emotional case, such as *Prosecutor v. Krstic*, the parties or the Trial Chamber may demand a separate sentencing proceeding. In contrast, a Trial Chamber may consider all relevant evidence in one proceeding when both parties and the Trial Chamber agree that the accused will not be unfairly prejudiced. If adopted by the ICTY and ICTR, a similar provision would enhance the legitimacy of the Tribunals' proceedings and, when appropriate, save time and money.

V. CONCLUSION

The ICTY and ICTR should reassess certain aspects of their sentencing practices, as revealed by the above discussion. With regard to the use of

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118. Patricia M. Wald, *Judging War Crimes*, 1 Chi. J. Int'l L. 189, n.a1 (2000).

119. Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9 [hereinafter ICC Statute].

120. *Id.* at Article 76.

121. Schabas, *supra* note 79, at 980.

aggravating and mitigating circumstances, the Trial Chambers must refrain from deviating substantially from the principles of deterrence and retribution merely because of the existence of mitigating factors. In light of the complexity of many of the Tribunals' cases, the Judges should stress legitimacy over marginal cost-effectiveness and adopt a provision similar to that of Article 76 of the Rome Statute of the ICC. Such a provision, which would enable either party or the Trial Chamber to call for a separate sentencing hearing, would help ensure the neutrality and objectivity of the Judges.

The ICTY and ICTR are "developing an unprecedented jurisprudence of international humanitarian law."[122] Although the evolution of substantive international criminal law receives the most attention, the Tribunals must also concentrate on sentencing law and procedure. The development of appropriate sentencing law and procedure will help ensure that punishments imposed by the Tribunals are fair and legitimate, and it will serve as a valuable precedent for the ICC and other courts tasked with judging those accused of similar atrocities. Perhaps most importantly, it will advance the Tribunals' roles as vehicles for peace and reconciliation in the former Yugoslavia and Rwanda.

122. Murphy, *supra* note 86, at 95.

DEMOCRACY AND THE MIS-RULE OF LAW: THE ISRAELI LEGAL SYSTEM'S FAILURE TO PREVENT TORTURE IN THE OCCUPIED TERRITORIES

Barak Cohen*

INTRODUCTION

The continual violence in the Middle East brings with it increasingly urgent hostility against Palestinians, demands for national security on the part of Israeli Jews, and renewed resentment of Israeli violence on the part of Palestinians. These reactions are particularly serious given the Israeli government's policy in the Occupied Territories with respect to the alleged torture of Palestinians. Israel has contended with the moral and physical challenges of military occupation since it captured the West Bank of the Jordan River from Jordan, and the Gaza Strip from Egypt in the 1967 Arab-Israeli War. While in the course of this occupation, Israel has faced significant criticism from human rights advocates concerning the occupation's general treatment of Palestinians, nothing has proven more problematic, in terms of both Israel's self-image and its world image, than the alleged torture of Palestinians. It seems particularly troubling to most reasonable people that a country that describes itself as a democracy should care so little about human rights. However, considering the recent history of England's torture of suspected terrorists in Northern Ireland, the French colonial experience in Algeria, and the American experience with Jim Crow in Parchman Penitentiary, Alabama, among other examples, it may be more relevant to ask why we would expect that torture would *not* occur in democratic societies.

Perhaps what bothers people about torture in ostensibly democratic regimes and, in particular, Israel, a country with a well-developed legal system, is the complicity of the law in facilitating torture. This complicity somehow invalidates the alleged primacy of the rule of law in democratic societies. In a democracy, the law supposedly upholds rights. What higher right could there be in a polity that worships "self-government" than human rights, the right of the individual?

This article examines these questions in the context of Israel's torture of Palestinians. In the article's first section, torture is defined, paying particular attention to the fact that torture may encompass both physical and psychological abuse. Accordingly, categorizing an action as torture may have more to do with the context and combination of actions inflicted on a victim than on any particular activity. Field data, anecdotal evidence and official

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statements from the Israeli government are then marshaled to prove that Israel has, indeed, systematically tortured Palestinian suspects. Section II of the article examines justifications for torture. Rather than assuming that torture is necessarily "bad", this articles examines Israel's use of national security needs as justification for the abrogation of Palestinian rights, historicizes torture to evaluate if there is anything inherently objectionable about it, and critiques Israel's justification for torture, both on its own terms and by evaluating its underlying premises against their de facto impact. This critique ultimately determines that not only is Israel's use of torture unjustifiable, at least on the basis of national security needs, but that there may be deeper psychological impulses rooted in group violence and the nature of the nation-state that drives states to torture. The article's final section analyzes the Israeli legal regime's response to torture and concludes that not only is this response both ambiguous and inadequate, but that it also calls into question the very notion of the "rule of law" in a democratic society.

I. DOES ISRAEL TORTURE PALESTINIANS?

A. *Defining Torture*

Regardless of official denials to the contrary, facts suggest that Israel has tortured Palestinians systematically in the Occupied Territories (the Territories) since Israel captured these lands in 1967. Proving this requires a careful definition of "torture". Because the primary focus in this inquiry is the Israeli legal regime's response to torture, it makes particular sense to define the term legally. Article 1 of the 1984 United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Convention") defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[1]

1. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1, 23 ILM 1027 (1984).

The UN definition is appropriate to this topic for two reasons. First, the Convention's definition of torture is widely accepted on an international basis, encompassing the broadest possible understanding of what torture is and when it is worthy of sanction. Furthermore, the Israeli government ratified the Convention in 1991, stating that "[w]hile Israeli legislation does not specifically define torture, statutory provisions clearly cover all acts of torture as found in the definition of Article 1 of the Convention."[2]

Accepting the Convention's definition presents a useful starting point for developing a working understanding of torture, but it also poses challenges in distinguishing between torture, in the relatively narrow, legal sense, versus "merely" cruel and inhumane treatment. In terms of international law, this is not necessarily a problem because all major instruments of international law equally prohibit both forms of abuse.[3] However, distinguishing the two is important in conducting a critical inquiry into the Israeli response to alleged torture since torture suggests a more egregious level of moral culpability and concomitant legal responsibility than the morally lesser offense of inhumane treatment.

Distinguishing torture from inhumane action raises three questions. First, should we define torture in terms of single actions only, or should we consider combinations of lesser actions on a single person as torture in an aggregate sense? Secondly, to what extent does psychological abuse count as torture? Lastly, how should we account for the subjective measurement of pain in different people to achieve the level of "severity" required by the Convention to categorize an action as torture?

While most people would have no problem viewing certain extremely violent actions as torture in light of the Convention, classifying relatively less physically brutal activities, such as what is generally understood as psychological pressure (threats, verbal intimidation, etc.) and non-impact physical abuse (sleep deprivation or position abuse[4], among other things, as opposed to electrocution and mutilation) as torture is more difficult. For example, few people would argue that a prisoner subjected to prolonged, intense questioning, perhaps after a sleepless night on a narrow prison bed, while seated in an uncomfortable chair, is suffering from torture. In fact, it is arguable whether that prisoner is even being treated inhumanely, given the fact that interrogations inherently tend to employ some measure of physical discomfort. However, extreme applications of a combination of these factors—prolonged lack of sleep, being forced to stand for unreasonable periods of time with arms held to the front at shoulder level, being denied food

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2. *Id.*

3. *See* HUMAN RIGHTS WATCH / MIDDLE EAST, TORTURE AND ILL TREATMENT: ISRAEL'S INTERROGATION OF PALESTINIANS FROM THE OCCUPIED TERRITORIES 76 (1994).

4. Generally defined as forcing a subject to remain in a painful physical position for an extended period of time.

and use of a lavatory for extended periods, culminating with concentrated questioning and verbal threats of future abuse could be considered torture, although any one of these activities by itself might not be severe enough to constitute torture *per se*.

Furthermore, distinguishing between physical and mental abuse in defining torture is not constructive. Physical abuse is generally understood as an action, such as the administration of electrical shocks, inflicted primarily to produce physical pain. Any psychological effect resulting from the abuse is contingent upon the inducement of that physical pain. On the other hand, mental abuse is generally understood as an action that seeks to generate primarily mental distress, such as constantly exposing subjects to loud, disorienting noises. In fact, the distinction between the two is artificial. Both forms of abuse employ physical means to achieve a psychological effect—fear and anxiety that ultimately brings about the rupture of the subject's ego, thereby allowing a torturer to impose his will on the subject. Furthermore, in a long-term sense, both methods result in physical and psychological suffering—physical abuse produces mental trauma and a scarred psyche often produces physical symptoms.[5] Consequently, the key to identifying torture is in determining whether any particular activity or combination of activities, exacerbated by the intensity and duration of abuse, inflicts the "severe pain or suffering" necessitated by the Convention. This is a crucial point, keeping in mind that Israeli interrogation in the Territories generally employs combinations of techniques that, taken individually, might not otherwise constitute torture.[6]

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5. *See* HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3, at 77-78.

6. The English experience in using what this article would define as torture against the Irish Republican Army (IRA) in Northern Ireland illustrates the importance of critically assessing the aggregate effects, duration, and intensity of various interrogation techniques that, taken alone, do not seem particularly abusive. In 1971, the British Army detained large numbers of suspected IRA activists, fourteen of whom were subsequently subjected to a combination of abuses consisting of mild position abuse, subjection to loud noise, and sleep, food, and drink deprivation. Ultimately, the case of alleged torture of these suspects was brought before the European Court of Human Rights. In a controversial decision, the majority of the court held that, "Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment...they did not occasion suffering of the particular intensity and cruelty implied by the word torture as understood." The Landau Commission discussed, *infra*, in this article, noted this decision with approval. It is possible to infer that Israel based their torture regimen on the British experience in Ireland. *See Id.* at 79-81. However, the Israeli High Court of Justice stated that "since [the techniques] treated the suspect in an 'inhuman and degrading' manner, they were nonetheless prohibited." *The Judgment Concerning the Interrogation Methods Implied by the GSS*, the Supreme Court of Israel, sitting as the High Court of Justice, adjudicating H.C. 5100/94, H.C. 4054/95, H.C. 6536/95, H.C. 6536/95, H.C. 5188/96, H.C. 7563/97, H.C. 7628/97, H.C. 1043/99 (from the official website of the Israeli Supreme Court, last visited December 2, 2000) available at http:www.court.gov.il./mishpat/html/en/ verdict/judgments.html, para. 30 (hereinafter *Judgment*).

This begs the question of whether assessing torture requires a subjective measurement of "severe" pain that accounts for the variable tolerance to suffering in different people. What may be severe pain to one person may not be severe to another person. It is only logical that the standard of severity required to identify the torture of a particular subject should differ for a strong, physically and mentally robust man versus the standard applied to a frail, impressionable boy. However, it is sufficient for this examination to accept that most humans have a comparable level of tolerance to pain. In any case, if the goal of torture is to reduce all subjects to roughly the same level of mental and emotional subordination to the torturer, the only important point is that any given subject has been reduced to this state or that a serious attempt has been made to reduce the subject to this state. Consequently, the level of pain required to accomplish this goal is secondary, and we need not assess it as a factor in this investigation.

In summary, the Convention offers a useful, basic definition of torture for the purpose of this article. In addition to the language of the Convention, this article's view of torture explicitly includes the understanding that combinations of lesser forms of abuse, including what others may understand as psychological coercion, may, in the aggregate and when exacerbated by prolonged application, amount to torture.

B. Israel's Torture of Palestinians

Irrefutably establishing that Israel uses torture, as defined above, against Palestinians is a challenging proposition. Israel has never officially admitted to torturing prisoners. Moreover, sources investigating and reporting alleged torture, including a variety of Palestinian, international, and Israeli human rights organizations, are open to charges of bias and lack of sensitivity to Israel's national security situation. Close Israeli allies, such as the United States, have criticized Israeli treatment of Palestinian prisoners in official State Department reports, but these reports stop short of accusing Israel of outright implementation of torture.[7]

However, reference to a variety of sources makes it possible to assemble a mosaic illustrating Israeli use of torture. These include Israel's two preeminent legal statements on permissible interrogation practices in the Territories, the 1987 Landau Commission Report and the High Court of Justice's (HCJ) watershed 1999 ruling specifically addressing GSS interrogation methods.[8] These pronouncements allow a glimpse of the contours, if not the specifics, of Israeli interrogation practices. Also, a vast amount of anecdotal evidence gathered in studies conducted in the Territories

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7. *See* ILAN PELEG, HUMAN RIGHTS IN THE WEST BANK AND GAZA: LEGACY AND POLITICS 94 (Syracuse University Press 1995).

8. *See Judgment, supra* note 6.

by human rights organizations as well as widely-reported and substantiated cases of Palestinian injury and death help provide the content of Israeli practices by establishing a pattern of systemic activity that amounts to institutionalized torture.

Israel has flatly denied employing torture against Palestinians since its capture of the Territories in 1967. In fact, between 1967 and November 1987, Israel denied using any type of coercive interrogation techniques whatsoever. For example, the July 3, 1977 issue of the London *Sunday Times* published a scathing expose providing strong evidence of methodical, institutionalized use of torture against Palestinian detainees.[9] The Israeli Embassy in London responded that:

> Israeli police and security have every reason to refrain from use of force. Such use of force is a serious criminal offense, and where cases of police brutality have been found in the past, police officers have been prosecuted, and it is Israel's policy to do so in the future. Furthermore, as has been emphasized, any statement obtained by such methods is inadmissible [in a court of law].[10]

The Landau Commission Report, issued in November 1987, belied these official contentions.

The Landau Commission (the Commission), headed by former Israeli Supreme Court Justice Moshe Landau, was appointed in May 1987 to investigate the General Security Service's (GSS, also known as the Shin Bet) "methods of interrogation in regard to hostile terrorist activities" and court testimony regarding interrogation of Palestinians.[11] The Commission's appointment was motivated by two notorious incidents. The first incident involved the fabrication of evidence by GSS officials to hide the fact that agents had beaten to death two Palestinian bus hijackers. The second incident concerned a Turkic Muslim Israeli Defense Forces (IDF) officer falsely imprisoned for espionage on the basis of a false confession coerced from him by GSS agents. The agents later lied in court as to how they had forced the confession from the officer. The Commission's report, issued in November 1987 and endorsed by the Israeli government, was the foremost Israeli official

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9. PELEG, *supra* note 7, at 94.

10. HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3, at 46-47.

11. The GSS is a highly secretive organization that reports directly to the Prime Minister. In fact, the existence of the unit was not publicly acknowledged by the Israeli government until the Landau Commission report was published. The unit has no direct enforcement powers, but, among other things, it recommends the arrest, detention, and deportation of Palestinians, interrogates high-priority Palestinian detainees, and prepares secret evidence for presentation before governmental review committees. *See* Christopher Greenwood, *The Administration of Occupied Territory in International Law*, *in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 267, 269 fn. 4 (Emma Playfair, ed., 1992).

statement concerning treatment of Palestinians during interrogation until the HCJ's 1999 ruling addressing interrogation procedures.[12]

The Commission squarely refuted Israel's official averments that it did not practice torture. In fact, the Commission found that since 1971, GSS interrogators' policy was to extract confessions from Palestinians through coercive means and to perjure themselves before the military courts to hide the fact that they had coerced confessions.[13] The Commission also found that GSS agents routinely lied to military judges regarding the use of torture to coerce confessions from Palestinian detainees and that the practice was routinized through guidelines distributed through the GSS.[14]

Moreover, the Commission dictated formal guidelines for continued use of coercive pressure against Palestinian detainees. Recognizing the necessity of pressure to overcome terrorist suspects and possibly prevent acts of terrorism against Israeli citizens, the Commission stated that, "The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation...*However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided* [emphasis added]."[15] The Commission sought to balance national security against civil rights by justifying this treatment of suspects by applying the provisions of Article 22 of the Israeli Penal Law, which allows actors accused of criminal offenses to assert the affirmative defense of "necessity." Under Article 22, proving that particular actions that would otherwise be criminal are "necessary" for the prevention of some greater evil exempts actors from criminal liability.[16] The Commission analogized coercive interrogation procedures to "necessity" by reasoning that in acting to preserve state security, interrogators prevented grievous harm to Israeli citizens.[17]

In a classified section of its report, the Commission dictated guidelines for applying such pressure, stating that, "if these boundaries are maintained exactly...the effectiveness of the interrogation will be assured, while at the same time it will be far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity."[18] While it is difficult to say with certainty what actions these secret principles allow, it is possible to infer their nature. First, the Commission showed little recognition that psychological pressure is questionable. This

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12. For a discussion of the events leading up to the Commission's appointment *see* Pnina Lahav, *A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture*, 10 CARDOZO L. REV. 529 (1988).

13. PELEG, *supra* note 7, at 93.

14. *Israel and the Occupied Territories* at 52. See HUMAN RIGHTS WATCH / MIDDLE EAST, supra note 3, at 49.

15. *Id.* at 53.

16. *See Id.* at 52.

17. *See id.*

18. *Id.* at 54.

implies relative leniency in the application of psychological pressure by Israeli interrogators. Furthermore, GSS agents testifying before Military Courts in the Territories since 1987 have openly admitted to using various techniques of physical coercion against Palestinian subjects, including position abuse, imposing hoods on subjects to produce disorientation, and sleep deprivation. The fact that these agents have readily detailed this information without facing prosecution and that Military Courts have not automatically discarded confessions when interrogators have used these methods on defendants strongly suggests that they fall within the Commission's standards.[19] It is noteworthy, regardless of the specific nature of the guidelines, that in October 1994, the Israeli government authorized the GSS to use "increased physical pressure" for a three month period against Palestinian terrorist subjects after the bombing of Dizengoff Street in Tel Aviv. After the January 1995 Beit Lid suicide bombing, the government renewed this heightened standard of coercion, and has continued to do so thereafter.[20]

The HCJ's 1999 decision sheds further light on the practices of Israeli interrogators. In 1998, the HCJ consolidated seven petitions, five from Palestinian detainees and two from Israeli human rights organizations, questioning GSS interrogation policy.[21] In the decision, the HCJ unanimously and unequivocally stated that:

> a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever...These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable.[22]

Furthermore, the HCJ disavowed use of the necessity defense to vindicate physical coercion. The HCJ did not construe the Commission's report as resting on the necessity defense as the source of the legal authority for employing physical coercion; "[a]ll that the [Commission] determined is that if an investigator finds himself in a situation of 'necessity,' constraining him to choose the 'lesser evil—harming the suspect for the purpose of saving

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19. *See* HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3, at 51.

20. *See* AMNESTY INTERNATIONAL, ISRAEL / OCCUPIED TERRITORIES AND THE PALESTINIAN AUTHORITY—FIVE YEARS AFTER THE OSLO AGREEMENT: HUMAN RIGHTS SACRIFICED FOR "SECURITY" 10 (1998).

21. *See* Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 306, 333 (2000).

22. *Judgment, supra* note 6, at para. 23.

human lives—the 'necessity' defense shall be available to him."[23] The HCJ found, as a doctrinal matter, that interrogators could not use the necessity defense to establish a prospective normative standard for use of coercion against suspects; necessity is intended to serve as an after-the-fact, highly particular justification of certain *extreme*, *imminent* actions that the law would otherwise sanction as "criminal." Standardizing these actions in advance effectively de-criminalizes them, which the state should accomplish properly through legislation, rather than through a theory of criminal defense.[24]

The HCJ's judgment also openly addressed four types of physical pressure used, alone and in combination, by Israeli interrogators: "shaking,"[25] position abuse (specifically, the "shabach" and the "frog crouch"),[26] excessive tightening of suspects' handcuffs, and sleep deprivation.[27] The 1999 decision officially prohibits these techniques, flatly disavowing use of physical coercion by GSS interrogators.[28] It is particularly noteworthy that the decision does not patently ban psychological pressure—it addresses only physical abuse. The point is that the GSS has used these techniques since the publication of the Commission's report and that the HCJ's 1999 decision does not retroactively sanction the GSS for unauthorized use of coercion. The obvious implication is that Israel systematically and legally promoted the use of these techniques, which can constitute torture in light of the definition established in this article.

Anecdotal evidence collected and subjected to critical study by human rights organizations and a number of widely-reported cases of abuse help establish clear patterns of activity that elaborate the sketches of coercive interrogation procedure offered by the Israeli government itself. Human Rights Watch / Middle East (HRW) conducted a study of Israel's interrogation of Palestinians in the Territories consisting of lengthy interviews with thirty-six former detainees interrogated by either the IDF or the GSS between June 1992 and March 1994; five interviews conducted by defense lawyers with incarcerated Palestinians; a review of declassified GSS documents, such as official interrogation logs; and interviews with former Israeli soldiers posted

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23. *Id.* at para. 36.

24. *See id.*

25. The HCJ defined shaking as "the forceful shaking of the suspect's upper torso, back and forth, repeatedly, in a manner which causes the neck and head to dangle and vacillate rapidly." *Id.* at para. 9.

26. The HCJ stated that, "a suspect investigated under the 'Shabach' position has his hands tied behind his back. He is seated on a small and low chair, whose seat is tilted forward, towards the ground. One hand is tied behind the suspect, and placed inside the gap between the chair's seat and back support. His second hand is tied behind the chair, against its back support. The suspect's head is covered by an opaque sack, falling down to his shoulders. Powerfully loud music is played in the room...suspects are detained in this position for a prolonged period of time, awaiting interrogation at consecutive intervals." *Id.* at para. 10. The frog crouch "refers to consecutive, periodical crouches on the tips of one's toes, each lasting for five minute intervals." *Id.* at para. 11.

27. *See id.* at para. 12, 13.

28. *See id.*

to interrogation centers.[29] The period of incarceration examined in the study is significant because it accounts for post-Commission changes in interrogation practice that were ostensibly intended to curb abusive practices. Also, while it occurs after the peak of the conflict, the period occurs during the Intifada, the wide-scale uprising of Palestinians in the Territories marked by open Palestinian defiance of the occupation and resulting intensification of Israeli policing of the Territories that began in 1987 and continued until the beginning of the Middle East peace process in 1992.[30] While the interviewees constitute neither a broad cross-section nor random sample of those Palestinians subjected to interrogation, these reported incidents yield valuable anecdotal data that helps establish a clear scheme of abusive treatment amounting to torture.

In summary, the HRW investigation found that since the beginning of the Intifada, Israel has interrogated between four and six thousand Palestinians each year. The strategy of Israeli interrogators during the examined period was to subject these detainees to a coordinated regime of painful psychological and physical duress over a period of days and sometimes for as long as four weeks. A statistical breakdown of some of the abuses inflicted on interviewees yielded the following data:

1. *Beating and Shaking* Of seventeen GSS subjects, nine reported suffering from beatings or shakings. Two of sixteen GSS subjects reported being beaten on the testicles (interviewers did not question the seventeenth subject on this topic). Of nineteen IDF detainees, sixteen reported being beaten and thirteen reported being beaten on the testicles. Interviewers did not consider light blows or slaps intended to intimidate through degradation, as opposed to brute infliction of physical pain, in this tally.
2. *Position Abuse*
   - *Shackling* Ten of seventeen GSS subjects reported being shackled to walls for periods ranging from a few hours to, in one case, three days, with short breaks for interrogation, eating, and use of a lavatory. Seven of this group were shackled while uncomfortably seated on "kindergarten chairs," while six were shackled in standing positions. One IDF subject reported being shackled to a wall.

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29. *See* HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3.

30. For a discussion of the Intifada from an Israeli perspective *see* ISRAEL, THE "INTIFADA" AND THE RULE OF LAW (David Yahav et al., eds., 1993).

- *Standing* Fifteen of nineteen IDF subjects reported being forced to stand for periods of at least three hours and for periods commonly exceeding ten hours, with breaks for interrogation, eating, and use of a lavatory.
- *Seating on "Kindergarten Chairs"* Thirteen GSS subjects reported being confined for extended periods in uncomfortably small kindergarten chairs.

3. *Deliberate Exposure to Temperature Extremes* Five GSS detainees reported being imprisoned in deliberately over-cooled spaces. Two other interviewees reported exposure to cold weather without adequate clothing. One was placed in a hot, poorly-ventilated space.
4. *Hooding/Blindfolding* All GSS and IDF detainees reported having their heads covered with hoods for prolonged periods.
5. *Sleep Deprivation* Sixteen of the GSS subjects alleged that they were deprived of sleep for extended periods, while being forced to remain in uncomfortable standing or sitting positions.
6. *Deliberate Subjection to Loud and Continuous Noise* All the GSS interrogation subjects claimed that loud, disruptive music was constantly broadcast through the facilities in which they were interrogated.[31]

Additional methods of interrogation inflicted on nearly all interrogated Palestinians included generally degrading treatment, such as verbal intimidation, confinement in extremely small spaces, extended toilet and hygiene deprivation, and the forcing of prisoners to eat and use the lavatory simultaneously.[32] HRW states that the Commission's report, and, specifically the secret guidelines included in the report, did little more than to systematize the abuses in terms of measured combinations of psychological and physical pressure, with reduced use of crude physical coercion, such as beatings.[33] The sustained, intensive, and combined use of these various interrogation techniques produces the level of severity required to categorize activity as torture within the meaning of the term established in this article.

Studies from other sources verify the HRW findings. In a 1998 report, Amnesty International stated that although the five years since the Oslo

31. *Id.* at 27-29.
32. *See id.* at x.
33. *See id.* at 55.

Agreement signed between the Palestinians and the Israeli government marked an ostensible reduction in the reduced tension between Israel and Palestinians in the Territories, Israeli use of torture has continued to entrench itself as an institutionalized aspect of the occupation.[34] The report verifies use of the same types of abuse detailed in the HRW study.[35] A 1991 report by the Israeli human rights organization *B'Tselem* notes at least nine cases in which Palestinians died while in the process of interrogation since the beginning of the Intifada.[36] The United States' Department of State human rights report for 1989 cites ten such cases since the beginning of the Intifada.[37] The fact that many of these claims received widespread, public media attention within Israel implies how frequently the abuse of Palestinians occurs, given the extent to which secrecy shrouds GSS interrogations.

Examined with reference to the legitimation of coercive pressure in the Commission's report and their subsequent disavowal (with the glaring exception of psychological pressure) in the HCJ's decision in 1999, the consistency of detail, sheer volume of alleged occurrences, and public acknowledgment of some of the abuses cited in the evidence listed strongly point to widespread, institutionalized abuse of interrogated Palestinians under the Israeli occupation. Subjecting this evidence to the definition of torture presented above, it is at least possible to conclude that the use of torture by Israeli security personnel is so widespread that the practice certainly enjoys de facto, if not outright de jure, acceptance.

II. IS THE TORTURE OF PALESTINIANS JUSTIFIABLE?

A. *National Security Rhetoric—How Israel Justifies Torture*

National security is a preeminent concern in Israeli society. This is unsurprising considering the fact that the country has never known peace and is surrounded by hostile, numerically superior nations that disavow Israel's very right to existence. Even before Israel's establishment, Jews fought Arab and British forces to win the right to carve an independent state from the Palestinian Mandate. In 1948, on the dawn of the new state's declaration, Israel defended its independence against the Arab population of Palestine and the organized armies of surrounding Arab states. In the ensuing decades, Israel has fought four major wars, ceaseless border skirmishes and terrorist raids, launched a number of cross-border strikes and special operations missions, and, among other territorial gains, in 1967 captured and occupied the Territories. To this day, with the exception of Egypt and Jordan, Israel

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34. *See* AMNESTY INTERNATIONAL, *supra* note 20, at 9.

35. *See id.*

36. *See* PELEG, *supra* note 7, *citing* B'TSELEM, ANNUAL REPORT 52 (1989) and B'TSELEM, THE MILITARY JUDICIAL SYSTEM IN THE WEST BANK 6 (1989).

37. *See* PELEG, *supra* note 7, at 94.

remains at war with the Arab states of the Middle East, not to mention the Palestinian Arab population of the Territories that fall under Israeli control. While it falls beyond this article's scope to explore the political or moral rectitude of Israel's history of conflict and arguable right to control the Territories, we may assume that Israel has grave reasons to decisively respond to threats to its security.

The Palestinians of the Territories represent a particular challenge to Israeli security, given that many are declared enemies of Israel with relatively open access to Israeli territory.[38] Palestinian terrorists operating from the Territories successfully launch terrorist attacks against civilian targets within Israel. The consequent inability to distinguish terrorists from Palestinian non-combatants only serves to heighten the overall tension of the occupation. This justifiable concern with security has grown into a strong commitment to the defense of Israel. The commitment intertwines with Zionist discourse[39] to generate a powerful cultural narrative that, in its simplest articulation, tells the following story:

> Formerly, we (Jews) lacked a home and could not defend ourselves, and nobody was willing to defend us. Under great duress, we founded Israel as the bastion of world Jewry. Now we have a state and we may defend ourselves. Thus, Israel as a state and Jews as a people share a common fate—if Israel falls, so fall the Jews. Unfortunately, Israel is a relatively weak state with many enemies and without dependable friends. Therefore, we can never afford to relax our vigilance in the defense of the state, since, after all, world Jewry depends on us for its guaranteed existence. *Israel must survive.*[40]

Consequently, Israeli politicians commonly invoke the security imperative to justify otherwise questionable conduct. When the President of Israel pardoned GSS agents for beating to death a terrorist under interrogation

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38. It is virtually impossible to entirely close Israeli borders to the Occupied Territories—there are too many unmonitored back-roads that offer access to the Israeli hinterland. Typically, in relatively peaceful times, major roads between Israel-proper and the Territories are loosely manned and open to both traffic from Israel-proper into the Territories, and vice versa.

39. For a description of the development of Zionism with respect to modern anti-Semitism, *see* ALBERT S. LINDEMANN, ESAU'S TEARS: MODERN ANTI-SEMITISM AND THE RISE OF THE JEWS (Cambridge University Press, 1997). *See also* S. ZALMON ABRAMOV, PERPETUAL DILEMMA: JEWISH RELIGION ON THE JEWISH STATE 63-81 (1976).

40. *Id.* See also the description of "catastrophe zionism" in PRINA LAHAV, JUDGEMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTRUY (University of California Press, 1997); TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST (Mill and Wang, 1993).

in one of the incidents that led to the Commission's appointment, he stated that "[i]n the special conditions of the State of Israel we cannot allow ourselves any relaxation of effort, nor permit any damage to be caused to the defence establishment and to *those loyal men who guard our people.*"[41] This narrative generates a prevailing, consequentialist justification for acts that would otherwise be viewed as criminal under Israeli, as well as international law. Furthermore, it helps explain how the judges appointed to the Commission could extend the necessity defense of the Israeli penal code to prospectively rationalize acts of brutality in the course of interrogations.

Briefly, consequentialists evaluate the morality of all actions based solely on their consequences. Thus, it is possible to understand the Commission as having justified the use of torture on consequentialist grounds. On the basis of the Commission's reasoning, if a terrorist is held in custody with knowledge of the location of a bomb capable of killing hundreds of Israelis, then the pain, perhaps even the death of that terrorist, under interrogation is not as compelling a moral interest as the saving of many innocent lives if it is possible to get that terrorist to reveal the location of the bomb in time to defuse it. Implicit in this moral formulation is that there is still something problematic about torture, even if it may be justified under certain circumstances. Exactly what is it about torture that is morally offensive?

B. Evaluating Israel's Justification for Torture

1. Evaluating Torture

Organized bodies of human beings regularly commit extreme acts of violence against other human beings in acts of war; yet only committed pacifists argue that war is morally unjustifiable under any circumstances. Is torture, as an instrument of state policy and as a tool defined by its use of violence to inflict pain, so different from aiming missiles, firing handguns, detonating mines, etc., against human targets in warfare? Is there something intrinsically problematic about the application of torture that is different from other categories of state violence?

History suggests that the aversion to torture expressed in international legal instruments has more to do with contemporary cultural norms than with any quality inherent to torture. In fact, torture, defined in roughly the same terms as established in Section I, has seen wide use as a legal instrument since Graeco-Roman times. M.I. Finley noted that ancient Greek practice dictated that slaves could only give evidence at trial under torture.[42] Torture held an

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41. Lahav, *supra* note 12, at 545 *citing* H.C. 428/86, *Barzilai v. Israel*, 40(3) P.D. 505 (1986) (emphasis in original).

42. *See* M.I. FINLEY, ANCIENT SLAVERY AND MODERN IDEOLOGY 94 (Viking Press, 1980).

established place in Western Europe as a judicial tool for ascertaining the truth dating from the thirteenth century. Thus, the civil lawyer Bocer Blithely wrote in the seventeenth century, "[t]orture is interrogation by torment of the body, concerning a crime known to have occurred, legitimately ordered by a judge for the purpose of eliciting the truth about the said crime."[43]

This attitude changed in Europe in the eighteenth century with the advent of the Enlightenment. Thinkers such as Voltaire and Montesquieu propagated humanitarian principles that implicitly undermined the legitimacy of torture. Cesare Beccaria made this potential explicit in *On Crimes and Punishment*, the seminal piece of legal scholarship that inspired the rejection of torture in legal codes throughout Europe. As Beccaria wrote, "The torture of the accused while his trial is still in progress is a cruel practice...[a] man cannot be called 'guilty' before the judge has passed sentence, and society cannot withdraw its protection except when it has been determined that he has violated the contracts on the basis of which that protection was granted to him."[44] Moreover, changes in European trial practice, such as implementation of jury trials, rendered torture a crude and irrelevant instrument for distinguishing the guilty from the innocent.[45]

Scholars have attributed the resurgence of institutionalized torture in the twentieth century to the rise of totalitarianism before World War II.[46] It makes sense, given that states such as the Third Reich used torture as part of a greater expression of contempt for egalitarian notions, that people dislike torture because it somehow insults their notion of the respect due to others as human beings. Torture differs from warfare in the vague notion that soldiers choose to serve, or at least to obey orders, and, therefore, choose to engage in warfare. Once at war, they may fight and defend themselves, but, if taken prisoner, are supposedly protected from violence because they no longer have the benefit of choice. In essence, war is supposed to be a "fair fight." As Henry Shue has suggested, perhaps one aspect of people's disgust with torture lies in the fact that torture begins only after the fair fight, from the victim's perspective, has ended—it is blatantly unfair.[47]

Following World War II, these concerns and the powerful reaction to Axis atrocities led to the evolution of international legal norms outlawing torture and inhumane treatment. Chief among these is the definitive articulation of this prohibition, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Torture has

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43. RITA MARAN, TORTURE, THE ROLE OF IDEOLOGY IN THE GRENCH-ALGERIAN WAR 6 (Praeger, 1989).

44. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 29 (Hackett Publishing Company, 1986) (1764).

45. *See* Maran at 6.

46. RONALD D. CRELINSTEN AND ALEX P. SCHMID, THE POLITICS OF PAIN: TORTURERS AND THEIR MASTERS 147 (Westview Press, 1995).

47. *See* Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 130 (1978).

undoubtedly proven morally problematic from the view of international law and the vast majority of human beings. However, the primary concern in this discussion is the Israeli justification for use of torture in exceptional circumstances, and it is this consequentialist justification that will be critiqued. Accepting the consequentialist position for the sake of argument, this article will examine the Israeli government's position, not by rejecting the consequentialist premise, but by showing that even granting its validity, the position's logic fails.

2. *Evaluating Israel's Use of Torture*

An internal critique that accepts Israel's justification of torture on its own terms generally belies any reasonable claim that Israel tortures Palestinians in the maintenance of a consequentialist balance of evils. A cogent examination of the practical results achieved by institutionalized torture and the way that torture is applied strongly suggests that Israel tortures Palestinians for reasons other than those expressed by the Commission, or even officially acknowledged by the Israeli government.

Consequentialism dictates that the use of torture to prevent terrorism is only justifiable where the moral good of preventing the harm of innocent Israelis outweighs the evil of inflicting pain on interrogation subjects. An easy way to support the Commission's argument on this point is to cite the raw data verifying that the GSS has prevented numerous terrorist incidents that would have resulted in the deaths and injuries of many Israeli civilians. While this data is not readily available, we can assume, *arguendo*, that the use of torture has successfully coerced Palestinian terrorists into revealing information that has directly prevented destructive acts against Israel. However, consequentialism must account for long-term, as well as short-term moral outcomes.

On a long-term view, torture fails to prevent terrorism because it builds hostility in the Palestinians of the Territories, encouraging them to support and pursue terrorism. Also, the very rationale used to justify torture, *mutatis mutandis*, justifies terrorism. As Sanford H. Kadish noted, "[i]f the norm to prevail for torture and other cruel treatment is that it may be justified if the evils to be avoided are great and significant enough, how can a similar qualification be denied to the resort to acts of terrorism?"[48]

The British experience in Ireland and the French experience in Algeria are striking examples of the long-term inefficacy of torture regimes in this respect. In particular, it is significant that while the French military defeated *Front de Liberation Nationale* (FLN) terrorists in the Battle of Algiers through widespread use of torture, the resentment bred by use of torture fed Algerian

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48. Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISRAEL L. REV. 345, 353 (1989).

nationalism and made it difficult for the French to continue to argue that colonization of Algeria was based on altruistic humanitarian principles. Unsurprisingly, the FLN ultimately defeated the French.[49] The United Kingdom fared little better in its fight against Irish nationalists.

Furthermore, institutionalized abuse of human rights may pose serious negative consequences for societal mores by disrupting the internal logic of the rule of law in a democratic society. Kadish has pointed out that legitimation of torture, even on narrow grounds, establishes a sliding scale of outrages that the state may commit against individuals.[50] Undoubtedly, given the complication of legal processes, many unjustified acts of torture will take place, but will be accepted as part of the normal course of doing business in a legal regime that recognizes torture. More significantly, assuming that the rule of law in a liberal democratic society[51] is built on the foundation of respect for individuals and human rights,[52] inserting a legal element that contradicts those values fractures the internal coherence of the entire construct, as is already happening in Israel (this point will be explored more fully in Section III of this article). If inhumane treatment becomes acceptable in fighting terrorism, it would probably not take long until the state would feel compelled to extend its use to other high-stake contexts. This could result in a broader relaxation of humanitarian standards, for, as Justice Brandeis observed in a related issue concerning American society, governmental law is "the potent, the omnipresent teacher."[53]

Given these arguments, perhaps it is possible to justify torture on the narrowest of grounds, invoking the greatest of short-term positive outcomes to outweigh the least problematic of evils, as to prevent the corruption of the state's legal body and the encouragement of further terrorist acts. Such a scenario might require that the state know that the subject of interrogation is a terrorist, that a bomb has been planted, and that torture will enable the state

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49. *See* Maran for a general history; ALISTAIR HORNE, A SAVAGE WAR OF PEACE: ALGERIA 1954-1962 (Viking Press, 1977).; *see also* LA BATTAGLIA DI ALGERI (Gillo Pontecorvo 1967) for a compelling cinematic exposition of the close relationship between torturer and terrorist in the context of French colonialism in Algeria. Interestingly, Saadi Yacef, the leader of FLN operations in Algiers during the Battle, starred in and co-produced the film.

50. *See* Kadish, *supra* note 49.

51. This article adopts the definition of liberalism presented by Frank I. Michelman in BRENNAN AND DEMOCRACY 65 (Princeton University Press, 1999). Liberalism describes a set of programmatic commitments that stress freedom, individual rights, the rule of law, and limited government. Freedom and individual rights in this context generally mean some formulation of pluralism, voluntary association, toleration, privacy, free speech, and a separation of government actors to prevent the growth of powerful, centralized government. *See id.*

52. Granted, every "democratic" society has failed this ideal (we only have to look at Jim Crow in the United States, among other examples of American failures in this regard). At the risk of being too optimistic, the ideal and the potential to fulfill it still exist, as well as an altruistic commitment to serve that ideal, at least in many quarters.

53. Kadish, *supra* note 49. It is interesting that Kadish allows torture on an ad hoc basis. His critique of state-sponsored torture hinges on the vast implications for a society and its legal system when the state prospectively sanctions torture for regular use.

to defuse that bomb in time to save the lives of citizens. The problem remains, as demonstrated in Section I of this article, that Israel widely employs torture against Palestinians. In fact, the evidence presented suggests that Israel undoubtedly uses torture against Palestinians who have only a peripheral involvement with terrorism or subversive movements (perhaps merely having general knowledge of group members or activities, rock-throwing, or distributing political pamphlets). Thus, as applied, Israel's internal justification for torture is invalid.

Then why does Israel torture Palestinians? Perhaps the most obvious answer is, lacking objective distance from the heated emotion surrounding the Arab-Israeli conflict, the Israeli government truly believes that torture is justified on the grounds of national security. A critique of the consequentialist premise reveals the problem with this answer and suggests the real reason why Israel tortures Palestinians. If national security alone justified the use of torture, then one could reasonably expect torture to be used against national security threats of Jewish, as well as Palestinian, origin.

In fact, the different treatment of Israeli versus Palestinian (and other non-Jewish) subversives is striking. For example, in 1983, twenty-nine (Jewish) yeshivah students attempted to infiltrate the Temple Mount in Jerusalem, a site holy to Muslims. When captured, Israeli authorities found that the students had brought massive quantities of explosives with them, presumably to destroy the two mosques built over the site of Solomon's Temple (a Jewish holy site) on the Mount. The judge, deciding their case on the grounds that "the assault was only the amateurish act of innocent youth," acquitted all twenty-nine Israelis.[54] Although we do not know this for a fact, based on the inconsequential nature of this holding, it is doubtful that any of these students faced GSS interrogators intent on discovering the extent of the students' terrorist activity.[55] Similarly, the members of a Jewish terrorist underground movement were captured while attempting to wire West Bank buses with bombs. These same men had launched a series of attacks targeting Palestinians in the Territories. These attacks included bombing cars, attacking a girls' high school in Bethlehem with automatic weapons, and attacking an Islamic college in Hebron. None of these men served more than three years in jail for their crimes.[56] There are no reports that they were tortured and the leniency of their sentences certainly suggests that the Israeli authorities did not consider their crimes particularly serious, enough to warrant "coercion." In contrast, the GSS has little problem torturing Palestinians for comparatively minor anti-occupation activity, such as the production of anti-Israeli leaflets.

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54. MARTIN EDELMAN, COURTS, POLITICS, AND CULTURE IN ISRAEL, 110-12 (University Press of Virginia, 1994); for a broader discussion of discriminatory practice in Israeli law enforcement, *see* B'TSELEM, LAW ENFORCEMENT VIS-À-VIS ISRAELI CIVILIANS IN THE OCCUPIED TERRITORIES (1994).

55. *See id.*

56. *See id.* at 114.

One explanation for this difference is that Jews are citizens of Israel while the Palestinians of the Territories are not. However, this difference should not really matter if Israel adheres to the values of humanism and the rule of law supposedly inherent to democracy. Democratic governments are implicitly predicated upon a respect for the intrinsic value of human beings (think of the phrase, in the United States Declaration of Independence, "all men are created equal"). Violating this standard, regardless of citizenship, calls into question democracy itself. Section III of this article will address this point in greater detail.

An Israeli national security ideologue might counter that a Palestinian terrorist threatens the lives of Israeli citizens, if not the existence of the state of Israel itself, and, therefore, constitutes a grave enough threat to Israeli security to necessitate torture; whereas a Jewish terrorist merely threatens the stability of Arab-Israeli relations. However, any threat to national stability is a de facto threat to security. Furthermore, national security for Israel is contingent upon Arab-Israeli relations. The destruction of holy sites and the murder of Palestinians certainly has the potential of provoking serious responses from Arab powers hostile to Israel. Clearly, the Israeli government feels comfortable torturing Palestinians where it does not feel comfortable torturing Jews, and close examination reveals that this has little connection with national security. This suggests that Israel tortures Palestinians because it is useful for reasons other than imminent threats of national import.

Ervin Staub offers a convincing rationale from a social psychology perspective, to describe why Israel may torture Palestinians. Staub describes torture as a form of group violence rooted in difficult life conditions, such as ongoing territorial conflict. To protect their self-concept and self-esteem during challenging times, states may elevate themselves by socially denigrating others.[57] This rationale for torture makes particular sense in light of Henry Shue's notion of "terroristic torture," wherein a single victim's pain is used to intimidate an entire community and "[t]he victim is simply a site at which great pain occurs so that others may know about it and be frightened by the prospect."[58] In Israel's case, terroristic torture may reinforce a nationalistic ideology (Zionism) which focuses on the welfare, well-being, and future of one's nation (defined in terms of Jewishness) by subordinating a threatening enemy. It is key that such philosophies are contingent upon identifying enemies: an *other* from which to distinguish the superior group *self*.

Staub notes that certain societal characteristics may predispose a state to use torture against its designated enemy. The characteristics that apply with particular relevance to Israel include:

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57. *See* Ervin Staub, *Torture: Psychological and Cultural Origins*, Politics at 99-111.
58. Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 132 (1978).

1. *A monolithic rather than a pluralistic society.* Given the major divisions in its Jewish population along religious and ethnic lines, it is possible to argue that Israel is not truly a monolithic society. However, with respect to collective Jewish self-identity versus Arabs, particularly given Israel's security situation, Israel may be understood as monolithic. A monolithic society's belief in its cultural superiority often goes unchallenged. Thus, minority outsiders are less likely to share in the full rights of the society's monolithic in-group and thus far more likely to suffer from abuse. This characteristic seems to apply strongly to Israel. While the numerical dominance of Jews is not significant within Israel, the fact that the nation defines itself as a Jewish state supports the applicability of this predisposition to Israel vis-à-vis the Palestinians.
2. *A sense of cultural superiority.* A sense of vulnerability often accompanies a sense of cultural superiority. This is particularly true when a sense of cultural superiority is frustrated by the actual conditions of a state. Israel, in particular, exhibits a sense of frustration with its growing internal incoherence, exhibited by the strife between secular versus religious Jews for control of the nation's self-concept, and cracks in its facade of moral superiority, arguably exhibited by the growing numbers of Israeli youth seeking to evade national military service.[59]
3. *A history of aggression.* Where a state has generally resorted to aggression to resolve conflict, as is the case of Israel, this normalizes the use of violence, making it an acceptable response to threats to the state.
4. *A history of antagonism between two groups.* The ongoing fact of the Arab-Israeli conflict obviously reflects this predisposition in Israeli society. [60]

These factors are mutually reinforcing. A sense of cultural superiority depends upon a monolithic self-understanding. Cultural superiority feeds upon historical antagonism, which, in turn, is exacerbated by a predisposition to violent reaction to state threats. The result, according to Staub, is an identification of the dominant in-group in terms of antithetical opposition to

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59. ELIOT A. COHEN ET AL., KNIVES, TANKS, AND MISSILES: ISRAEL'S SECURITY REVOLUTION (Washington Institute for Near East Policy 1998) for a discussion of the rising numbers of Jewish Israeli youth evading military service.

60. Staub, *supra* note 57.

a designated *other*, in this case, the Palestinians. This self-identification is not only dependent upon opposition to Palestinians, but it also depends upon Israeli vulnerability and perceived superiority to Palestinians. Thus, while it would be unthinkable to treat Jews, even if they threaten Israeli security interests, as somehow lesser beings undeserving of the full protection of the humanitarian rule of law, Jewish identity politics might demand a different standard for Palestinians.[61]

Thus, Israel does not torture Palestinians because they represent a threat to national security, in the tangible sense of vulnerability to armed attack, but because Palestinians threaten the security of Israel's fragile self-identification as a Zionist nation. While this phenomenon may also exist in the case of Israeli Arabs, Israeli Arabs are ostensibly citizens of the state, and thus extended some measure of state protection in the form of the rule of law, although perhaps in a lesser measure than their Jewish compatriots (a related issue beyond the immediate scope of this article). Palestinians, on the other hand, are subjects of a military occupation, and from the outset, suffer from a lesser status that allows Israel to act out its deeper social needs through discriminatory abuse.

At this point, it is useful to summarize our progress. We have defined torture, and on the basis of this definition have determined that Israel systemically tortures Palestinians from the Territories. We have scrutinized Israel's justification for torturing Palestinians—the overwhelming need to maintain state security, on its own terms, and have determined that Israel's stated rationale for these actions fails to justify the derogation of Palestinian rights. We have also examined the state security justification from an external viewpoint and found that Israel's actions fail from this perspective, as well. Applying Ervin Staub's view of the relationship between social psychology and group violence, we have found it is possible Israel tortures Palestinians as part of a greater process of self-definition. This inquiry leaves only one area unexplored—the adequacy of the Israeli legal regime's response to torture.

III. TORTURE AND THE ISRAELI LEGAL REGIME

A. *Democracy and the Rule of Law*

The legal response to torture is critical because of the importance of the rule of law, as a normative matter, in any society that describes itself as

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61. There is a long and complicated history of Jewish self-perception as an elite community. Often this elitism coexisted and was strongly influenced by the oppression of Jews from more powerful communities. Thus, Jews of nineteenth century Russia often maintained their communal self-esteem by perceiving themselves as superior to their Slavic neighbors, despite the fact that the Jews were isolated in shtetls (ghettos) and often subject to abusive programs instigated by the Russians. Elements of this elitism survive in the Zionist narrative. *See* LINDEMANN, *supra* note 39.

democratic.[62] In Ronald Dworkin's view, democracy, understood as a representative form of collective government that seeks to maximize self-government, depends upon foundational laws to "rule out caste, guarantee a broad and equitable political franchise, prevent arbitrary legal discriminations and other oppressive uses of state powers, and assure governmental respect for freedoms of thought, expression, and association and for the intellectual and moral independence of every citizen."[63] Thus, in a functioning democracy, the law is supposed to insure a base level of equality among citizens that facilitates self-government through electoral representation.

But what about non-citizens and the rule of law? Why should Israel's problems addressing the human rights of Palestinians, the subjects of an occupation, implicate questions of the validity of "democracy" within Israel? Democratic governments implicitly understand themselves as predicated upon a respect for the intrinsic value of human beings; this value inherently underlies democracy's rhetorical commitment to self-government. It also explains the importance of the counter-majoritarian nature of the rule of law in democratic society in preventing a "tyranny of the majority" that might deprive individuals of their rights. While we might not expect the conferral of full benefits of democratic citizenship to non-citizens, it is, at least, reasonable to extend the recognition of human worth, which supposedly defines democracy, to any human being.[64] To make basic human rights contingent upon citizenship is to deny the internal logic of democracy, which purports to acknowledge the intrinsic value of all human beings (thus, American use of the phrase "all men are created equal," rather than "all citizens are created equal" in the Declaration of Independence).

Where a democratic government does not respect these rights within land that it *controls* and, in fact, subverts the rule of law to undermine these rights over an extended period of time, then there is a serious disjunction between that state's self-conception versus its actions, and we should seriously question the nature of the polity served by that regime, if not the nature of democracy itself. Thus, we care about the rule of law with respect to the torture of Palestinians in Israel because exploring this issue sheds light not only on problems in Israel but, perhaps more importantly, on ways in which the law may fail to serve democratic ideals in other places as well.

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62. There is a healthy debate regarding the extent to which Israel can be described as a democracy, particularly given that it describes itself as a "Jewish state," and that the nation's official policies reflect this self-definition. In any case, Israel describes itself as a democracy and utilizes democratic procedures in its decision-making. Whether or not these procedures fully embrace the Israeli populace (Jewish, Arab, Druze, etc.) is material for a related, but different article.

63. MICHELMAN, *supra* note 51 at 17.

64. Although, scholars have argued, from a cosmopolitan perspective, that we should extend citizenship rights beyond those limits. *See* OWEN FISS, A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS (Beacon Press, 1999).

So what formal commitment does Israel have to human rights? In the forty-four years between Israel's inception in 1948 until 1992, human rights *within* Israel were, for the most part, protected by judge-made law because the country lacks a written constitution, at least in the sense of a single, unified document. Instead, the nation has depended upon a series of "Basic Laws" passed in piecemeal fashion by the Knesset, Israel's parliament, with the intention of ultimately organizing them into a constitution. Three background factors generally helped to make the Israeli legal environment inhospitable to the protection of human rights.

First, the nascent state incorporated British mandatory law into its own legal body. Not only did British mandatory law lack any clear public principles regarding the protection of human rights, but it also included the Mandatory Government of the Emergency Regulations—statutes providing draconian powers of detention and arrest, among other oppressive powers, to the government, that, ironically, were originally directed against Jewish resistance to the British Mandate before Israel's independence. These regulations have been used to enforce the military court system over Palestinians in the Territories. Secondly, two of the primary ideological sources of Israeli law--Jewish law and socialism-- do not emphasize individual rights. Jewish law tends to be duty-oriented, rather than rights- oriented, and socialist law privileges communitarian principles at the expense of individual liberties.[65] Lastly, the country's national security situation tends to pressure the judiciary into supporting security concerns, rather than defending civil liberties, when the two issues clash. However, through key decisions in a number of important cases, the Israeli HCJ has managed to sculpt a legal system that recognizes the rights of Israeli citizens.[66] In 1992, the Israeli Knesset formally embodied these rights in the Basic Law: Human Dignity and Freedom. The Basic Law enumerates and protects vital human rights, such as the right to life, body, and dignity.

On the other hand, human rights in the Territories depend upon an entirely different and less secure basis. In terms of international law, Israel administers the Territories in a situation of "belligerent occupation." This refers to temporary possession of territory as a result of military hostilities, in contrast to long-term possession via national sovereignty. International law, accepted in this instance by most countries, including Israel, as customary law, dictates that an occupying power must maintain the legal system of a displaced sovereign in civil and criminal matters. At the same time, the occupier reserves the right to create a separate system of courts to administer matters

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65. *See* ROBERT COVER, OBLIGATION: A JEWISH JURISPRUDENCE OF THE SOCIAL ORDER, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 239 (Michael Ryan et al. eds. 1993)

66. *See* Stephen Goldstein, *The Protection of Human Rights by Judges: The Israeli Experience*, *in* JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 55 (Mark Gibney, ed., 1999).

relating to the occupation.[67] While Israel has allowed the existence of a highly atrophied system of local courts using Jordanian law on the West Bank and a system of courts employing Egyptian law in the Gaza Strip, it has, at the same time, progressively broadened the jurisdiction of its military courts to encompass most important legal matters in the Territories.[68] For reasons explained in greater detail below, but broadly attributable to the fact that 1) military courts are geared towards security interests rather than public needs from a Palestinian view and 2) Palestinians are enemies of the Israeli occupation, the human rights of Palestinians are a relatively lesser concern to the military courts.

The contrast between the rights of Israeli Jews and the rights of non-Israeli Palestinians reflects the legal dimension of the "self-other" distinction articulated in Section II of this article. In fact, nothing more graphically illustrates this dichotomy than the fact that the Palestinians are governed by a different set of laws and courts than Israeli citizens. One counter-argument to this point is that the schism is not a function of an "us-them" attitude or racism, but instead, that it results either from the necessary distinction between Israeli territory and occupied territory, or between ordinary law enforcement and anti-terrorism. However, as pointed out in Section II, if this counter-argument were true, then Jewish settlers, who live in occupied territory and are also sometimes terrorists, should be governed by the law applied to Palestinians. This is obviously not the case: the operative distinction at work in Israeli law is "us-them," or, as Martin Luther King wrote in his "Letter from Birmingham Jail," the dichotomy is based on "difference made legal."[69]

It is possible to measure the disconnection between Israel's professed concern with the human rights of Israelis versus the rights of Palestinians with respect to torture in two facets of the Israeli legal regime. The first aspect is the bifurcation of the Israeli legal system. The second feature is Israel's ambiguous support of Palestinian rights at the highest levels of the state's legal body.

B. Bifurcation of the Legal System

As a member of the Israeli Knesset once noted, "In [the Territories] there are two legal systems and two types of people: there are Israeli citizens with full rights, and there are non-citizens, non-Israelis with non-rights."[70] Indeed, Israel maintains an entirely separate legal system to administer Palestinians in the Territories. This is part of a larger attempt to prevent the occupation from

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67. *See* Articles 42-56 of the Regulations annexed to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of August 12, 1949.

68. *See* EDELMAN, *supra* note 54, at 100-104.

69. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 85 (Mentor, 1964) (1963).

70. B'TSELEM, *supra* note 54, at 15.

corrupting Israel's internal legal norms, which tend to favor individual rights over security concerns.

Occupation policy in the West Bank and the Gaza Strip is determined by the Israeli government and executed by the Israeli Ministry of Defense through its Civil Administration.[71] Military courts are an essential component of Israeli control of the Territories. The military court system operates almost exclusively in the Territories and maintains jurisdiction only over Palestinians—Jewish settlers fall under the jurisdiction of the Israeli court system.[72] As discussed in Section II, this creates a striking dichotomy in the treatment of Israeli citizens versus Palestinians. This makes little sense when national security, which can be affected by both Palestinian and Israeli conduct, is used to justify harsh legal measures under the occupation. Under the residual Mandatory Government of the Emergency Regulations, reinforced by post-1967 legislation, the scope of this jurisdiction over Palestinians is all-encompassing. The military courts were originally restricted to jurisdiction over "security" issues, but the Civil Administration has defined security so broadly that the military courts currently hear cases involving a wide variety of issues, many of which are arguably only tangentially related to national security.[73]

The maintenance of this jurisdiction clashes squarely with the Fourth Geneva Convention, signed by Israel in 1949, which limits substantive derogation of local legal systems during belligerent occupations. Israel claims that the Convention is not binding in the land captured by Israel during the 1967 Six Day War because Egypt's claim to the Gaza Strip and Jordan's claim to the West Bank were never recognized by international law.[74] Consequently, Israel is not an occupier in the legal sense established by the Convention. Furthermore, Israel holds that the rules of international law do not limit national action unless those rules have been formally incorporated within the law of that state. While Israel recognizes the application of the Convention as customary law, it maintains that customary law only serves as an aid to interpretation of international legal codes, and thus lacks any intrinsic weight.[75] The military court system consists of single-judge and three-judge military

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71. *See* EDELMAN, *supra* note 54, at 100-104.

72. *See id.*

73. *See id.* at 104. Military court jurisdiction covers: firearms; public safety; illegal military training; aiding, abetting, and membership in unlawful organizations; sabotage; "injuring the safety of the roads" (spreading nails on roadways, throwing stones at cars, etc.); contact with the enemy; forging documents; interfering with the IDF's actions; obtaining military information; entry into prohibited zones; actions against public order, such as threats, pamphleteering, displaying the Palestinian flag, unauthorized meetings, nonprevention of actions; economic offenses, such as tax evasion and bribery; entering and leaving areas without a permit; incitement; hostile propaganda; illegal contacts; and political strikes.

74. *See* John Quigley, *Judicial Protection in Israel-Occupied Territories*, *in* JUDICIAL PROTECTION OF HUMAN RIGHTS: MYTH OR REALITY? 79 (Mark Gibney, ed., 1999).

75. *See id.*

tribunals. Single-judge courts, which try the vast majority of cases, may impose sentences of up to ten years incarceration.[76] Three-judge courts may pass any sentence, although these are always contingent upon the approval of the local IDF regional commander.[77] The courts are divided into courts of first instance and courts of appeal. Military courts of appeal for sentences decided by three-judge tribunals were established in 1989 at the bequest of the Israeli Supreme Court.[78] Palestinians may also appeal cases to the HCJ.[79]

Judges and prosecutors are recommended by the IDF Military Advocate General (the chief legal officer of the Israeli armed forces), are required to hold the rank of captain or above (a captain is a junior officer in the IDF), and are formally appointed by IDF regional commanders. Judges sitting in single-judge courts and the senior judge of three-judge courts are required to have legal training. Military court judges and prosecutors are formally attached to the same military organization within the IDF, and judges are generally selected from the ranks of former prosecutors, although prosecutors are required to spend a "cooling-off period" in other positions before sitting as judges. Regardless of the cooling-off period, the selection process of judges begs the question of potential conflicts of interest and the questionable existence of an impartial judiciary in the Territories.[80]

1. How the Legal System Affects Palestinian Rights

This system severely limits the rights of Palestinians, particularly with respect to torture. For example, Palestinians detained by the military court system lack *habeas corpus* remedies. Until 1992, Israel could hold Palestinian suspects incommunicado for up to eighteen days before they had to be brought before a judge. In 1992, this period was shortened to eight days for lesser offenses, such as "disturbances of public order." Furthermore, suspects are often denied lawyers throughout their interrogations. Israeli Military Order 378 guarantees a detained Palestinian the right to see a lawyer upon request, or if a family-retained lawyer requests to visit the detainee. However, persons in charge of investigations can, upon special request, deny this right for up to ninety days. Ultimately, many, if not most, detainees do not consult with lawyers until they have either confessed (quite possibly under torture) or until the authorities have released them.[81] The result is that many prisoners are tortured before they are ever fully informed of their rights by a sympathetic attorney. Few complaints of torture even make it through the military court

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76. *See* JORDAN J. PAUST ET AL., INQUIRY INTO THE ISRAELI MILITARY COURT SYSTEM IN THE OCCUPIED WEST BANK AND GAZA (International Commission of Jurists, 1989).

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.; See also Israel and the Occupied Territories* at 15-16.

81. *See* HUMAN RIGHTS WATCH / MIDDLE EAST, *supra* note 3, at 106-07.

appeals system because more than half of those detained, questioned, and tortured never appeared before a judge—they are released without ever facing charges.[82] Furthermore, the adversarial nature of the occupation, the legal system, and the poverty of many Palestinians produces a chilling effect that discourages Palestinians from taking any kind of legal action against abuses: why appeal to a legal system that seems so overwhelmingly committed to depriving your community of its rights?

2. *Broader Social Effects of the Compartmentalization of Rights*

The creation of a separate legal body for Palestinians virtually compartmentalizes legal treatment of Palestinians from the legal norms enjoyed by Israeli citizens. This has two interrelated effects. First, it allows the Israeli occupation to abuse Palestinians in the name of national security (although, as argued in Section II, there may be deeper motivations at work). Secondly, it upholds the coherence of the rule of law, which ostensibly stands for the maintenance of human rights, in Israel proper. If a single legal system existed that both claimed to defend the rights of Israeli citizens and systematized torture in the manner described above, then, ultimately, we could expect to see the decomposition of the value of human rights as applied to Israelis as society grew de-sensitized to torture. As Sanford H. Kadish has written, "When torture is no longer unthinkable, it will be thought about."[83]

However, there is evidence that the "dam" separating the two legal systems in Israel is beginning to crack. As increasing numbers of Israeli settlers have expanded into the Territories, some have committed acts of random violence and even organized terrorism against innocent Palestinians. Because of the fractured nature of Israeli jurisprudence, rather than adjudicating these cases in the military courts of the Territories, the government has tried these settlers in Israeli civil and criminal courts.[84] This has helped publicize the post-Commission inequitability of Israeli law and exposed Israeli Jews to some of their government's abuses in the Territories. Just as the reporting of abuse resulted in the Commission's report, post-Commission legal inequitability resulted in the HCJ's reappraisal of torture in 1999. However, while this decision seems to disavow torture, in some respects, it is just as ambiguous in its definition of "coercion" as the Commission's report. This reflects fundamental problems in the HCJ's ability to uphold the rule of law in the maintenance of human rights in Israel.

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82. *See* EDELMAN, *supra* note 54, at 106-7.
83. Kadish, *supra* note 49, at 353.
84. *See* EDELMAN, *supra* note 54, at 101-2.

C. *The Israeli Supreme Court*

Sitting as the HCJ, the Israeli Supreme Court (the Court) has jurisdiction in three primary areas. First, it serves as Israel's court of final resort, hearing civil and criminal appeals from Israel's district courts and appeals generated by the military courts in the Territories. Secondly, the Court functions as an appellate court for serious criminal cases or civil suits involving large amounts of money. Lastly, it adjudicates all administrative matters. As Israel's highest legal authority, the Court bears the greatest burden for the state's legal treatment of torture. However, the Court's response to torture has generally proven ambiguous, reflecting competing interests in the Israeli judiciary between the Court's fear that it might forsake its autonomy if it upholds the rights of Palestinians too boldly, the grip of national security narrative on popular culture, the spill-over of human rights abuses from the military courts, and the consequent realization of the failings of Israeli legality.

In *Segal v. Minister of Interior*, the Court stated that it must exercise increased authority to protect the rule of law in Israel: "When the Court does not become involved, the principle of the rule of law becomes flawed. A Government that knows in advance that it is not subject to judicial review, is a Government likely not to give dominion to the law, and likely to bring about its breach."[85] Yoav Dotan has amassed evidence suggesting that despite this rhetoric, the Court has, in the past, feared to act decisively to protect the rights of Palestinians because it was afraid that doing so would place it in conflict with the government, thereby jeopardizing the Court's prestige and autonomy.[86] This implies that the rule of law may not be as strong in Israel as Israelis might prefer to believe.

Dotan examined petitions to the HCJ from Palestinians in the Territories from 1986-1995. This period saw a sharp increase in the number of Palestinian appeals due to the violent excesses of the Intifada; in the twenty years between 1967 and 1986, the HCJ received 557 petitions from Palestinians, whereas during the first four years of the Intifada, the HCJ received 806 petitions.[87] The Court responded to this high volume of complaints, many of which concerned human rights violations, with strong rhetoric stressing the HCJ's commitment to judicial activism and human rights. According to most studies, Palestinian petitions to the Court during this period enjoyed extremely low rates of success. Based on these studies, it is only possible to conclude that the HCJ never translated its rhetorical attachment to human rights into a willingness to intervene in decisions of the military

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85. EDELMAN, *supra* note 54, at 103, quoting Segal v. Minister of Interior (1980) 34 (iv) P.D. 249.

86. *See* Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada*, 33 L. & SOC'Y REV. 319 (1999).

87. *See id.* at 328.

government on behalf of Palestinians.[88]

However, Dotan found that in a relatively high rate of cases, Palestinian petitioners succeeded in their claims via out-of-court settlements in spite of low rates of success in final court decisions. In fact, in absolute terms, Palestinian petitioners achieved their goals, either fully or partly, through HCJ adjudication in about six out of ten cases—a rate significantly higher than that of non-Palestinian petitioners (an unsurprising fact given the severity of human rights violations arising in these claims).[89] Dotan argues that this large reliance on out-of-court settlements, rather than public decisions and judicial statements, reflects on the political context in which the HCJ adjudicated human rights violations of the Palestinians during the Intifada.

This behavior makes sense in light of the view that judges seek to maximize two competing interests--their influence on society and their institutional autonomy. While these interests sometimes cohere, often, the more a court seeks to influence a society, the more likely it is the court will interfere with political spheres of responsibility, thereby risking the possibility of a backlash against judicial activism. During the Intifada, the HCJ faced a large amount of criticism from IDF leaders, cabinet members, and senior politicians who argued that legal constraints prevented decisive action against Palestinian unrest and threatened national security. Moreover, surveys reveal that HCJ rulings in favor of Palestinian human rights have generally enjoyed less support than other areas of jurisprudence. Consequently, it is unsurprising that the HCJ would find that the only way it could serve Palestinian rights without threatening its own continued viability was through out-of-court dealings.[90] Considering the current tension surrounding the Palestinian-Israeli peace process, it is quite likely that this apprehension still influences HCJ decisions in regards to torture, as well as other areas concerning Palestinian rights.

These contradictory pressures are also apparent in the two major legal statements regarding interrogations: the Commission's report and the HCJ's 1999 decision. For example, while the Commission's report was a direct response to the realization of GSS abuses of Palestinians under interrogation, its tacit approval of "coercion" and classified articulation of guidelines for use of coercion, which effectively sanctioned as de jure what had only been de facto abuses, reflected the need to satisfy Israel's preoccupation with national security.

Similarly, while the 1999 decision is the HCJ's reply to post-Commission human rights concerns, it nonetheless reflects the lingering anxiety in Israeli society that if the government does not maintain a "tough" attitude towards Palestinian subversives, Israeli security might suffer. Thus, in

88. *See id.* at 329.
89. *See id.* at 335.
90. *See id.* at 345-47.

1999 the Court specifically addressed post-Commission criticism of the necessity rationale for coercive interrogations, stating "[u]ntil [this decision]...the Court did not actually decide the issue of whether the GSS is permitted to employ physical means for interrogation purposes in circumstances outlined by the defense of 'necessity'."[91] As discussed in Section I, the HCJ disavowed the necessity defense as a prospective justification for coercive interrogations and even went so far as to claim that the Commission's report never legitimized physical coercion. Perhaps more significantly, the Court continued by rejecting any sort of consequentialist balancing of evils in regards to use of physical violence and by explicitly accepting international legal norms concerning torture:

> [A] reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject [of interrogation] and free of degrading handling whatsoever...Human dignity also includes the dignity of the suspect being interrogated...This conclusion is in perfect accord with (various) International Law treaties—to which Israel is signatory—which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment." [citations omitted] These prohibitions are "absolute." There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigative practice.[92]

While the HCJ's 1999 judgment seemingly disavows physical torture, it notes "[i]f the State wishes to enable GSS interrogators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose."[93] Furthermore, by failing to address specifically psychological interrogation techniques, the decision implicitly retains for Israel the right to psychologically coerce Palestinian suspects (which may still, of course, allow for the torture of Palestinians in light of the definition of torture used in this article). Thus, it appears that the Israeli judiciary is still struggling to maintain the coherence of a legal system that holds one set of basic rights for citizens and another for non-citizens within the framework of a single polity which implicitly claims to endorse universal human rights. While that legal system has grown closer to acknowledging the problems in employing torture, the tacit retention of the right to psychologically coerce suspects suggests that while the legal system has limited the means to torture Palestinians, it still accepts some "balancing" of their rights vis-à-vis the rights of Israelis.

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91. *Judgment, supra* note 6, at para. 17.
92. *Id.* at para. 23.
93. Grosso, *supra* note 21, at 335-36 (quoting *Judgment* at para. 37).

CONCLUSION

There are indications that the Israeli government ceased torturing Palestinian detainees following the HCJ's 1999 decision, [94] but it is difficult to predict the ultimate effectiveness of the judgment in preventing torture given the turbulence of the current state of Israeli-Palestinian relations. In fact, as recently as March 2000, then-Prime Minister Ehud Barak announced that a governmental committee would examine the possibility of passing legislation allowing the GSS once again to apply physical coercion against Palestinians in the Territories.[95] In any case, we may conclude that Israel has tortured Palestinians in recent history, and it did so, if not with the full approval of the state's legal body, then at least with that legal body's tacit, if conflicted support. If we accept that Israel is a democratic country, even in the attenuated sense of existing as an ethnic democracy, then two issues should immediately come to mind. The first is the acceptance that democratic states, which implicitly claim an ideological commitment to abstract notions of freedom and dignity in terms of human rights, abuse those rights. However, this should not surprise anybody, given the acknowledged fact that democratic regimes have abused these rights in the past. This begs the larger question of whether or not humanism of this sort bears any real weight, beyond vague rhetorical invocations, on the reality of democratic rule. The second issue is the role of the law in Israel in legitimizing and refusing to address fully what it formally rejects as illegitimate—torture.

Despite clear aversion to the use of torture, the Israeli judiciary has proven unable to address the use of torture in the Territories in a way which reconciles the abuse of Palestinians with the rights accorded to Israeli citizens. If a legal body is unable or unwilling to foment change when it clearly recognizes the need for such change, we must question the law's centrality to that society. Because Israel appears to be a functioning democracy, even if that democracy arguably does not fully extend to non-Jewish citizens, we must question the implications for the primacy of the rule of law in any democracy. At the very least, may conclude that in regard to the torture of Palestinians, the Israeli legal regime is largely subject to the powerful grip of the country's national security narrative and the influence of the Israeli government's occupation policies.

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94. *See id.* at 307 (citing a letter from Joanna Oyediran, Researcher, Amnesty International / International Secretariat, September 15, 2000, reporting that Palestinian detainees held by the GSS had not reported torture or ill-treatment since the judgment).

95. *See* AMNESTY INTERNATIONAL, ORAL STATEMENT TO THE UN COMMISSION ON HUMAN RIGHTS CONCERNING ISRAEL AND THE OCCUPIED TERRITORIES (2000), *available at* http://www.angelfire.com/ia/palestinefoever/amnestytorture.html.

MILITARY AND JUDICIAL INTERVENTION: THE WAY FORWARD IN HUMAN RIGHTS ENFORCEMENT?

March 24, 1999 marked the dawn of two important developments in the enforcement of international human rights law. First, the North Atlantic Treaty Organization (NATO) launched aerial attacks against the Federal Republic of Yugoslavia (FRY) purportedly to alleviate the humanitarian crisis in the republic of Kosovo. Second, the House of Lords issued its decision that, in principle, denied the former Chilean Head of State, General Augusto Pinochet, immunity from extradition for crimes committed under his authoritarian regime.[1] Ostensibly, both events symbolize a significant shift away from the traditional international law impetus on the sovereignty of the state in favor of the greater protection of human rights norms. Prior to the interventions in Kosovo and Chile, the enforcement of substantive human rights was criticized as inadequate and even non-existent. This paper analyses the efficacy of the military intervention in the former Yugoslavia and of the judicial intervention in Chile on the enforcement of human rights and assesses the significance of each event for future enforcements. This inquiry is particularly relevant because state sovereignty, although weakened, continues to play a role in international legal and political relations.

I. MILITARY INTERVENTION IN KOSOVO

The crisis in Kosovo threatened humanitarian disaster: daily news reports documented the FRY's employment of artillery, tanks, and anti-aircraft guns to commit human rights atrocities against its own people on the basis of ethnicity and race. The media recounted the FRY's attempts to ethnically cleanse whole peoples and continuously relayed visual images of the forceful removal of Kosovar Albanians from their homes. Reports of violent attacks by the Kosovo Liberation Army (KLA) paralleled those of the FRY. In the wake of Bosnia, few disagreed that the crisis necessitated some form of response from the international community.

A. Attempts to Resolve the Crisis Through Peaceful Means

The Contact Group[2] and the European Union consistently called upon the FRY and KLA to end the violence and reach a political solution. As tension between the FRY security forces and the KLA mounted, the United Nations Security Council (Council) adopted Resolution 1160 in March 1998, which both mirrored the attempts of the Contact Group to secure a peaceful

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1. R. v. St. Metro Stipendiary Magistrate and Others, *ex parte* Pinochet Ugarte (No. 3) 2 WLR 827 (H.L. 1999).

2. Composed of Great Britain, France, Germany, Italy, Russia and the United States.

resolution and imposed an arms embargo on the FRY.[3] Notably, the Council did not declare the situation a threat to peace and security in the region, whereby its Chapter VII[4] powers would be formally invoked, until its later adoption of Resolution 1199.[5] The FRY's failure to comply with the demands of Resolutions 1160 and 1199 resulted in the Contact Group supporting a United States led envoy, led by Richard Holbrooke, United States Ambassador to the United Nations, that secured the agreement of Yugoslavian President Slobodan Milosevic to comply with the resolutions. To enable monitoring of such compliance, Milosevic agreed to a NATO-led air verification mission and an unarmed ground mission of the Organization for Security and Cooperation in Europe (OSCE). The Council adopted resolution 1203[6] to formally endorse the Holbrooke agreement and to demand its full and prompt implementation. However, the agreements were only temporarily effective. Milosevic's co-operation soon lapsed and violence erupted once again. The Contact Group then agreed on the "basic elements for a political settlement"[7] and talks between the FRY and the Kosovar Albanians opened on February 6, 1999 in Rambouillet, France. When Milosevic refused diplomacy, NATO determined that sufficient grounds existed for the use of force.

B. The Potential for the Adoption of Sanctions with Teeth

The failure of efforts to secure a peaceful resolution and consolidate peace in the Balkan region compelled the international community to seek stronger means of redress, specifically in the form of military intervention. Arguably, the call for the adoption of military measures followed logically from the failure of the more pacific resolutions to impact the crisis. Nevertheless, recourse to military action to end human rights abuses is an uncertain area due to concerns of legality and legitimacy.

The international community traditionally recognizes the United Nations Charter (Charter) as the instrument most closely resembling a written international constitution. Article 2(4) prohibits "the threat or use of force against the territorial integrity or political independence of any state." One of the two exceptions to this prohibition lies within the collective security

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3. *See* S.C. Res. 1160, U.N. SCOR, 3868th mtg, U.N. Doc. S/RES/1160 (Mar. 31, 1998), *available at* http://www.un.org/Docs/scres/1998/sres1160.htm.

4. See infra Part I.B., *The Potential for the Adoption of Sanctions with Teeth.*

5. S.C. Res. 1199, U.N. SCOR, 3930th mtg, U.N. Doc. S/RES/ 1199 (Sept. 23, 1998), *available at* http://www.un.org/Docs/scres/1998/sres1199.htm.

6. S.C. Res. 1203, U.N. SCOR, 937th mtg, U.N. Doc. S/RES/ 1203 (Oct. 24, 1998), *available at* http://www.un.org/Docs/scres/1998/sres1203.htm.

7. Foreign & Commonwealth Office, *Kosovo: Chronology March 1998-March 1999*, Focus International at 9 and Annex A (28 July 1999), *available at* http://www.fco.gov.uk (last visited Jan. 28, 2002).

provisions of Chapter VII.[8] Chapter VII permits the Council to use force itself or to authorize its members to use force in the fulfillment of its responsibility to maintain and protect international peace and security under Article 24(1). It essentially assigns to the Council the role of international police officer.

In theory, the Council's determination that the situation in Kosovo constituted a threat to international peace and security[9] paved the way for the adoption of a resolution on the use of force. In reality, such a resolution was unforeseeable given the Council's perceived inability to agree upon sanctions with bite and thus effectively fulfil its role as international police officer. Past experience predicted that the Council would not agree upon the use of force in Kosovo. Since 1990, the Council had authorized the use of force in only three instances[10] - a small number compared to the number of situations in which the Council has failed to act or plainly ignored. Further, none of the crises that the Council declared to constitute a Chapter VII situation, were fully resolved.[11] Thus, if negotiation and possibly the application of less coercive Chapter VII sanctions failed, the situation was left to fester.

True to form, in responding to the crisis in Kosovo, the Council followed its trend of adopting ineffectual sanctions. The Council responded to the situation with a weak and half-hearted array of sanctions, predictably meeting cynical global expectations by failing to agree upon the use of force after Russia indicated that it would veto such a proposal. The inability of the Council to maintain peace and security in the region reflects the inherent conflict within the Council between the traditional conception of state sovereignty and the nature of contemporary warfare, which predominantly takes place within state borders. The change in the nature of international conflicts coupled with the increasing focus on the value of human rights presents an enormous difficulty for the Council in the fulfillment of its mission. Critics cannot condemn the Council for its failure to authorize a military intervention without acknowledging the historical and political obstacles facing the Council. These obstacles generally highlight the intrinsic difficulty of enforcing human rights norms through military intervention when the violations occur within a state's borders. Further, analysis of the obstacles reveals that the Council can never be the appropriate body to enforce human rights norms through the use of force.

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8. The other exception is the right of self-defense under Article 51.

9. *See supra* note 5.

10. The 28 nation military coalition against Iraq led by the United States and the authorization of regional delegations in Bosnia and East Timor.

11. Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN – A Dialectical View*, at http://www.ejil.org/journal/Vol6/No3/art2.html (last visited Jan. 28, 2002).

C. *The Difficulty of Reaching Agreement on the Use of Force: The History of the United Nations Charter*

Although Article 2(4) of the Charter exempts the Council from the general prohibition against the use of force, the exception only applies in so far as it meets the responsibility of Article 24(1) to maintain and protect international peace and security.[12] Thus, the Council's crucial challenge is to determine the types of situations that demand the intervention of the Council in order to maintain or protect international peace and security. The Charter was created towards the end of World War II. Under such circumstances, the drafters of the Charter regarded state sovereignty as a key factor in maintaining international peace and security as evinced by Article 2(4). Clearly, the drafters intended that force be used only in limited circumstances. However, the problem of defining the parameters of these limited circumstances continues to provoke aggressive debate as no instrument provides a guide to the extent of the exceptions. Thus, the proper method of interpretation of the exceptions is unclear, and the result is the promotion of unequal voting power among member nations.

1. *The Unclear Scope of the Exception to the Use of Force*

The unclear scope of the exception presents two problems. First, the lack of specificity regarding the parameters of collective defense compels certain members of the Council to adopt a narrow interpretation of the Council's authorization to use force. This narrow interpretation results in the failure to consider protection of human rights. The Charter itself embodies the principle of non-intervention in the affairs of sovereign states and makes scarce reference to substantive human rights.[13] This lack of focus on human rights reflects the time during which the Charter was adopted - towards the end of World War II when human rights did not feature very high on the drafters' agenda.[14]

Nevertheless, the Charter does not exist in a vacuum, but rather in a constantly evolving system of international law in which the promulgation of human rights norms has rapidly come to the forefront. The result has been controversially wide interpretation of the Council's authorization to use force and involves the enforcement of new and developing norms. Such norms include international human rights in so far as they fall under the umbrella of the Council's primary responsibility for the maintenance and protection of

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12. *See supra* Part I.B.

13. U.N. CHARTER art. 2(7), art. 55, and Preamble.

14. *See,* Koskenniemi *supra* note 11, at 4 n. 45 (discussing the failed attempt by the United States to incorporate the protection of basic human rights into the Council's mandate).

international peace and security.[15] Inevitably, the two disparate schools of interpretation produce huge conflicts and contribute greatly to the Council's inability to agree on the situations that require collective intervention.

2. *Political Paralysis and Arbitrary Decision Making*

A second issue constraining the effective enforcement of international human rights norms through the Council is the superpower balance inherent in the Permanent Five membership. The members of the Permanent Five consistently fail to act in the best interests of the global community. Instead, these nations prefer to act only in situations that are compatible with, or promise to promote their own nation's foreign policy and will issue a veto or an abstention in situations that are not favorable to their own foreign relations. The lack of a legal culture within the Council is characteristic of an entity that has been described as, "an elitist, political organ whose primary responsibility is the maintenance of a political conception of international ordering."[16] This unfortunate situation inevitably occasions the risk that the political will of one state may determine the outcome of a specific crisis.

The crisis in Kosovo was shocking but not unique. The Council's political and arbitrary decision-making is a subject of major concern when considering the expansion of the Council's authority to include humanitarian considerations under the umbrella of Chapter VII. This type of extension could risk the manipulation of such authority by the members of the Council in order to pursue political objectives under the façade of human rights protection. In particular, powerful Western states are often perceived to abuse humanitarian considerations in order to forcefully coerce sovereign states to adopt the democratic model or with the intent of overthrowing a dictator.[17] The risk, and some argue the reality, of such institutional abuse further polarizes the Council, thus preventing it from focusing on the immediate crisis. The collision of political wills may lead members to lose sight of their original mandate to maintain or restore international peace and security. This result calls into question whether the Council can ever be used as a body genuinely interested in the enforcement of international human rights norms. Many

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15. U.N. CHARTER art. 24. *See also,* THE ROLE OF LAW IN INTERNATIONAL POLITICS, ESSAYS IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 276 (M. Byers ed., Oxford Univ. Press 2000).

16. THE ROLE OF LAW IN INTERNATIONAL POLITICS, ESSAYS IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 272 (M. Byers ed., Oxford Univ. Press 2000).

17. *See* Koskenniemi, *supra* note 11, at 4 (claiming that the motivation of the Council, when it authorized the United States to use force against Iraq, was not of a humanitarian nature, but for the purpose of overthrowing the Iraqi political order).

expect Chapter VII's enforcement provisions to remain a dead letter.[18] Hence, the question of how international human rights are to be enforced in the twenty-first century, if the Council cannot guarantee their adequate protection arises. In the exemplary situation of Kosovo, the Council's inaction left the international community with two choices: to continue encouraging negotiations and apply economic sanctions or to allow another actor to assume the role the Council was unable to fill. The void left by the Council motivated NATO, under the rubric of humanitarian intervention, to authorize the use of military action by its members in order to compel compliance with the Council resolutions.

D. NATO's Intervention

1. The Legality of NATO's Use Of Force

International law does not readily recognize the doctrine of humanitarian intervention as evidenced by its absence from the general corpus of international law, specifically the Charter; the minimal evidence of its adoption in state practice; and the dangerous and uncertain precedent such a doctrine sets.[19] Most importantly, the concept of humanitarian intervention lies in direct conflict with the black letter law of the Charter, which only permits the use of force in two instances.[20] NATO's unilateral intervention fell into neither category, therefore, the unilateral use of force constituted a clear breach of the Charter.[21] Additionally, the intervention was a breach of NATO's founding document - Articles 1 and 7 bind the members to act with the UN Charter and Article 5 endorses the use of force only to respond to an armed attack against a NATO member.

Accepting that international law coupled with the paralysis of the Council denied any foreseeable stronger legal remedy than the existing Council resolutions, should the matter have ended there? Many answered no. The rapidly deteriorating situation in Kosovo demanded some form of response in order to contain and prevent further escalation of the humanitarian crisis and to stabilize the peace and security in the region. Clearly, such action

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18. *See* Helmut Freudenschub, *Between Unilateralism and Collective Security: Authorizations of the Use of Force by the UN Security Council, at* http://www.ejil.org/journal/Vol5/No4/art2.html (last visited Jan. 28, 2002).

19. *See* Brunno Simma, *NATO, the UN and the Use of Force: Legal Aspects, at* http://www.ejil.org/journal/Vol10/No1/ab1.html (last visited Jan. 28, 2002).
(quoting the United Kingdom Foreign Office).

20. *See* Part I.B, *The Potential for the Adoption of Sanctions with Teeth.*

21. *See also,* Robert Hayden, *Humanitarian Hypocrisy, at* http://jurist.law.pitt.edu/hayden.htm (last visited Sep. 23, 2001) (claiming that, at worst, the unilateral use of force actually constituted an act of aggression against the FRY).

would not be strictly legal, but some "hard cases"[22] may necessitate derogation from the legal constraints in order to meet the moral and political exigencies of a situation. Nevertheless, whether NATO's actions adequately rose to such a demand is more than questionable.

2. *The Legitimacy of NATO's intervention*

Some commentators argue that NATO's attempt to align itself with the spirit of the Charter somewhat legitimizes the unilateral use of force and renders it a negligible breach of the Charter. In authorizing military action, NATO's reasoning mirrored, in form and in substance, the style of a Council resolution. This presented an attempt to persuade the international community that the intervention was prompted by the inaction of the Council, and that it only acted in order to further United Nations' interests where the Council was unable to act. Simma argues that there was only a "thin red line"[23] between the legality and illegality of NATO's action, and that such efforts to get as close to the law as possible should distinguish NATO's actions from other instances of blatant unilateral use of force.

However, Simma fails to recognize that NATO's ability to embark on its quest of humanitarian intervention, thereby unilaterally extending its traditional territorial reach, rested with the fact that it had the sheer brute power to do so. No matter how much NATO dresses its actions in legal clothing, power does not, and should not, equate to legitimacy: "power is distinct from authority: a gunman's orders do not turn into law merely because there happens to be no police around."[24] The lack of authority, on the part of the Council, in the Kosovo crisis shatters the prospects of the effective legal enforcement of international human rights law by effectively rendering its enforcement at the hands of political superpowers.

In any case, NATO's concerns with legitimizing its actions by shrouding its actions in legal language failed to move beyond its initial authorization to use force. In actually carrying out the unilateral humanitarian intervention, NATO proved ill prepared to rise to the challenge of focusing on the narrow task of the enforcement and protection of human rights norms. Not only did NATO breach the Charter, it also committed textbook war crimes, thus contributing further to human suffering: the aerial attacks focused on civilian targets, destroying water and electricity supplies as well as killing a huge number of citizens.[25] The commission of war crimes directly conflicts with the very nature of humanitarian intervention, which places upon the intervening

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22. *See also,* Simma *supra* note 19.

23. *Id.*

24. Koskenniemi, *supra* note 11, at 3 (the quote is out of context but captures the nature of NATO's actions).

25. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM.JUR.INT'L L. 628, 632 (1999).

parties a duty not to aggravate the suffering.[26] Essentially the collateral damage disproportionately outweighed military damage.[27] As a result of NATO's "humanitarian intervention", Serbia and Kosovo face reconstruction costs estimated at $10 billion.[28]

The purity of NATO's motives clouded further as the stated aims of the intervention appeared to change daily, thus calling into question the true motivation of the military action. "[T]he campaign aimed variously to force Milosevic to accept the Paris peace deal; to prevent a humanitarian catastrophe in Kosovo; to degrade and destroy the Yugoslav army; to weaken Milosevic's grip on power; and to stop the spreading of conflict beyond Kosovo."[29] The range of aims raises the more ominous question of whether humanitarian considerations even lay at the heart of the motivation to intervene. Speculation as to whether the motivation was "prompted by extra-Balkan considerations[,] the place and future of Nato [sic], the role of the United States as the global military superpower and especially its strategic stake in European affairs,"[30] appears cynical, but not unfathomable. Even if such ulterior motives did not lie at the heart of NATO's bombing campaign, some authorities believe that, at the very least, its aims were ill-conceived. One such authority argues: "NATO's leadership highlighted the humanitarian issue, less to cover up any ulterior motives it may have had in waging war than to camouflage its own deep confusion regarding its aims and tactics."[31]

Further, the public refusal of NATO members to commit to a comprehensive military intervention, including the deployment of ground forces if needed, showed NATO to be as flawed as the Council in its inability to adequately commit to a crisis. The FRY intensified its onslaught against the Kosovar Albanians following the aerial attacks, a predictable reaction as Milosevic was assured that an intervening ground force would not follow the aerial attacks. This knowledge "gave Milosevic an enormous tactical advantage."[32]

3. *Prospects for Future Enforcement of Human Rights Norms*

The experience in Kosovo demonstrates that the enforcement of human rights norms in the form adopted by NATO is ineffective and dangerous. The precedent set in Kosovo, not only does little for human rights, but also

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26. *See* Christine M. Chinkin, *Editorial Comments: NATO's Kosovo Intervention: Kosovo: A "Good" or "Bad" War?*, 93 AM.JUR.INT'L L. 841, 843 (1999).

27. *See* Hayden, *supra* note 21 at 4.

28. MISHA GLENNY, THE BALKANS: NATIONALISM, WAR AND THE GREAT POWERS 1804 -1999 660 (2000).

29. *Id.* at 657-58.

30. *Id.* at 659 (quoting Maria Todorova).

31. *Id.* at 660.

32. *Id.* at 658.

threatens peace, which is ultimately the overriding concern of the international community.[33] The situation cannot be left as it stands. NATO has sent a message that should the Council fail to act in a situation that falls within the ambit of Chapter VII, a state or group of states with the power to respond to a situation will do so in whatever manner it sees fit. This message creates a slippery slope considering that "an illegitimate order is an unstable order."[34] If humanitarian intervention is set to become a reality, strict guidelines need to be devised in order to create a legitimate and effective system.

PART II: THE PINOCHET CASE

The beginning of NATO's military intervention marked the end of the judicial intervention of the United Kingdom in the legal proceedings against General Augusto Pinochet. Asmal summarises the significance of the House of Lords decision:

> It was the first time that a former head of state was subjected to extradition proceedings in a country of which he was not a national in response to a request for extradition from a country of which he was not a national and where his own State had granted him amnesty from prosecution during the transition.[35]

Again, the judicial intervention in a state's internal affairs denoted the erosion of national sovereignty. The combination of military and judicial intervention marks a wholesale attack on state sovereignty. The simultaneous timing of the two events sends the message that no state stands above the law for past or present human rights infringements.

A. *The Legal Proceedings*

The Metropolitan Police arrested Pinochet in response to an extradition request from Judge Garzon, a Spanish Magistrate. The accusation against the former Chilean head of state involved authorizing human rights abuses against his political opponents during his 1973 to 1990 military government. The alleged abuses included *inter alia,* torture, hostage taking and disappearances. International law recognizes that some crimes are of such an egregious nature as to invoke universal jurisdiction. Under such jurisdiction, states may

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33. *See,* Antoino Cassesse, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, at* http://www.ejil.org/journal/Vol10/No1/com.html (last visited Jan. 28, 2002).

34. *Id.*

35. Kader Asmal, MP, *International Law and Practice: Dealing With the Past in the South African Experience,* 15 Am. U. Int'l L. Rev. 1211, 1213 (2000).

proscribe and prosecute certain offences recognized by the international community as of universal concern. Article VII of the Convention against Torture and Other Cruel and Degrading Treatment or Punishment, as well as customary international law, dictate that the alleged perpetrators of such crimes should either be prosecuted, extradited to another state for trial, or surrendered to an international criminal court. Until the Pinochet case, the promulgated rules remained firmly theoretical. Pinochet's arrest marked the first time a state had ever invoked its power to arrest a foreign state official for human rights atrocities committed within his own state. Like Kosovo, this step signifies a remarkable move away from the primacy of state sovereignty as a consequence of the elevation of human rights norms.

The Pinochet case presented complex and conflicting principles of international law. On one side, universal jurisdiction urged the extradition or prosecution of Pinochet by the United Kingdom. On the other, head of state immunity, and, to a lesser degree, the requirement of double criminality, impeded the exercise of universal jurisdiction. Lord Steyn, Nicholls and Hoffman reversed the decision of the lower court[36] by concluding that head of state immunity did not extend to the alleged crimes under international law and consequently Pinochet was subject to extradition. Lord Nicholls, in the majority opinion, wrote: "[I]nternational law has made plain that certain types of conduct ... are not accepted conduct on the part of anyone. This applies as much to heads of states, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law."[37] Proponents of the enforcement of human rights norms celebrated the decision as a triumph towards greater enforcement.

Nevertheless, celebration was short-lived. An appearance of bias in the initial proceedings caused by Lord Hoffman's failure to reveal his position as a director of Amnesty International Charity Ltd., [38] forced the House of Lords to hear the pleadings of both sides once again before a newly composed panel of seven Law Lords. The new panel of Law Lords, more conservative than their predecessors, upheld the denial of immunity.[39] However, the ruling focused on much narrower grounds than the first. In Pinochet 1, the Law Lords based their denial of immunity upon customary international law. In contrast the Law Lords in Pinochet 3 determined that the recognition of the principle of universal jurisdiction only occurred once the Criminal Justice Act 1988 came into force. Thus, all of the alleged criminal acts, committed before September 29, 1988, fell outside the scope of universal jurisdiction. The result

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36. Composition of lower court: Lord Bingham CJ, sitting with Collins and Richards JJ

37. R v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte, 4 All E.R. 897, 905 (H.L. 1998).

38. R v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 2) 1 All E.R. 577 (H.L. 1999).

39. R v. Bow St. Metro. Stipendiary Magistrate *et al, ex parte* Pinochet Ugarte (No. 3) 2 All E.R. 97 (H.L. 1999).

was that the thirty-two criminal charges were reduced to only three: conspiracy to commit torture; conspiracy to commit torture in an unspecified number of murders in various countries, including Spain; and an official act of torture.[40] Section twelve of the Extradition Act of 1989 vested the Home Secretary, Jack Straw, with the duty to decide the ultimate fate of General Pinochet. Following the House of Lords' reduction of the number of charges, and the analysis of various medical reports indicating that Pinochet may be unfit to stand trial, Pinochet was released and returned to Chile.[41]

B. The Impact of the Case for Human Rights

Although Pinochet eventually secured release, the procedural and substantive precedent set by his case, in principle, foreshadows more far-reaching enforcement of human rights norms. The House of Lords' decision established that no one stands above the law in two respects. First, the holding reaffirms the principle that the alleged perpetrators of torture must be prosecuted or extradited in any state in the world. Second, former heads of state are not immune from the application of universal jurisdiction over such egregious crimes. In contrast to NATO's response to the crisis in Kosovo, the disposition of the Pinochet case illustrates a much stricter legalist approach to the enforcement of the human rights norms in question. This result was partly due to the inherent legalistic character of a judicial, as opposed to a military, intervention. Nevertheless, the Pinochet proceedings were subject to great political pressure, which both the judiciary and the United Kingdom government fought to resist.

The governments of the United Kingdom and Spain did not share the verve for extradition with their respective judiciary.[42] Both governments' reservations on the matter were over general concerns of state sovereignty following from the idea that governments do not want their former heads of state to be subjected to extradition and prosecution proceedings abroad. Given the extent of the United Kingdom's participation in international conflicts, the issue of protecting heads of state presented a serious concern. Further, the United Kingdom enjoys tight political and economic ties with Chile. Baroness Thatcher fervently campaigned for her political ally's release, while Pinochet tacitly supported Thatcher's government in the Falklands War of 1982. In a letter to the London Times Newspaper, Baroness Thatcher highlighted the perceived indebtedness of the United Kingdom to General Pinochet in stating,

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40. *See,* Frances Gibb, *Straw Must Clear New Legal Hurdles,* THE TIMES OF LONDON, Mar. 25, 1999, at 10, *available at* http://www.times-archive.co.uk.

41. Home Office News Release, *Senator Augusto Pinochet Ugarte,* COMMUNICATION DIRECTORATE OF HER MAJESTY'S GOVERNMENT – UNITED KINGDOM, Mar. 2, 2000, (attached answer to a written Parliamentary Question), *available at* http://www.homeoffice.gov.uk/oicd/jcu/pinochet.htm.

42. The British government did not take a stance on the issue of immunity.

"by his actions the [Falklands] war was shortened and many British lives were saved."[43] Thus, judicial intervention threatened diplomatic ties between the two countries. This threat also extended to economic pressures. Many British companies operate in Chile, and Chile is of significance importance for the British arms industry.[44] Economically, for the United Kingdom, the case constituted a dangerous embarkation.[45]

Even in light of these political issues, the Home Secretary, Jack Straw, determined the issue a judicial matter in a move intended to depoliticise the issue. Further, the assertion that Lord Hoffman's connections with Amnesty International Charity Ltd. constituted the appearance of bias, sufficient enough, to compose a new panel to hear the case reflected a strong effort to exclude political motivations from the legal proceedings.

C. The Potential Danger for Human Rights

The principle of the Pinochet case symbolizes a huge achievement for the prospective enforcement of core human rights through prosecution. Among the core objectives of universal jurisdiction over the perpetrators of human rights atrocities lies the value of the deterrent effect of prosecution on those who might violate human rights in the future. The hope is that other dictators will refrain from committing human rights abuses for fear that universal jurisdiction will be exercised against them.[46] However, this argument is somewhat ideological and practically tenuous. Recent history speaks for itself - the threat of prosecution did not halt any of the official actors in their horrific activities in the Former Yugoslavia.[47]

Perhaps more important is the effect potential extradition or prosecution has on the state in which the atrocities were committed. In contrast to NATO's military intervention, judicial intervention necessarily occurs post-crisis. Indeed, the newly democratized state of Chile intervened in Pinochet's case, advocating his release. Thus, the legal proceedings in the United Kingdom

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43. *Pinochet – Thatcher's ally*, BBC ONLINE NETWORK: BBC NEWS, *available at* http://news.bbc.co.uk/hi/english/uk/newsid_198000/198604.stm. *See also, Thatcher Stands by Pinochet*, BBC ONLINE NETWORK: BBC NEWS, March 26, 1999, *available at* http://news.bbc.co.uk/hi/english/uk/newsid_304000/304516.stm.

44. *See also, Business: The Economy, Pinochet Saga Bad for Business*, BBC ONLINE NETWORK: BBC NEWS, December 9, 1998, *available at* http://news.bbc.co.uk/hi/english/uk/newsid_222000/222899.stm (discussing the impact of Chilean customer boycott on British business).

45. *See*, Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415, 421 (2000).

46. *See*, David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999).

47. *See*, Jonathon I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 459 (1999).

potentially threatened the stability of the new democracy.[48] Asmal asserts that, "[w]here, as in Chile. . . a state declines to prosecute past despots as a result of democratic, conscious, public decision widely seen as fundamental to the implementation of democracy, [it is doubtful] that other states are, or ought to be, free to take up the task."[49] He suggests a new interpretation of state sovereignty built on the premise that, in the case where a newly democratic state democratically decides to grant amnesty to a former state official, the decision should be respected internationally.[50] The extradition proceedings compelled the sovereign state of Chile to rehash old ground and forced ordinary Chileans to deal with the past - a past which some would prefer to leave behind in order to concentrate on the future.

The actions of the United Kingdom and Spain nullified the amnesty law and pressured Chile to return to the issue of how to deal with the atrocities of Pinochet's authoritarian regime. Such a command failed to recognize that dealing with large scale human rights violations while attempting to move towards democracy requires a sensitive balancing act, which only the individual state involved can fully appreciate under the particular circumstances of the transition. Therefore, in the future, states' intent on the exercise of universal jurisdiction should be mindful of the balance between punishing a perpetrator and possibly deterring others in the future on the one hand, and, the sensitive nature of a new democracy on the other. The enforcement of human rights norms should not produce further human suffering by stirring unrest or spurring regression to the former authoritarian regime.

Further, the exercise of universal jurisdiction necessitates careful examination as it may threaten the move from an authoritarian regime to democracy itself. The authoritarian regime may refuse to relinquish power on the basis that the precedent of the Pinochet case permits any other state to exercise its right of universal jurisdiction for human rights abuses committed by its regime, even with the offer of immunity by the prospective democratic government. If states frequently invoke universal jurisdiction to extradite or prosecute violators of human rights, the inability of states to move away from an authoritarian regime becomes a real threat.[51] The political pressure imposed upon the Chilean government to annul the amnesty law, granted to Pinochet as part of the transitional agreement, illustrates the lack of guarantee such amnesty agreements ensure. On Pinochet's return to Chile, he was met with more legal proceedings for acts committed during his period as head of state. The Santiago Appeals Court recently held General Pinochet fit to stand trial on reduced charges of the attempt to conceal crimes and human rights abuses

48. *Id.* at 458.
49. Asmal, *supra* note 35, at 1222.
50. *Id.* at 1228.
51. *See,* Charney, *supra* note 47.

committed after 1973. This decision awaits appeal. Fortunately, the overturn of Pinochet's self-imposed amnesty did not jeopardize Chile's democracy, but the same may not hold true for other transitional states in the future.

D. The Precedential Value of the Pinochet Case

Theoretically, the Pinochet case facilitates the enforcement of human rights law through extradition or prosecution. However, reality suggests that the case will not hold as strong a precedent as human rights proponents might hope. Granted, the so-called "Pinochet Precedent" has been invoked in a small number of cases. For example, a Senegalese judge recently used the precedent to indict the former Chadian dictator Hissein Habre on charges of torture.[52] Nevertheless, the world continues to be governed by sovereign states, each tending to react to an inherent dilemma. A state will be cautious to actively exercise its universal jurisdiction for fear that other states will exercise their jurisdiction upon its officials. Further, the diplomatic and economic considerations underlying the Pinochet proceedings dictate that states will seek to avoid such imbalances if possible. The harsh truth is that, "states wish to avoid complications in their political and economic relations that may be produced by these prosecutions despite the gravity of the crimes and their adverse impact on international peace and security."[53]

CONCLUSION

While the military intervention in Kosovo and the judicial intervention in Chile symbolize the increasing importance of human rights protection against traditional doctrines of sovereignty and immunity, the execution of both events foreshadows the restricted application of such intervention in the enforcement of human rights in the future. The combined experience points to the danger of creating adverse humanitarian effects in the quest to relieve the situation in hand. In Kosovo, NATO's bombing caused further human suffering, and in Chile, judicial intervention threatened the young democracy. Further, the risk of double functioning results in state reluctance to enthusiastically pursue any form of intervention. States will seek to prevent a strong precedent authorizing military or judicial intervention in order to protect their territory and the freedom of their former and current officials travelling abroad.

Lorna McGregor

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52. *See, More "Pinochet Style" Prosecutions Urged: Senegal's Habre Arrest a Precursor, Says Rights Group*, HUMAN RIGHTS WATCH, March 3, 2000, *at* http://www.hrw.org/press/2000/02/pin0303.htm.

53. Charney, *supra* note 47 at 458.

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GLOBAL SOLUTIONS TO PREVENT COPYRIGHT INFRINGEMENT OF MUSIC OVER THE INTERNET: THE NEED TO SUPPLEMENT THE WIPO INTERNET TREATIES WITH SELF-IMPOSED MANDATES

I. INTRODUCTION

> *"You should not expect others to be as scrupulous as you, and you may at some time need help from the legal system. When this time comes, your position will be much stronger if you have already taken the necessary steps to formalize your intellectual property ownership."*[1]

It is predicted that worldwide Internet usage will grow to 349 million users by the end of 2000.[2] The Internet[3] is a window to the world that provides a myriad of options and problems. The possibilities of opportunities over the Internet seem endless. Everything from shopping, education, recreation, and even retrieving digital musical can be accomplished with the click of a mouse. The number of countries that do not have Internet access is shrinking.[4] In Asia alone, Internet usage is expected to increase 422% over the next six years.[5] The expansion of the Internet[6] provides a huge market for piracy.[7] The music

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1. Lewis C. Lee & J. Scott Davidson, *Intellectual Property for the Internet*, 75 (Lewis C. Lee & J. Scott Davidson eds., Wiley Law Publications 1997).

2. *See* Q. Todd Dickinson, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, Statement, *The Costs of Internet Piracy for the Music and Software Industries*, July 19, 2000. [This is Dickinson's statement before the Subcommittee on Economic Policy and Trade Committee on International Relations].

3. Jennifer Burke Sylva, *Legal and Business Issues in the Digital Distribution of Music: Digital Delivery and Distribution of Music and other Media: Recent Trends in Copyright Law; Relevant Technologies; Emerging Business Models*, 20 Loy. L.A. Ent. L.J. 217, 239 (2000). The Internet was originally created in 1969 as an experimental project called ARPANET. Its purpose was to link the computer networks of the military, defense contractors, and university laboratories conducting defense-related research. *See id.*

4. *See* Dickinson, *supra* note 2.

5. *See id.*

6. "The Internet is 'a global electronic network, consisting of smaller, interconnected networks, which allows millions of computers to exchange information over telephone wires, dedicated data cables, and wireless links. The Internet links PCs by means of servers, which run specialized operating systems and applications designed for servicing a network environment.'" Universal Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 306 (S.D.N.Y.).

7. *See* Michael B. Rutner, *The Ascap Licensing Model and the Internet: A Potential Solution to High-Tech Copyright Infringement*, 39 B.C. L. Rev. 1061, 1069 (1998).

industry has suffered a great deal from copyright infringement on the Internet.[8] Internet Service Providers ("ISPs")[9] and services such as Napster [10] are being blamed for most of this piracy. I will refer to Napster as an ISP even though a recent court decision said Napster plays a more active role in facilitating file-sharing than an ISP.[11] Theories of Third Party Liability for Infringement can apply to both and will therefore be the focus.

This is not a problem that can be isolated in a single country, its reach has no boundaries.[12] Because of the ease and speed of the Internet, piracy over the Internet crosses borders more freely than any other type of commerce or crime.[13] The copyright holder may very likely be in one country, the violator located in another and the ISP in yet another. Copyright infringement on the Internet is a global problem that begs for global solutions.[14]

It is almost impossible to regulate or enforce a crime governed by so many different laws and that crosses many jurisdictions in the process.[15] The music industry is appealing to the courts and the legislature to do something about copyright infringement.[16] Shared information contributes to the growth of a nation's intellectual property and the lack of access to copyrighted material impinges on that basic principle.[17] "Limiting access to the works by means of technological gates and digital envelopes creates a risk of establishing a climate in which only those who pay will benefit from creative

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8. *See Reimerdes*, 111 F. Supp.2d at 306. The Recording Industry Association of America reports estimated losses of $22 billion to the U.S. copyright industries worldwide from piracy. "These losses mean lost income for creative Americans – authors and composers – as well as lost jobs, revenues and foreign royalties for American workers and industry." *Id.*

9. "An ISP is a company or service that connects subscribing users to the Internet, usually in exchange for subscription fees or as part of a company or non-profit organization (e.g., educational institutions, government offices). Each ISP contains a group of users who subscribe to its particular system." Rutner, *supra* note 7, at 1067. *See also* 17 U.S.C. § 512(k). It defines a service provider as "a provider of online services or network access, or the operator of facilities therefor, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received." *Id.*

10. *Recording Industry Sues Music Start-up*, CNET, *available at* http://news.cnet.com/news/0-1005-202-1485841.html. (Dec. 7, 1999).

11. *See* A&M Records, Inc. v. Napster, Inc. 114 F. Supp. 2d 896, 919 (N.D. Cal. 2000). The court said that Napster is not an Internet Service Provider because it does not act as a mere conduit for the transfer of files. [The merits of this claim will not be argued in this Note].

12. *See* Rutner, *supra* note 7, at 1069. "Internet Transmission has been global since the early 1990's." *Id.* at 1068.

13. *See id.* at 1069.

14. *See* Rutner, *supra* note 7, at 1069.

15. *See id.* Copyright laws generally do not extend beyond the source country's jurisdictional boundaries, unless by international treaty. *See id.*

16. *See id.*

17. *See* Sylva, *supra* note 3, at 229.

works."[18] A balance needs to be struck between ensuring that consumers have easy access to music without imposing unreasonable burdens on the technology and still ensuring that the music industry receives the incentive it needs to continue creating new music.

"Copyright provides essential incentives for authors and artists to develop creative new works by ensuring their rights will be respected as they make their works available on-line."[19] International treaties play a vital role in setting standards to protect copyrights. The two most recent treaties that attempt to do this are the WIPO Internet Treaties.[20] The treaties provide protection to domestic works abroad and give authors the exclusive right to authorize their works for availability over the Internet.[21] The treaties cannot be effective to combat Internet piracy in the music industry unless every country that has Internet access follows the standards set out in the WIPO Internet Treaties. Even with ratification, the treaties still fall short because they lack enforcement standards. The violators not only have to be identified, the proper jurisdiction of law also has to be determined.[22] International treaties will clearly provide important standards to protect the music industry, but copyright holders must do everything possible to prevent an infringement in the first place.

The high-speed changes in technology will not allow the music industry to rely on treaties that take years to go into effect, or court decisions that may take just as long and are even more unpredictable. The music industry needs to supplement governments' intervention by self imposing mandates to prevent infringement. Shutting down ISP's through court action will not stop the piracy.[23] The music industry must protect itself by implementing prevention devices before their work reaches the international market.

Part II of this Note familiarizes the reader with the problem of copyright infringement over the Internet, specifically in the music industry. It proceeds to discuss existing copyright laws in the United States, Japan, and Great Britain. It further considers the dilemma faced by ISP's and provides reasons why a courtroom is not the proper battleground. Part III briefly chronicles international copyright protection but focuses on the most recent international treaties, the WIPO Internet Treaties. The major relevant provisions of each

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18. *Id.*

19. *WIPO Copyright Treaty: What is it and Why it Was Imperative for the U.S. to Ratify the Treaty, available at* http://www.bsa.org/policy/copyright/wipo_new.html. (Sept. 5, 2000).

20. *See World Intellectual Property Organization Web Page, available at* http://www.wipo.org/.

21. *See* Wendy M. Pollack, Note, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 Fordham L. Rev. 2445, 2463 (2000).

22. *See* Rutner, *supra* note 7, at 1069.

23. *See* Rutner, *supra* note 7, 1070. "Individual infringers often do not have enough assets to make legal action worthwhile. [M]ost infringing parties are not large corporations, but rather individual copies. Consequently, a copyright holder is often left uncompensated for numerous infringements of his or her copyrights." *Id.*

treaty are addressed. Part IV analyzes the ratification and enforcement problems that arise with relying on international treaties to fight copyright infringement over the Internet, and provides reasons why international treaties should never mandate global enforcement mechanisms. Part V examines possible solutions that copyright holders should use to fight the piracy and suggests that self imposed mandates are the best way to safeguard copyrights in the global environment of the Internet. Part VI concludes the Note by proposing that international treaties should never mandate global enforcement mechanisms for copyright infringement because that should be determined by the societal needs of individual countries. Finally, the Note suggests that the music industry is responsible for protecting its work and should self impose mandates for technical protection of digital music.

II. THE INTERNET, THE MUSIC INDUSTRY AND COPYRIGHT INFRINGEMENT

A. *Generally*

It has been argued that copyright law does not make sense in the Internet environment because of the ease of copying and the great difficulty of detecting infringement on the Internet.[24] On the other side of the argument are claims that even the most routine functions such as forwarding e-mail and browsing web pages are technical infringements under many country's copyright laws.[25] "Obtaining copyright protection for materials requires very little effort. Avoiding infringement is the most challenging task."[26]

Copyright is a form of protection provided by law. It is defined as a "statutory protection of an artist's or writer's work, giving the creator (or the holder of the copyright) the right to regulate the publication, multiplication, or use of the copyrighted material for a certain period of time. It is an incorporeal right; i.e., a right to something intangible...."[27] The ease of which digital music can be accessed and infringed over the Internet threatens the benefits of both the music industry and consumers. Recent lawsuits against ISP's have threatened to restrict advances in technologies and hamper creative works by artists.

Retrieving sound recordings via the Internet is relatively easy, given the right equipment. The technology has already been created and the devices can be purchased at your local computer store. Copyrighted music can be downloaded or uploaded on the Internet. An author or copyright holder can upload the material in order to reach a broad range of users, or a non-copyright

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24. *See* Lee, *supra* note 1, at 77-78.
25. *See id.*
26. *Id.* at 78.
27. Gilbert Law Summaries Pocket Size Law Dictionary 65 (1997).

holder who owns a copy of the work can also upload the material.[28] The music is then downloaded by anyone who has access to the Internet and the right technical devices.[29] If the work is protected and not uploaded by the copyright holder, a person who downloads the material may be liable for copyright infringement.[30]

Information on the Internet that is downloaded is copied material, but that may not necessarily mean an infringement of copyright has occurred. A claim of infringement has to be based upon the copyright owner's exclusive rights of reproduction. This right is defined differently among national copyright laws. Liability stems from the fixation of materials on a computer's Random Access Memory when information is viewed on the Internet.[31] "However, if the copyright owner places his/her work on the Internet, it could be inferred that the owner expects other Internet users to read and download the copyrighted work." [32]

"Digital compression technology makes it possible to store audio recordings in a digital format that uses less memory and may be uploaded and downloaded over the Internet."[33] Compression technology allows data that occupies a large amount of space to be compressed into files that can be easily transferred across the Internet and downloaded onto any computer.[34] This process appeals to consumers of music who want free access to popular music. A common format used to store the compressed audio files is MP3.[35] MP3 files are small and they require little time to transfer information.[36] Due to the size of the files and transfer time, they are well suited for transmission over the Internet.[37]

MP3 is an international format with no ties to a single company.[38] This format has become internationally popular, replacing "sex" as the most

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28. *See* Pollack, *supra* note 21, at 2448. Copyright holders typically upload material to reach a broad audience or to promote a forthcoming album. *See id.*

29. *See id.*

30. *See id.* "Piracy is practiced both by individual consumers making copies for their own use, and by 'professionals' who seek to make content available on a wide scale." *Id.*

31. *See* Douglas Reid Weimer, CRS Report for Congress, *The Copyright Doctrine of Fair Use and the Internet: Caselaw* 3 (March 30, 2000).

32. *Id.*

33. *Napster Inc.*, 114 F. Supp.2d at 901.

34. *See* Pollack, *supra* note 21, at 2449. "These files retain CD-quality sound no matter how many copies are made, and can be played through computer speakers any time the listener wishes to hear them." *Id.*

35. *See id.* "Free MP3 software applications available on the Internet allow users to upload songs from their own CD collections by 'ripping' the files from their CDs and encoding them in MP3 format...." *Id* at 2450.

36. *See id.* at 2449.

37. *See id.*

38. *See* Pollack, *supra* note 21, at 2485.

searched word on the Internet.[39] MP3 files can be acquired by either downloading audio recordings that are already converted by using an ISP or by using "ripping" software to copy an audio compact disc directly onto a computer hard-drive.[40] Laws have not had time to catch up with compression technology because it has only been available since 300-MHz processors blasted into the market.[41] The music industry's outrage stems from the fact that ISP's, such as Napster, enable copying and distribution of copyrighted music that has not been authorized.[42] MP3 offers no protection against unauthorized copying, use, or distribution of music unless it contains a copyright management system.[43]

B. Existing Laws

An "International Copyright" does not exist.[44] Copyright protection throughout the world depends largely upon the laws of the particular country where the infringement takes place.[45] The common practice for those who want to protect their work is to register for protection anywhere it is used, sold, manufactured, or licensed.[46] This practice is very expensive and usually elusive due to policing and enforcement problems.[47] A greater problem has developed with the advent of the Internet. It is impossible to predict everywhere digital music will be uploaded or downloaded. A copyright is not expected to understand or monitor copyright laws throughout the world. International treaties and conventions have tried to extend copyright protection in simplified form.[48] Such treaties fall short of standardizing protection to

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39. *See id.* at 2446. MP3 is more likely to be used by unsigned bands who want to get their music to a wide audience. *See id.* at 2450.

40. *See* Napster, Inc., 114 F.Supp.2d at 901. "ripping software compresses the millions of bytes of information on a typical CD into a smaller MP3 file that requires a fraction of the storage space". *Id.*

41. *See* Pollack, *supra* note 21, at 2450.

42. *See Riaa/current issues, available at* http://www.riaa.com/Napster.cfm. (Sept. 20, 2000).

43. *See* Pollack, *supra* note 21, at 2450. "Digital rights management is an industry term used to describe the attempt by content providers of copyrighted materials to preserve authorship of a digital work." *Id.*

44. *See* U.S. Copyright Office, Copyright basics (2000).

45. *See id. See also* Lee, *supra* note 1, at 76. In Germany, the only claim that can be made against a German in respect of an unlawful act perpetrated abroad are those that would be actionable under German law. *See id.* at 244. And this also states that the EU Commission and the U.S. take different views in describing temporary copying of a document from the Internet into a PC. The U.S. describes it as reproduction while it regards keeping data available as dissemination. The EU advocates a right to digital distribution. *See id.*

46. *See* Lee, *supra* note 1, at 285.

47. *See id.*

48. *See* U.S. Copyright Office, *supra* note 44.

ensure universal protection and enforcement because it is impossible for them to be comprehensive throughout the world.

The courts in many countries have attempted to get involved with the issue of copyright infringement of music on the Internet, with disappointing results for everyone involved.[49] This issue is more properly the domain of the legislature than that of the court. When the courts get involved it only makes international standards harder to apply.[50] Countries talk to one another in efforts to balance global problems and to develop solutions. There are a multitude of examples of international conferences and communications between leaders of countries on global issues.[51] Courts of one country do not discuss the global impact of decisions with courts of other countries. Legislation can be implemented to combat global problems, court decisions only affect its respective jurisdictional boundaries. Even wide sweeping decisions, such as those made by the United States Supreme Court, only affect the jurisdiction of the United States. The Internet has presented new problems and the courts have not had time to catch up. Even though legislation implemented in a particular country generally only affects that particular country, the purpose of legislation often has a global reach.[52] International standards, such as the WIPO Internet Treaties, cannot be implemented without national legislation.[53]

1. United States

There is no state copyright law in the United States; it is governed exclusively by Title 17 of the U.S. Code.[54] The limitations of liability relating to material online are set out in § 512.[55] Congress has enacted legislation to protect copyrights from infringement over the Internet.[56] This is an ongoing process that requires attention now and well into the future. Sound recordings

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49. *See generally* Napster, Inc., 114 F.Supp.2d 896. The court defers to the legislature. *See id.*

50. *See* Rutner, *supra* note 7, at 1070.

51. *See generally* WIPO Webpage, *supra* note 20. (General information and lists of international conventions and treaties).

52. *See* Rutner, *supra* note 7, at 1070.

53. *See* WIPO Webpage, *supra* note 20.

54. *See* Lee, *supra* note 1, at 9.

55. *See* 17 USCS §512 (2000). (provisions scattered throughout code).

56. *See* H.R. 3456, 106th Cong. (1999). Known as the "Digital Theft Deterrence and Copyright Damages Improvement Act of 1999," this act amended the Federal copyright law with respect to the statutory damages available for copyright infringement. *See id. See also,* Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998). Known as the "Digital Millennium Copyright Act of 1998," this act implements two 1996 World Intellectual Property Organization Treaties: The WIPO Internet Treaties. *See id. See also U.S. Copyright Office*, Copyright Legislation, visited September 27, 2000, *available at* http://lcweb.loc.gov/copyright/legislation/archive/. (This site provides developments in copyright legislation during the 105th Congress and the 106th Congress).

were given protection for the first time in 1971, but public performance rights were not protected until digital technology made the change necessary in 1995.[57] The United States Constitution grants Congress the enumerated power to give exclusive copyrights to authors, inventors and creators through Article I, Section 8, Clause 8.[58]

The fair use doctrine in copyright law was codified in the Copyright Act of 1976.[59] The doctrine sets out four criteria to determine if a use is an infringing use: "1) the amount and character of the use; 2) the nature of the copyrighted work; 3) the amount copied in relation to the whole copyrighted work; and 4) the effect of the copying on the potential market for the copyrighted work."[60] Since American courts have treated the Internet as a form of communication, the four fair use factors are generally applied to determine if an infringement has occurred over the Internet.[61] Therefore, although copyright owners possess various exclusive ownership rights, under certain circumstances, the fair use doctrine permits the unauthorized use of copyrighted works.[62] It is unclear whether the fair use doctrine applies to online music infringement.[63] Although the fair use doctrine can be a defense to some copyright infringements, the doctrine probably will not work as a defense to copyright infringements of digital music because of the verbatim reproduction of the copies.[64]

The Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement was implemented in the United States in 1994 when President Clinton signed the Uruguay Round Agreements Act.[65] This substantively altered copyright law in the United States because it restored copyright protection to foreign works which are protected by their "source" country but

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57. *See* Arlene Bielefield & Lawrence Cheeseman, *Technology and Copyright Law: A Guidebook for the Library, Research, and Teaching Professions*, 29 (Neal-Schuman Publishers, Inc. 1997).

58. U.S. CONST. Art. I, § 8, cl. 8. "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

59. *See* Weimer, *supra* note 31, at 2. "Fair Use means that a copyright owner's exclusive rights are technically violated, but other circumstances justify the violation." *Id. See also* Lee, *supra* note 1, at 72.

60. Weimer, *supra* note 31, at 2.

61. *See id.*

62. *See id.*

63. *See* Pollack, *supra* note 21, at 2459. "The answer may [d]epend on whether or not an entire song is copied, and most likely turns on whether the use is a private or commercial one." *Id.*

64. *See* Stacy Snowman & David H. Bernstein, Protecting Your Intellectual Property 193, (Practising Law Institute 1997).

65. *See id.* at 147.

which are in the public domain[66] in the United States.[67] The Restored Work[68] is entitled to all the remedies of the United States Copyright Act.[69] The Act included a single exception to immediate enforcement for reliance parties,[70] persons who have relied in good faith on the public domain status of the work.[71] In the music section of the Act, compulsory licensing is required.[72]

The Digital Performance Right in Sound Recordings Act was enacted in 1995.[73] This act requires a party to consider both the record company's rights in the recording as well as the underlying music publisher's public performance or distribution rights prior to making a digital transmission of a sound recording.[74] An interactive service is one of three types of digital performances distinguished in the Act. It defines an interactive service as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient."[75] The Act grants a public performance right to copyright holders of sound recordings when they are digitally performed by an interactive service.[76] The Act helps to ensure that copyright owners are compensated for distribution of their work by digital transmission.[77] This provides only limited protection because the only way this can work is if the user is downloading a song from a company that employs a compression technology.[78]

In the United States, copyright protection applies regardless of the nationality or domicile of the author.[79] The protection also applies if one or more of the authors of the work is a national or domiciliary of the United States[80] The United States copyright law only offered protection to United

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66. *Id.*

67. *See* id. at 147.

68. "The Restored Work will be that remainder of the copyright that the work would have had in the United States, but for the loss of the U.S. copyright." *Id.* at 148.

69. *See id.*

70. *Id.* To qualify as a reliance party you must: "a. used the Restored Work both before and after January 1, 1996; and b. made or acquired copies of the Restored Work before January 1, 1996; c. bought or acquired at any time an interest in a derivative work based upon the Restored Work; or, d. otherwise acquired significant assets (multiple copyrights, bulk assignment, inventory) from another Reliance Party." *Id.*

71. *See id.*

72. *See id.*

73. *See* Pub. L. No. 104-39 (1995).

74. *See id.*

75. *Id.*

76. *See* Pollack, *supra* note 21, at 2454. For example, if a user requests a song from an Internet site that is licensed to release a copy for a fee, the Internet site pays a subscription fee to the record company for allowing that user access. *See id.*

77. *See id.* at 2455.

78. *See id.*

79. *See* U.S. Copyright Office, *supra* note 44.

80. *Id.*

States citizens and residents until 1891.[81] Copyright law in the United States has evolved from a bare bones structure of protection of domestic copyrights, to an intricate system that includes protection for foreign works.

The Digital Millennium Copyright Act of 1998 (DMCA)[82] implements the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in Title I of the Act.[83] The Act also has important domestic provisions. Title II, the "Online Copyright Infringement Liability Limitation Act," creates limitations on the liability of online service providers for copyright infringement when engaging in certain types of activities.[84] The crucial part of this is that it provides "safe harbors" for ISPs under four sets of circumstances.[85] The Act also includes three other articles that address other significant copyright-related issues.[86] By providing "safe harbors", "title II of the DMCA forces copyright owners to target the actual infringers, those individuals who upload songs against an artist's will, instead of giving the owners a liability catch-all in the ISPs."[87] However, this is not a saving grace for ISPs. There are gaps in the Act that may expose ISPs to liability, and since ISPs generally have "deep pockets", the costs of litigation may be justified for copyright holders.[88]

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81. *See* Bielefield, *supra* note 57, at 26.

82. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

83. *See id. See also,* Susan A. Mort, Article, *The WTO, WIPO, & the Internet: Confounding the Borders of copyright and Neighboring Rights,* 8 Fordham Intellectual Property, Media & Ent. L.J. 173, 175 (1997). (Although the United States signed the Treaties, it was not among the initial signatories because of limitations in the delegation's negotiating authority).

84. *See id.*

85. *See* Pollack, *supra* note 21, at 2465. "First, section 512(a) limits the liability of ISPs in transitory digital network communications as long as the ISP is acting automatically with respect to the user and the material.... Second, section 512(b) removes liability for system caching, which is the practice of temporarily storing copies of popular Internet material locally in the ISP's server so that the ISP's users can access that material more readily... The third limitation on liability is for information residing on systems or networks at the direction of users... Lastly, section 512(d) provides a safe harbor for information location tools. This section applies to hyperlinks, online directories, search engines, and other location tools of that nature." *Id.*

86. *See* Mort, *supra* note 83, at 176. *See also* The Digital Millennium Copyright Act of 1998, U.S. Copyright Office Summary (December 1998). Title III, the "Computer Maintenance Competition Assurance Act," creates an exemption for making a copy of a computer program by activating a computer for purposes of maintenance or repair. Title IV contains six miscellaneous provisions, relating to the functions of the Copyright Office, distance education, the exceptions in the Copyright Act for libraries and for making ephemeral recordings, "webcasting" of sound recordings on the Internet, and the applicability of collective bargaining agreement obligations in the case of transfers of rights in motion pictures. Title V, the "Vessel Hull Design Protection Act," creates a new form of protection for the design of vessel hulls. *See id.*

87. Pollack, *supra* note 21, at 2466.

88. *See* Sylva, *supra* note 3, at 225.

2. *Japan*

Japan's copyright system has its origins of development in 1869 when it enacted the Publishing Ordinance, which provided for protection of copyright and regulation on publishers.[89] What is now referred to as the Old Copyright Law was enacted in 1899 and is said to be "the first modern copyright law of Japan consistent with the international standard of copyright protections."[90] Japan has paid attention to developments and advances in technology by revising their copyright law on several occasions. International concerns of copyright protection prompted Japan to reform its copyright system thoroughly and in 1971 the new Copyright Law was enacted.[91] Several amendments have since taken place.[92]

Japan's Copyright Law[93] provides protection to,

> "(i) works of Japanese nationals...; (ii) works first published in this country, including those first published abroad and published in this country within 30 days of that first publication; (iii) works not falling within those mentioned in the preceding two items, to which Japan has the obligation to grant protection under an international treaty."[94]

Section 58 of this Act grants copyright protection under the Berne Convention.[95] When the right expires in the country of origin, it also expires in Japan.[96] The Act grants both moral and economic rights.[97] Economic rights

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89. *See History of Copyright System in Japan,* visited October 4, 2000, *available at* http://www.cric.or.jp/cric_e/ecsij/csij2.html.

90. *Id.*

91. *See id.*

92. *See id.* Recent revisions include a 1999 amendment to comply with the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. *See id. See also*, The Japan Times, *Law for a New Age*, Sept. 13, 2000. "Copyright law has been amended almost every year on an ad hoc basis since it took effect in 1971 in Japan." *Id.*

93. Law No. 48, Copyright Law of Japan, (Amended through May 12, 1995). (English translation). The purpose statement of the Law states: "The purpose of this Law is, by providing for the rights of authors and the rights neighboring thereon with respect to works as well as performances, phonograms, broadcasts and wire diffusions, to secure the protection of the rights of authors, etc., having regard to a just and fair exploitation of these cultural products, and thereby to contribute to the development of culture." *Id.*

94. *Id.* (Section 2, Scope of Application, Art. 6).

95. *See* Lee, *supra* note 1, at 271.

96. *See id.*

97. *See id.* at 270. Moral rights are not assignable, and therefore expire upon death of the creator. "The creator has the rights to govern release of the work, to be identified as the creator of the work, and to dictate any alteration in content of the work." *Id.* Economic rights have a different purpose. "[I]t is common practice to assign, exercise, pledge, and transfer

prevent the unauthorized copying of works and are therefore the focus of the music industry when dealing with digital music.[98]

Japan has ratified the WIPO Copyright Treaty, but as of July 15, 2000, it had not ratified the WIPO Performances and Phonograms Treaty.[99] The current system of copyright law in Japan is based on analog technology, not the new digital.[100] In June 1999, Japan amended its copyright law to prohibit anti-circumvention devices.[101] Unlike the WIPO Internet Treaties and United States copyright law, Japan's copyright law does not regulate copies made at home or in libraries for limited private use.[102] Japan has taken steps to implement the WIPO Internet treaties.[103] WIPO is working closely with Japan to help them meet these goals.[104]

The proliferation of karaoke in Japan exposed Japan to outrage over copyright infringement of musical works. A 1980 claim by the Japanese Association of Music Composers and Players against a karaoke[105] establishment demonstrated Japan's commitment to protecting copyrights.[106] The Fukuoka High Court found that the karaoke devices were "provided on a commercial basis to draw in customers," therefore royalties should be paid.[107]

3. *Great Britain*

Prior to the first national copyright statute, authors who wanted to protect their work had to be members of the Company of Stationery.[108] A letters patent was granted only on rare occasions to those who were politically well connected.[109] This practice forced many great authors to sell their manuscripts outright to a member of the company for a very small amount.[110]

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economic rights." *Id.*

98. *See id.* at 271.

99. *See Actions in Respect of Treaties Administered by WIPO Not Yet in Force, available at* http://www.wipo.int/treaties/ip/index.html.

100. *See Law for a New Age,* THE JAPAN TIMES, Sept. 13, 2000

101. *See id.*

102. *See id.*

103. *See id.*

104. *See WIPO to Beef up Japanese Internet address arbitrators,* JAPAN COMPUTER INDUSTRY SCAN, Sept. 11, 2000. WIPO recently doubled the number of Japanese arbitrators in order to handle future disputes on Internet domain names. *Id.*

105. *See* Roderick Seeman, *Karaoke to Pay Royalties,* THE JAPAN LAWLETTER (August 1984). "Karaoke devices are basically 8-track stereo cartridge players which take the music from popular hits and put them on tape without the professional singers. Instead of the professional singers, the people using the microphone equipped with the device can sing to the accompaniment of the taped music." *Id.*

106. *See id.*

107. *See id.*

108. *See* Bielefield and Cheeseman, *supra* note 57, at 10.

109. *See id.*

110. *See id.*

The Statute of Queen Anne, which was passed in 1710, is the foundation for copyright law in both England and the United States.[111] This was the first time rights of an author were explicitly recognized.[112] The Copyright, Designs and Patents Act of 1988, which now includes several amendments, is the main copyright legislation in Great Britain today.[113] European Community, "EC",[114] Directives have guided the amendments of this Act.[115] The European Union does not protect sound recordings under copyright law.[116] A Directive was issued in 1992 to try and harmonize the protection of databases and create a sui generis[117] form of protection.[118]

The question of placing liability for copyright infringement on the Internet on ISP's in Great Britain has been discussed but has not been implemented. The proposals that have been developed call for "clearly defined, tightly drawn exceptions to such liability on grounds of practicability."[119] This clearly demonstrates the reluctance to place blame on ISP's and inhibit the Internet.

Great Britain was not a signatory on either of the WIPO Internet Treaties, nor did it ratify either.[120] Great Britain's absence from the international treaties does not mean it has abandoned copyright protection across international borders. The Copyright (Application to Other Countries) Order 1999[121] is a Statutory Instrument that came into force on July 22, 1999.[122] The Order sets out specifically to which countries the Copyright, Designs and Patents Act of 1988 applies. Countries who are given protection in respect to all works except broadcasts and cable programs include countries who are either parties to the Berne Copyright Convention, the Universal Copyright Convention or the Agreement establishing the World Trade

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111. *See id.* at 10-11. "The full title of the act was 'A Bill for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, during the times therein mentioned.'" *Id.* at 11.

112. *See id.*

113. *See The Patent Office Web Page, Further information about UK and EU copyright legislation*, (visited October 18, 2000) http:// www.patent.gov.uk/dpolicy/furtinfo.html.

114. Lee, *supra* note 1, at 271. (interestingly, there was no mention of copyright in the EC founding treaties).

115. *See id.*

116. *See* Dorothy Schrader, *IntellectualProperty Protection for Databases at the International Level: Copyright and Sui Generis Forms of Protection*, CRS Report for Congress 5 (March 17, 1999).

117. Of its own kind or class, unique or peculiar. BLACK'S LAW DICTIONARY, (7th ed. 1998).

118. *See* Schrader, *supra* note 116, at 7.

119. Lee, *supra* note 1, at 244.

120. *See Lee*, supra, note 1. *See also*, Mort, supra, note 83 (according to the terms of the Treaties, any WIPO member could sign on until December 31, 1997).

121. The Copyright (Application to Other Countries) Order, (1999) SI 1999/1751.

122. *See id.*

Organization, which includes the United States and Japan.[123] Countries who are given full protection for sound recordings include countries that are either parties to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization, or are Member States of the European Community. Japan is included but the United States is not.[124]

C. *Internet Service Providers*

Claims of copyright infringement over the Internet may be brought on many different levels. An infringement action might be brought against an ISP who provides copyrighted material at its site, a user who downloads the software, and maybe a network operator who allows transmission of the materials over its system.[125] The intricacy of the Internet makes the physical placement of information at any given time difficult. It is generally impossible to determine the path of communication.[126]

ISP's are not ignoring the threat of being shut down. Many are taking steps to try and safeguard their service through their terms of use and copyright policies.[127] Although these steps are commendable to show the Providers' awareness of the problem, it is unlikely that they alone will stop copyright infringement over the Internet. ISP's are simply the easiest entities to identify and are therefore targets for lawsuits.

1. *Third Party Theories of Liability*

The easiest way to demonstrate the dilemma faced by ISP's is to view it through problems that have recently arisen in the United States. The three basic theories of copyright infringement are direct infringement, contributory infringement, and vicarious liability.[128] However, these are only theories used in the United States and therefore are not adaptable to other countries. These theories will do nothing to protect domestic work abroad, they are examined only to demonstrate the inherent problem faced in any jurisdiction in the United States. Contributory infringement and vicarious liability are the two

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123. *See id.*

124. *See id.*

125. *See* Lee, *supra* note 1, at 200.

126. *See id.*

127. *See generally, Napster Copyright Policy,* (visited October 3, 2000) http://www.napster.com/terms/. (providing information on the basic privacy policies of Napster, Inc. and terms of use, which includes a form to fill out for claims of copyright infringement). In order to download the Napster software, a user must agree to Napster's copyright policy. The terms make the user responsible for any copyright infringement and warns the user that access to Napster will be cut off upon notification of such infringement. *See id.*

128. *See* Pollack, *supra* note 21, at 2455.

theories that apply to ISP's.[129] A theory of direct infringement is usually reserved for single infringers, and since one person is unlikely to have "deep pockets", copyright holders will likely sue an ISP.[130] The appeal of using third party liability theories, such as contributory infringement and vicarious liability, in the Internet environment stems from the fact that single direct infringers are difficult to identify.[131]

To prevail on a theory of contributory infringement, the copyright holder must show the following three things: "(1) a direct infringement occurred, (2) the defendant knew or had reason to know of the infringing activity, and (3) the defendant substantially participated in the infringement by inducing, causing, or materially contributing to its occurrence."[132] It is hard to predict what kind of activity will meet the threshold of knowledge that is required to prevail on this theory.[133]

Vicarious liability for copyright infringement[134] against ISPs is the other theory of liability that may be used. You must show that the ISP "(1) is in a position to supervise the infringing activity, and (2) has a financial stake in the infringing activity."[135] There are inherent problems in prevailing on such a claim. The first element may be dependent upon the user agreement provided by an ISP. If the agreement claims to be able to terminate a user's access at will, the element will probably be satisfied.[136] However, the agreement may not be that specific or clear enough to easily establish this element. The second element may be satisfied if an ISP charges any fees to download or if it receives advertising revenue.[137] This theory may apply to some legitimate ISPs, but it will not apply to ISPs that are providing access to digital music on a purely anonymous basis.[138]

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129. *See id.* at 2456. To prove direct infringement one must show "(1) he or she has a valid copyright, and (2) the defendant copied the work.... Infringement occurs even when only one copy of a work is made, for example, where a consumer reproduces a copy solely for private purposes." *Id.*

130. *See id.*

131. *See id,* at 2457.

132. *Id* at 2456.

133. *See* Sylva, *supra* note 3, at 226.

134. "The common law doctrine of vicarious liability for copyright infringement imposes liability upon one party for the infringing actions of another party". Charles S. Wright, *Actual Versus Legal Control: Reading Vicarious Liability For Copyright Infringement into the Digital Millennium Copyright Act of 1998,* 75 Wash. L. Rev. 1005, 1008 (2000).

135. Pollack, *supra* note 21, at 2457.

136. *See* Sylva, *supra* note 3, at 225.

137. *See id.* at 225-226.

138. *See* Title 17 USC §512(a) stating: "(a) Transitory digital network communication – A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing

2. *The Courtroom Should Not be a Battleground for Fighting Piracy*

Court cases are not consistent in finding liability and therefore have not produced a clear doctrinal rule.[139] Identifying an infringing party over the Internet is extremely difficult. The search usually leads to an ISP.[140] Many times an ISP may be unwilling to divulge its list of subscribers to track down the infringer.[141] Even if the list is obtained, it probably consists of pseudonyms (also known as "handles"), and may not include real names or addresses.[142] Evidence that an infringement occurred is hard to prove even if the identity of the suspected infringer is revealed.[143] Assuming that an infringer can even be identified, one major problem faced by copyright holders occurs when the infringer lives in a different country. The rights holder may have no choice but to have a judgment rendered in a foreign country. This allows even more control to be lost than if in the same jurisdiction because the copyright holder is now subjected to a foreign jurisdiction's control.

The music industry, namely the Recording Industry Association of America ("RIAA")[144], has shut down more than 2000 pirate sites in a little over two years.[145] The court room battles that resulted in these shut downs occurred after the infringer who held a copy work was identified; however, the technology they used could not find the infringer who posted the unauthorized files in the first place.[146] Courts should not decide the scope of copyright protection. This is an unwarranted form of judicial legislation. The United States Supreme Court iterated this premise when it stated, "sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."[147] A New York District Court has

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connections . . . ." *Id.*

139. *See generally* Pollack, *supra* note 21, at 2457-2458. (provides examples of the various court decisions).

140. *See* Rutner, *supra* note 7, at 1067. To enforce copyright protection, the holder has to locate the source of the infringing transmission and an ISP is usually that source. *See id.*

141. *See id.*

142. *See id.* There is no requirement that ISPs divulge its lists by request. *See id.*

143. *See id.* This is a problem because user's accounts are usually shared with other people and anyone with access to the account could be the infringer. *See id.*

144. Riaa, *supra* note 42. (RIAA is a group of recording artists).

145. *See* Pollack, *supra* note 21, at 2469.

146. *See id.* The RIAA uses Web crawler technology that conducts daily searches for unauthorized musical material. *See id.*

147. Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417, 431 (1984).

upheld this premise in Universal Studios, Inc. v. Reimerdes.[148] In that case, the court stated, "clashes of competing interests like this are resolved by Congress."[149]

Some commentators believe that the courts are crucial to saving music copyrights.[150] They do concede that the courts have exhibited sympathy toward both sides of the copyright balance, making the decisions highly fact specific.[151] The problem with using the courts is that they are slow, unpredictable, and not uniform, especially from an international point of view. Ever changing technology will bring issues of first impression before the court in record numbers. The court decisions will not fix the problem because copycat software or modified software will constantly spring up. In cases where temporary restraining orders were granted against allegedly pirating sites, the sites disappeared.[152] The Internet reaches the global community, and without uniform international standards, the problem will reach the United States through another country.

Supporters of ISPs base their right of operation on the fact that ISPs serve as a means to share information.[153] The opposition claims that companies like Napster encourage misconduct.[154] Even if the music industry prevails in shutting down a single company like Napster through court action, there will be more copycat software to replace it.[155] ISPs should not be held responsible for providing the means by which copyright infringement takes place when it is the individual violator's fault for choosing to use the information in the wrong way.[156] It is not fair to put the liability on the service provider. Liability should be placed on the violator not the provider.

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148. *See Reimerdes*, *supra* note 6 , at 346.

149. Id.

150. *See* Pollack, *supra* note 21, at 2483.

151. *See id.* "Thus far, courts have exhibited sympathy toward both sides of the copyright balance, which means that ultimately cases will turn on their individual facts." *Id.*

152. *See id.* at 2469. File transfer protocol technology allows Web pages to be easily obscured and spring up in different places daily. *See id.*

153. *See id.* Napster claims that it allows a "substantial non-infringing use" because it allows legitimate music reading of unknown bands and other unprotected music. *See id.* at 2475.

154. *See id.* at 2475. The RIAA claims that Napster is commercially benefiting from copyright infringement without touching the stolen goods. *See id.*

155. *See* Rutner, *supra* note 7. (for a general discussion of software).

156. *See* 17, USC 101, The Berne Convention Implementation Act of 1988. (This Act Amended Title 17 of the United States Code). Berne places the liability on the actual infringing party, not the ISP. *See id.*

III. INTERNATIONAL TREATIES AFFECTING THE MUSIC INDUSTRY ON THE INTERNET

A. *Brief History*

The Berne Convention for the Protection of Literary and Artistic Works was created in 1886[157] and set a minimum standard of copyright protection for its contracting parties.[158] This treaty, like the WIPO Internet Treaties, establishes a system whereby member states implement minimum standards that ensure the operation of the Berne Convention through adoption of their domestic laws.[159] The United States revised its copyright law in 1976 to bring the United States more in line with the copyright laws of other countries so it could eventually join the Berne Convention.[160] It was not until 1988 that the Berne Convention was implemented in the United States.[161]

The World Intellectual Property Organization (WIPO) is an international body, under the United Nations, responsible for promoting the protection of intellectual property rights throughout the world.[162] WIPO was created in 1967 to promote the protection of intellectual property worldwide. Countries, including the U.S., look to WIPO to create treaties that establish a basic standard of intellectual property protection worldwide.[163]

In December 1996, the international community adopted two treaties created by WIPO, the WIPO Copyright Treaty[164] and the WIPO Performances and Phonograms Treaty, collectively called the WIPO Internet treaties.[165] Although these treaties are of vital importance to the music industry for combating Internet piracy, the treaties are not conclusive in stopping the piracy. As of July 2000, only 19 of the required 30 countries have ratified the WIPO Copyright treaty[166] and only 16 of the required 30 countries have ratified the WIPO Performances and Phonograms treaty.[167]

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157. Robert M. Blunt, Comment, *Bootlegs and Imports: Seeking Effective International Enforcement of Copyright Protection for Unauthorized Musical Recordings*, 22 Hous. J. Int'l. L 169, 177 (Fall 1999). Berne is the oldest multilateral copyright convention. *See id.*

158. *See* Mort, *supra* note 83, at 183.

159. *See* Blunt, *supra* note 157, at 178.

160. *See* Bielefield and Cheeseman, *supra* note 57, at 26-27. The United States was not a signatory to the Berne Convention in 1887 because it could not meet the convention's standards. *See id.* at 26.

161. *See* The Berne Convention Implementation Act of 1988, *supra* note 156. This Act amended title 17 of the United States Code. *See id.*

162. *See id.*

163. *See id.*

164. WIPO Webpage, *supra* note 20.

165. *See id.*

166. WIPO Copyright Treaty, December 20, 1996.

167. *See* WIPO Performances and Phonograms Treaty, December 20, 1996.

The ability to reproduce a physical copy of a music file or re-transmit it to millions of others via the Internet through digital technology gave rise to a diplomatic conference in Geneva in December 1996.[168] The conference negotiated, agreed upon and adopted the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.[169] Since traditional copyright principles are based upon national borders, the Internet made it necessary to adopt new standards of Copyright protection if international treaties were going to be followed for Copyright infringement protection.[170] The WIPO Internet Treaties are the first international treaties that deal specifically with copyright infringement over the Internet.[171]

B. WIPO Internet Treaties

The WIPO Internet Treaties were not swept into adoption at the Diplomatic Conference. The debate followed two general paths. On one side of the aisle was the group referred to as "copyright purists."[172] The "copyright purists" supported the extension of traditional copyright principles to digital technologies.[173] The other side consisted of the group called the "innovators."[174] The "innovators" championed the loose application or modification of current theory.[175] The lobbying efforts of each group, and the influence each side held at the Conference, shaped the adopted versions of the treaties. By ratifying the WIPO Internet treaties, the contracting parties provide a standard level of protection for nationals of the other contracting parties as they do for their own citizens.[176] Some countries already provide these standards in their local Copyright laws, but for those countries that do not, this is a vital step in protecting copyrights abroad.

The WIPO Internet Treaties were adopted to address the problems of copyright infringement on the Internet. Both treaties recognize the right of distribution of copies, but they allow national legislation to determine the territorial effect of the exhaustion of rights with the first sale of a copy.[177] In agreed statements to both treaties, it was agreed that, "[i]t is understood that

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168. *See* e-mail from Jorgen Blomqvist, Director, Copyright Law Division, World Intellectual Property Organization (September 27, 2000), on file with author.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See* Mort, *supra* note 83, at 192. "The purists believe 'that copyright laws provide the best protection for the upcoming boom in electronic commerce and information transfer'. Without stronger protections, they argue, there will be no incentive to develop new material to sate the appetite of the emerging global-information infrastructure." *Id.*

173. *See id.*

174. *See id.* at 193.

175. *See id.* at 194.

176. *See id.*

177. *See* WIPO Press Release No. 106, Geneva (December 20, 1996), on file with author.

the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."[178] The treaties give the copyright holder the ability to decide whether their work will go onto the Internet at the beginning of the process.[179]

1. WIPO Copyright Treaty

On December 20, 1996, the international community adopted the WIPO Copyright Treaty.[180] The preamble to the Treaty states:

> Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible, *[r]ecognizing* the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments, *[r]ecognizing* the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works, *[e]mphasizing* the outstanding significance of copyright protection as an incentive for literary and artistic creation, *[r]ecognizing* the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention.[181]

This Treaty "supplements the Berne Convention by providing copyright protection while considering the need for the free flow of information."[182] The drafters of the Treaty were careful not to take away any of the existing provisions Berne had established.[183] The provisions in the Treaty do not provide enforcement mechanisms; therefore, enforcement is left up to the individual countries.

The Copyright Treaty provides legal remedies against circumvention of technological measures and copyright management information placed on

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178. E-mail from Jorgen Blomqvist, *supra* note 168.

179. *See id.*

180. *See* WIPO Copyright Treaty, December 20, 1996, CRNR/DC/94.

181. *Id.*

182. Mort, *supra* note 83, at 196.

183. *See* Blunt, *supra* note 157, at 177. Berne does not grant protection of copyright in the country of origin, it provides for national treatment. *See id.*

protected works.[184] However, individual countries have to first implement the anti-circumvention measures.[185] Anti-circumvention laws are the most beneficial remedies available to stop copyright infringement of digital music on the Internet.[186]

The scope of the WIPO Copyright treaty encompasses that set out in Article 2 of the Berne Convention.[187] Article 4 and 5 of the Treaty confirms the protections established in the Berne Convention to computer programs and databases.[188] The Treaty does not firmly establish a right of distribution. Article 6 provides an exclusive Right of Distribution to authors but allows member states to independently determine under which conditions the Right of Distribution will apply.[189]

At the initial stages of the Convention to adopt the Treaty, there were some problems. One of the drafts presented to the Convention contained a provision that met widespread criticism in the Internet community. The Right of Reproduction that is contained in Article 9 of the Berne Convention, if adopted, would have arguably made it a copyright infringement to merely access a web page containing protected works without the consent of the author.[190] This is because any computer has to temporarily store and therefore, reproduce a web pages' content in its random access memory in order to make it viewable for the user.[191] In addition, most browsers also store a temporary copy of each accessed webpage in a cache directory on the computer's hard disk.[192] The lobbying efforts of groups, such as Internet Service Providers, managed to get this provision deleted from the final draft. Instead, there was an agreement reached which was attached to the Treaty to attempt to clarify Article 1(4) which states: "It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."[193] Notwithstanding the Right of Reproduction, the fact that it was not included in the Treaty, and the

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184. *See* WIPO Copyright Treaty, *supra* note 180. Article 11 of the treaty provides that contracting states:

> shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law." *Id.*

185. For example, in the United States, the anti-circumvention laws were not effective until October 28, 2000. *See* Sylva, *supra* note 3, at 235.

186. *See id.*

187. *See* WIPO Copyright Treaty, *supra* note 180.

188. *See id.*

189. *See id.*

190. *See* Mort, *supra* note 83, at 174.

191. *See id.*

192. *See id.*

193. Agreed Statement concerning the WIPO Copyright Treaty, *available at* http://www.eblida.org/ewp/exceptions/wipo/ct.htm

negotiation process that took place, indicates that it is left up to the member states to apply the Reproduction Rights of author's to digital mediums.

Attached to the Treaty were agreed statements concerning nine of the Articles. The statement regarding Article 1(4) further states: "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form."[194]

Enforcement is an area where much debate erupted. Two provisions were considered, but neither was adopted.[195] Article 14 of the Treaty only requires punishment and prevention of infringement based on what each authority deems necessary to ensure the Treaty's application.[196]

2. *The WIPO Performances and Phonograms Treaty*

On December 20, 1996, the international community adopted the WIPO Performances and Phonograms Treaty in addition to the WIPO Copyright Treaty. The preamble to this treaty states:

> *Desiring* to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible, *Recognizing* the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments, *Recognizing* the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms, *Recognizing* the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information.[197]

The Treaty protects the rights of performers of literary or artistic works and of phonogram producers. It has been criticized for only covering "the various rights of performers and producers in a recorded work, while leaving copyright issues, such as a composer's interest in his song, to the Berne Convention".[198] This Treaty is vital to the protection of performances and

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194. *Id.*

195. *See* Mort, *supra* note 83, at 202. ("Alternative A incorporated by reference the TRIPs Agreement's articles 41 through 61 via an annex which would have formed an 'integral' part of the treaty. Alternative B instead required that the contracting parties integrate articles 41 through 61 into their national laws.") *Id.*

196. *See id.* This was the position the U.S. wanted adopted. *See id.*

197. WIPO Performances and Phonograms Treaty, *available at* http://www.wipo.org/.

198. Mort, *supra* note 83, at 205.

phonograms in digital form.[199]

IV. THE PROBLEM WITH RELYING ON THE WIPO INTERNET TREATIES TO FIGHT COPYRIGHT INFRINGEMENT IN THE MUSIC INDUSTRY

A. *The Treaties Cannot be Internationally Effective Unless all Countries Ratify*

The United States Department of Commerce has recognized the importance of reaching the necessary threshold of thirty countries to sign each of the WIPO Internet Treaties. The Secretary of Commerce committed the Department to work internationally in the hopes that this goal will be met.[200] The Internet is no longer used only for educational and research purposes, it is primarily viewed as a business opportunity.[201] International treaties are the best way to extend copyright protection across borders in the form of laws, but if the music industry wants to protect its work to the fullest potential, it is not enough for the music industry to let international treaties fight the piracy. Implementing treaties takes years and they will never keep abreast of the demands of the technology being addressed.[202]

Treaty ratification is important because of the standards[203] it sets, but the passage of two international treaties will not stop Internet piracy of digital music. Even if the necessary thirty countries ratify the treaty, it is still only thirty countries that claim they will rise up to these standards. The Treaties necessarily give a lot of leeway to the member states to apply their own national laws.[204] The Treaties may set a standard but they do not guarantee the uniformity that most people intuitively expect when an "international" treaty is referenced. Self imposed mandates to prevent copyright infringement and enforce national laws are necessary supplements to the WIPO Internet Treaties.

B. *Global Enforcement Mechanisms are not Included*

Most countries will not stand for a uniform system of laws, and there is no reason they should. There are inherent enforcement problems that cannot be addressed by a collage of member states. "Laws reflect the culture and social attitudes of the people governed by the laws. Must universal legal standards be adapted to such different laws; or must the local laws be adapted

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199. *See* E-mail from Blomqvist, *supra* note 168.

200. *See* Dickinson, *supra* note 2, at 3.

201. *See* Lee, *supra* note 1, at 77.

202. *See* Lee, *supra* note 1, at 161.

203. Standard is defined as "any specification of technology that has been approved or adopted for widespread use." *Id.* at 153.

204. *See* Blunt, *supra* note 157, at 177.

to fit the universal standards?"[205] It has been suggested that the "inequalities in domestic legislation could not only make enforcement of these treaties difficult, but also stifle the growth of the Internet as a means of commerce."[206]

It is impossible for one global standard to satisfy the culture of a vast number of nations. International treaties should set standards, but the individual nations should provide laws that uphold its cultural needs while still complying with a minimum standard of protection for copyright holders. Although international treaties like the WIPO Internet Treaties are useful to set standards for countries to reach up to and to bring awareness to international concerns, other means are needed to fight copyright infringement over the Internet.

Once the copyright holder or anyone else places a work on the Internet, it can be accessed by anyone who subscribes to the Internet anywhere in the world. It is impossible for a copyright holder to know and prepare for each individual national law. The ease, speed, and accuracy of copying at multiple anonymous locations pose a serious obstacle to effective enforcement of any copyright laws, especially those set out in international treaties.

Enforcement of copyright laws under the WIPO Internet Treaties is left to the national laws of each country.[207] Even with ratification of the WIPO Internet Treaties, global enforcement mechanisms need to be implemented. One solution that has been suggested to make enforcement effective is to implement the TRIPS Agreement enforcement mechanisms into the WIPO Internet Treaties.[208] TRIPS enforcement power comes from the dispute resolution process offered by GATT.[209] Under this process, disagreements on trade issues are resolved by committees, which become legally binding obligations.[210] This is not the best solution because it is impossible to determine if the country will penalize the infringer.[211]

The best way to protect digital music on the Internet is for the copyright holders to protect their work before it reaches the market.[212] Technological advances on the Internet will constantly develop new methods to make more information available to people. Unfortunately, this brings the question of copyright infringement into focus. By staying one step ahead of the possible infringer, copyright holders are in a better position to protect their work. The WIPO Internet Treaties provided a vital role of awareness and education of the problem, which are both major components of prevention.

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205. Lee, *supra* note 1, at 285.

206. Mort, *supra* note 83, at 216.

207. *See* Agreed Statement, *supra* note 193.

208. *See* Blunt, *supra* note 157, at 190.

209. *See id.*

210. *See id.* at 191.

211. *See id.* The hearings also tend to long and drawn-out, averaging forty-five months. *See id.*

212. *See* Rutner, *supra* note 7, at 1080.

V. ENFORCEMENT BY PREVENTION

The United States and Japan issued a joint statement on electronic commerce in 1998, which called for the private sector to lead in the development of electronic commerce.[213] It also provided that unnecessary regulations or restrictions on electronic commerce should be avoided, and encouraged self-regulation through enforcement mechanisms developed by the private sector.[214] Since the growth of electronic commerce is dependent upon the protection of intellectual property rights,[215] these same standards of regulation should be adopted to fight copyright infringement over the Internet. The music industry must strive to develop and implement techniques that have no boundaries. Laws define the minimum standards of copyright protection, there is nothing to stop anyone from setting a higher standard.[216] It is not the responsibility of international treaties to mandate provisions for digital security controls. If the music industry wants to protect itself it must self impose mandates.

Many copyright holders will never give up the fight to protect their work. The suggestion by the author Blunt that the music industry should cut losses and join those who are distributing digital works is a good starting point but the solution needs to go further.[217] The music industry needs to beat the infringers at their own game. They need to make it almost impossible to infringe upon protected work and make it possible to find those who do infringe.[218] A conglomerate of record companies can combine resources, financially and innovatively, and take the upper hand. Some parts of the music industry are taking advantage of the Internet marketplace.[219] But this will not stop infringement of works by those who do not want to or can not take advantage for some reason. There is reluctance by many to enter the online world.[220] Therefore, the music industry must stay one step ahead of everyone else.

Copyright infringement will be a problem even with technical protection because infringers can bypass the protection devices with other technical

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213. *See* Clinton-Hashimoto Statement on Electronic Commerce, USIS Washington File (May 20, 1998).

214. *See id.*

215. *See id.*

216. *See* Lee, *supra* note 1, at 75.

217. *See* Blunt, *supra* note 157, at 208.

218. *See* Lee, *supra* note 1, at 247. It is rumored that there are programs being developed that can recognize on the Internet whether a computer contains a pirated program and can immediately transmit a virus which will paralyze the whole computer. The use of this technology may bring up constitutional problems that have not been addressed. *See id.*

219. *See SDMI*, visited November 13, 2000, *available at* http://www.sdmi.org..

220. *See id.*

devices.[221] Technical protection devices increase a copyright holder's protection but they are insufficient without legal support.[222] Therefore they must be combined with international standards to give the maximum amount of protection to digital music.

1. Education

Education should not be overlooked as a tool to fight infringement. The RIAA has implemented a program called "Soundbyting," which informs users "that music, including the sound recordings and the underlying musical composition, is copyrighted property and is not freeware."[223] WIPO is helping to raise this public awareness, not only through the Internet Treaties, but also by involving itself in a "long term demystification program."[224] Public education and awareness must be undertaken to prevent and control copyright infringement of digital music.[225]

2. Tracking Devices

Identifying an infringer is one of the most challenging tasks faced by copyright holders.[226] Existing laws cannot be enforced if the infringer is not identified. Digital watermarking is a compression technology used "to encode within the digital format data about the author, the copyright date, and permitted uses of the material."[227] A version of this technology is made available through the company Liquidaudio.[228] Once an infringer is caught, the watermark provides the information. Copyright holders must embed watermarks on their work so infringers can then be tracked, identified, and assessed a royalty revenue.[229] This is a great tool for the music industry to employ; however, it does not safeguard against all unauthorized copying because it does not prevent the first copy.[230] There is also concern that using

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221. *See* Neil Smith and Andrew V. Smith, *Technical Protection Devices and Copyright Law*, 3 B.U. J. SCI. & TECH. L. 7 para. 3 (1997).

222. *See id.*

223. Sylva, *supra* note 3, at 240.

224. *See* E-mail from Blomqvist, *supra* note 168.

225. *See id.*

226. *See id.*

227. Pollack, *supra* note 21, at 2451. "Digital watermarking is commonly known for its use on paper money . . .." *Id.*

228. *See id.*

229. *See* Sylva, *supra* note 3, at 227.

230. *See* Pollack, *supra* note 21, at 2451. "Used in conjunction with tracking tools ... copyright owners are able to track down and prosecute infringers. It enjoys popularity because it does not limit consumers' fair use rights as much as other rights management technologies, unless it is employed in conjunction with access control methods." *Id.*

technology to limit access to creative work will only benefit those who pay.[231] Watermarking is a crucial tool because it can help identify the actual violator and place blame on the individual infringer rather than an ISP.

3. *Rights Management Technology*

The success of the recent introduction of rights management technologies is thus far unknown, but the idea is promising.[232] Combined with tracking tools, these technologies are the best means to prevent copyright infringement of music over the Internet.

Cryptographic ciphers, or encryption, are a real solution to prevent protected work from being digitally transmitted. This is a security measure that can be implemented which makes it almost impossible to break the code.[233] One way functions in cryptographic ciphers are used in electronic networks.[234] "A one way function is a mathematical function that is relatively easy to compute in one direction, but computationally infeasible to undo without knowing a secret."[235] Messages are encrypted by the cryptographic ciphers from their original text to an encrypted state.[236] This is not the most effective way to stop infringement of digital music because once a recipient receives a legitimate copy, it can be uploaded and duplicated.[237] If this technology were placed on digital music before it reaches the market, piracy of the protected work would be greatly inhibited. Anti-circumvention laws hold infringers liable if they try to unscramble these devices.[238]

A digital envelope, or digital box, uses encryption technology and authentication techniques to guarantee that only licensed consumers can gain access.[239] A user must pay a fee to decode the envelope or box.[240] The fee can

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231. *See* Sylva, *supra* note 3, at 229.

232. *See* Pollack, *supra* note 21, at 2451.

233. *See* Lee, *supra* note 1, at 58.

234. *See id.*

235. *Id.*

> The security of cryptographic ciphers is rooted in the mathematical strength and ability of the one-way function to withstand computational brute force in attempting to undo a function. One example of a mathematical function used in cryptographic ciphers is an exponential function, whereby the security is based on the difficulty of calculating discrete logarithms." *Id.*

236. *See id.*

237. *See* Sylva, *supra* note 3, at 226. The copyright infringement is being created by the proposed recipients of the material, such as members of the public who upload the material to their websites. *See id.*

238. *See* Pub. L. No. 105-304, *supra* note 82. The United States has anti-circumvention provisions in the DMCA. *See id.*

239. *See* Pollack, *supra* note 21, at 2451-2452. This is referred to as persistent encryption because "the content is decrypted and accessible only while specific authorized users are using it for the amount of time for which they have rightfully obtained access." *Id.*

240. *See id.* at 2451.

be a one-time listening fee, a twenty-four-hour listening fee, or a copy can be purchased.[241] If a copy is purchased, it can be recorded on a CD or left on the hard drive.[242] This method ensures that copyright holders will be compensated; however, in some jurisdictions, it may raise controversy over the restrictions it places on fair use rights and on copyrighted work that is in the public domain.[243]

An excellent example of how to implement this technology to protect digital music is demonstrated through the situation that was recently faced by the advent of digital movies. Digital versatile disks ("DVDs") contain motion pictures in digital form and are used for private home viewing.[244] Motion picture companies insisted on an access control to prevent the increased risk of unauthorized reproduction because of this new digital format.[245] A Content Scramble System ("CSS") is an "encryption–based security and authentication system that requires the use of appropriately configured hardware... to decrypt."[246] CSS has been licensed to hundreds of DVD player manufacturers around the world.[247] In October 1999, a software utility called DeCSS was offered on ISPs that enables users to break the CSS encryption.[248] The Motion Picture Association of America ("MPAA") demanded that ISPs and identified individuals remove DeCSS from their servers.[249] The MPAA took legal action and the court ruled that DeCSS was a circumvention measure since it "effectively controls access to plaintiffs' copyrighted movies because it requires the application of information or a process, with the authority of the copyright owner, to gain access to those works."[250] If the music industry implements encryption technology as the motion picture industry has done, possible infringers will be less likely to circumvent the access controls for fear of being caught.

4. *Organizations*

Organizations such as the Federation Against Software Theft (FAST)[251] raise the awareness of piracy and lobby government to make revisions in

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241. *See id.*

242. *See id.*

243. *See id.* at 2452.

244. *See* Universal Studios, Inc., v. Reimerdes, 82 F. Supp. 2d 211, 214 (S.D.N.Y 2000). Like digital music, copies made from DVDs do not degrade and are therefore targets for copyright infringement. *See id.*

245. *See id.*

246. *Id.*

247. *See id.*

248. *See id.*

249. *See Universal Studios*, 82 F. Supp. 2d at 214.

250. *Id.* at 216

251. *The Federation Against Software Theft homepage*, visited October 16, 2000, *available at* http://www.fast.org.uk/Client130/Faster.nsf/lookup/introhome.html.

copyright laws.[252] Since they are working on a narrower basis than international treaties, their goals are more likely to be met in that limited capacity. FAST is different from organizations such as the RIAA because it represents both software publishers and end-users. Most organizations only represent one side of the debate. This may be a step toward the suggestion that "If you can't beat 'em, join 'em"[253] This is not necessarily the best way to solve the problem.

Secure Digital Music Initiative ("SDMI") is an organization that includes members such as RIAA representatives, record labels, America Online, AT&T, and Microsoft.[254] Oddly enough, the Executive Director of SDMI is the digital engineer and original developer of the MP3 compression format.[255] The objective of the organization is to set technological standards for management information in digital music distribution.[256] To reach this goal, SDMI has developed a two part plan as follows: "(1) a series of technological rules that all digital music devices and programs must follow in order to affix the 'SDMI compliant' label to their products and play SDMI-owned content; and (2) a rights management system that will most likely consist of a system of digital watermarking."[257] The rules SDMI develops are not legal mandates, but the most powerful players in the music industry belong to it. Therefore, it is very likely that much of the popular music will be encoded according to its rules.[258] This is an excellent format for self imposed mandates. The obstacles faced by SDMI include the slow pace of developing its standards and the flexibility and popularity of MP3's.[259] Consumers are not eager to join a secure format of protected work when it is available for free. However, if copyright holders only make their work available with encryption technology the consumers will have little or no choice.

Many record companies are offering digital download sites on the Internet or licensing services, such as MP3.com.[260] There are no foolproof techniques to stop copyright infringement of musical works via the Internet, but there are steps the copyright holder can take to make it harder for infringement to take place and prevent the infringement. Combining tracking tools with rights management technology sends a message to infringers that the music industry is playing the same game, and it is playing to win.

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252. *See id.* FAST was set up by the British Computer Society's Copyright Committee and it works to influence legislation in Great Britain. *See id.*

253. Blunt, *supra* note 157, at 208. The author suggests that the music industry should cut losses and join those who are distributing digital works. *See id.*

254. *See* Pollack, *supra* note 21, at 2473. *See also* Sylva, *supra* note 3, at 234. There is a fee to join SDMI and a company must meet certain other criteria. *See id.*

255. *See* Sylva, *supra* note 3, at 233.

256. *See* Pollack, *supra* note 21, at 2473.

257. *Id.* at 2473.

258. *See id.*

259. *See id.*

260. *See* Riaa, *supra* note 42.

VI. CONCLUSION

International treaties should not mandate global enforcement mechanisms for copyright infringement because this would inhibit the sovereignty of each individual country to set its own laws. On the other hand, we should be mindful of the usefulness the WIPO Internet Treaties provide in setting standards. These standards set a bar for countries to reach. They also present an awareness of the problem of copyright infringement. One of the main characteristics of infringement of digital music is that it is not limited to one single national territory. International standards are necessary to bring traditional copyright laws into the new digital age.

There is a big problem in identifying a copyright infringer of digital works, but holding the ISPs responsible is not a fair way to solve the problem. The international community recognized this by keeping the blame on the violator, as was also provided for in the Berne convention. Even countries that have discussed putting the blame on ISPs, and who are not signatories of the WIPO Internet Treaties, such as Great Britain, have recognized the problems and opposition of doing so and have shied away from the idea.

It is clear that the courts are not the best place to fight copyright infringement over the Internet. Litigation is expensive, time consuming, and unpredictable. There needs to be a foundation of laws, and those are reflected in the WIPO Internet Treaties. Laws should not be revised which would hold the ISPs responsible, like many court cases are trying to do. The WIPO Internet Treaties provide international standards, but enforcement is clearly a problem. Therefore, prevention techniques such as education, watermarking, and encryption need to be developed through the vices of the copyright holders and organizations like SDMI.

Copyright holders must take precautions when putting their work on the market. A step-by-step approach of enforcement by prevention is the best available tool. There is nothing to stop anyone from setting a higher standard than the one set by law. The Internet serves as an invaluable tool for creative work to reach the public. Since the Internet is so easily accessed throughout the world, methods of copyright infringement prevention need to start at the source. The music industry can prevent infringement by making it almost impossible to copy protected work.

Education to promote awareness of the problem of copyright infringement will help foster support for the importance of protecting works; and digital security controls, such as watermarking and encryption, will help prevent infringement of digital music. Technology advancement has become a war between innovators, and the end of this war is nowhere in sight. The copyright holders must implement technology to protect their work. When this technology is overcome by new technology, as it most likely will be, local legislation must govern how to handle the change. International laws, such as the anti-circumvention provisions for access controls in the WIPO Internet

treaties, harmonize those standards. The challenge is not to win the war; it is to win as many battles as possible.

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* J.D. Candidate, 2002, Indiana University School of Law – Indianapolis; B.A., 1999, History, Indiana University – Fort Wayne. Thank you to my mom, dad, and brother for your faith in me, patience with me, and love for me. Mom, thank you for reading all of my drafts and never complaining, you are a wonderful source of support and inspiration. To my husband, Chris, thank you for your enduring patience and understanding while I pursue my career and for sharing your life with me. I would also like to thank the Honorable Jeffrey Heffelfinger for suggesting the idea of writing on this timely topic.

CHILD SEXUAL EXPLOITATION IN COSTA RICA

I. INTRODUCTION

In 1990 the United Nations Convention on the Rights of the Child (CRC) entered into force.[1] Every nation-state except two[2] ratified this Convention, the first international treaty to address directly and focus upon the rights of children.[3] As momentum swept around the world in favor of the CRC, Costa

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1. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25 (1989) [hereinafter CRC]. For the text of numerous other international documents regarding children, including regional and global treaties, see GERALDINE VAN BUREN, ED., INTERNATIONAL DOCUMENTS ON CHILDREN (1993).

2. Neither Somalia nor the United States have done so. *See* U.S. Dept. of State, *Country Reports on Human Rights Practices, Appendix C*, Feb. 25, 2000. There are several advantages to the United States' ratification of the Convention. First, ratification would help to make children a national priority throughout the several states. CYNTHIA PRICE COHEN & SUSAN H. BITENSKY, UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: ANSWERS TO 30 QUESTIONS, 6 ¶ 30 (1994). Secondly, ratifying the treaty would enhance the United States' role as a human rights promoter, provide the country with the opportunity to elect members of the Committee on the Rights of the Child, and help monitor whether States Parties comply with the Convention. *Id.* Elizabeth Bevilacqua notes that one reason why the CRC faces opposition in the United States is the United States' federalist system of government. *See* Elizabeth Bevilacqua, *Child Sex Tourism and Child Prostitution in Asia: What Can Be Done to Protect the Rights of Children Abroad Under International Law?*, 5 ILSA J INT'L & COMP. L. 171, 176 (1998). That is, many of the CRC's guarantees have traditionally fallen under the domain of the states. *Id.* For a collection of essays discussing the differing standards between state laws and the Convention, see CYNTHIA PRICE COHEN & HOWARD A. DAVIDSON, CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (1990). One conflict is between the Convention's prohibition against the execution of minors and life sentences without parole under CRC Article 37, *supra* note 1, and Indiana's law that allows executions and life sentences without parole for children as young as sixteen years old. IND. CODE ANN. § 35-50-2-3 (Michie 2000).The opposition's disapproval of the CRC is evident in a resolution submitted by Senator Helms to the Committee on Foreign Relations warning that "if the President does attempt to push this unwise proposal [urging passage of the CRC] through the Senate, I want him to know . . . that I intend to do everything to make sure he is not successful." Stefanie Grant, *The United States and the International Human Rights Treaty System: For Export Only?*, *in* FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 327 (Philip Alston and James Crawford, eds. 2000). Even if the United States ratifies the Convention, separate implementing legislation is necessary because the United States follows a policy of "non-self-execution," meaning that ratified treaties do not automatically become national law. CYNTHIA PRICE COHEN & SUSAN H. BITTENSKY, UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: ANSWERS TO 30 QUESTIONS, 5 ¶ 18 (1994).

3. According to CRC Article 1, "a child means every human being below the age of eighteen years unless[,] under the law applicable to the child, majority is attained earlier." *Id.* at art. 1. Costa Rica codified this principle in Article 2 of the El Código De La Niñez Y La Adolescencia (Child and Adolescent Code), which states that "[f]or the effects of this Code, every person will be considered a girl or a boy from conception until the age of twelve, and an adolescent for children older than twelve but younger than eighteen." La Asamblea Legislativa

Rica[4] not only ratified the treaty,[5] but also codified the agreement into national law.[6] However, despite the fact that Costa Rica has a relatively good track record regarding human rights,[7] at least one non-governmental organization alleges that the Costa Rican government is failing to uphold its obligations

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de la República de Costa Rica, EL CÓDIGO DE LA NIÑEZ Y LA ADOLESCENCIA, Ley 7739 de 6-1-1998, *at* http://imprenal.go.cr/ (last visited Oct. 15, 2000) [hereinafter Code].

4. Costa Rica is a democratic republic that gained its independence from Spain on September 15, 1821. *See* U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2000 –COSTA RICA, (2000), *available at* http://www.cia.gov/cia/publications/factbook/ geos/cs.html. (last visited Oct. 1, 2000). The country occupies 51,032 square kilometers and has a population of approximately 3.67 million. *Id.* San José, Costa Rica's capital, is the country's largest city with 1.2 million inhabitants. *Id.* Life expectancy in the country is approximately seventy-six years. *Id.* The economy is based upon tourism, agriculture and electronics exports. *Id.*

5. *See* La Asamblea Legislativa de la República de Costa Rica, Executive Decree No. 19884-PJ of 23 August 1990. U.N. Committee on the Rights of the Child, Summary Record of the 91st Meeting, ¶ 24 (1994) [hereinafter Summary Record of the 91st Meeting].

6. The Code of the Child and the Adolescent was enacted to codify this Convention. *See* Code, *supra* note 3, at art. 1. The Code states that it shall constitute the minimum judicial mark for the integral protection of the rights of minor persons. It establishes the fundamental principles including the social or community participation as well as the administrative and judicial processes that are invoked by the rights and obligations of this population. Any norms that provide [children] greater protection shall supercede the provisions of this Code. *Id.*

7. No political or extrajudical killings nor politically motivated disappearances were reported during 1999. *See* U.S. DEPARTMENT OF STATE, BACKGROUND NOTES: COSTA RICA (June 2000). Additionally, authorities generally respect the constitution's prohibition against cruel or degrading treatment as well as the restriction against arbitrary arrest and detention. *Id.* The State Department expressed its concern that some prisoners are incarcerated without bail for long periods of time awaiting trial for serious offenses. There were no reports of political prisoners. *Id.* "An independent press, a generally effective judiciary, and a functioning democratic political system combine to ensure freedom of speech and of the press." *Id.* The constitution protects and the government permits freedom of association, and clergy of all denominations practice freely. *Id.* The government does not restrict freedom of movement. *Id.* There are no legal impediments to women participating in politics. *Id.*

Additionally, Costa Rica has also ratified the following conventions relating to children's rights:

> (a) Supplementary Cooperation Agreement on Child Welfare signed in Santiago, Chile, on 6 March 1992, which entered into force from [sic] 22 September 1993 in pursuance of Article VI. The Agreement was promulgated in Costa Rica by Executive Decree No. 22413 of 30 June 1993; (b) Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption signed on 29 May 1993, Law No. 757 of 22 June 1995 (Official Gazette No. 135 of 17 June 1995); (c) Inter-American Convention on International Traffic in Minors signed in Mexico on 18 March 1994 at the Fifth Inter-American Specialized Conference on Private International Law.

U.N. Committee on the Rights of the Child, Periodic Reports of States Parties due in 1997: Costa Rica. Oct. 1, 1998, CRC/C/65/Add.7, ¶11, *available at* http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/424c5b0a328c2971802566fa005101c4 ?Opendocument (last visited Oct. 28, 2000). Additionally, "[t]he Convention on the Civil Aspects of International Child Abduction, adopted in the Hague on 25 October 1980, is currently awaiting approval by the Legislative Assembly." *Id.* at ¶ 12.

under these national and international requirements to protect children, particularly in regard to child prostitution for sex tourism.[8]

The present note argues that Costa Rica is not in full compliance with the Convention on the Rights of the Child. Although Costa Rica has made important strides in bringing its national legislation into conformity with the Convention's requirements, it is failing to ensure that these rights are enforced and protected. Due to this failure, Costa Rica is providing children only paper rights rather than actual guarantees of what the state promised children when the government ratified the Convention in 1990.

To analyze Costa Rica's compliance and non-compliance with the CRC, this note will first consider the Convention's background in Part II. Then, after a discussion of sex tourism and the causes of child prostitution in Parts III and IV respectively, the note will examine Costa Rica's compliance, or lack thereof, under individual Convention articles. This investigation will begin in Part III with the Convention's obligations as set forth in Article 4. In the subsequent sections, the note will consider Costa Rica's compliance in protecting children from sexual exploitation; in providing children the highest attainable standard of health; and, lastly, in ensuring the resources necessary to enforce legislation that prohibits child sexual exploitation.

After analyzing Costa Rica's CRC compliance, the note will then discuss legislation passed by the United States in an effort to curtail its citizens from going abroad to sexually exploit children. Finally, the note will recommend that the United Nations establish a special rapporteur to examine child prostitution in Costa Rica, that Costa Rica increase funding for its sex crimes unit, and that "alternative reports" submitted to the Committee on the Rights of the Child be made available to the general public on the internet.

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8. Casa Alianza made this allegation. *See* Casa Alianza, *Presentation to the United Nation's Committee on the Rights of the Child, 24th Sess. for the Day of General Discussion: State Violence against Children*, Geneva, Switzerland, *at* http://www.casa-alianza.org (visited Oct. 28, 2000) [hereinafter Casa Alianza Presentation to the United Nations]. Casa Alianza recently was awarded the Conrad H. Hilton Humanitarian Prize for its "extraordinary contributions toward alleviating human suffering." Casa Alianza, *Casa Alianza Wins World's Largest Humanitarian Prize*, *at* http://www. casa-alianza.org/EN/about/hilton/ (last visited Nov. 12, 2000). Bruce Harris, Casa Alianza's Executive Director, who was named a "human rights hero" by Amnesty International in 1991, is a recipient of the 1996 Olof Palme Award, as well as the 2001 "Monsignor Oscar Romero Award" from the University of Dayton. Casa Alianza, *Bruce Harris to Receive Monsignor Oscar Romero Award from the University of Dayton, USA*, at http://www.casa-alianza.org/EN/lastminute/prize.htm (visited Aug. 17, 2001). Queen Elizabeth II bestowed the Order of the British Empire upon Mr. Harris in 2001 for his "life's work with children in Latin America." Casa Alianza, *Queen of England Honours Casa Alianza Director*, at http://www.casa-alianza.org/EN/lastminute/6172001.htm (visited Aug. 17, 2001).

II. BACKGROUND ON THE CONVENTION ON THE RIGHTS OF THE CHILD

The CRC attained the unprecedented record of becoming essentially universally accepted within nine years after entering into force.[9] The Convention covers a broad range of rights including civil, political, economic, social and cultural rights.[10] In addressing these areas, the Convention "breaks new ground by being the first global instrument to explicitly recognize the child as possessing rights that states parties undertake to 'respect and ensure.'"[11] Aside from establishing guarantees for children, the Convention also provides a reporting process to enable governments, non-governmental organizations,[12] and others to work with the Committee on the Rights of the Child in an effort to realize the Convention's enumerated goals.[13]

A country's first report is due to the Committee on the Rights of the Child two years after ratifying the CRC, and then subsequent reports are due every five years thereafter.[14] Guidelines[15] created by the Committee establish

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9. *See* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 113 (Philip Alston and James Crawford, eds., 2000). For other works by Philip Alston, see Philip Alston (ed.), PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES (1999), an analysis of the impact that international human rights have had on bills of rights around the world; Mara R. Bustelo and Philip Alston (eds.), WHOSE NEW WORLD ORDER: WHAT ROLE FOR THE UNITED NATIONS? (1991), a collection of papers regarding a "new world order" in international peace and security, in dispute settlement, in international law, in economic and social issues, and in the United Nations; and Philip Alston (ed.), HUMAN RIGHTS LAW (1996), a collection of essays regarding the human rights field; and Philip Alston & Bridget Gilmour-Walsh, THE BEST INTERESTS OF THE CHILD: TOWARDS SYNTHESIS OF CHILDREN'S RIGHTS AND CULTURAL VALUE (1996), an analysis of the principle that the best interests of the child should be promoted in all aspects of the CRC.

10. *See* GERALDINE VAN BUREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 16 (1995).

11. A. GLENN MOWER, JR., THE CONVENTION ON THE RIGHTS OF THE CHILD: INTERNATIONAL LAW SUPPORT FOR CHILDREN 3 (1997). CRC Article 2(1) reads

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

CRC, *supra* note 1, at art. 2(1).

12. The NGO Group works to "facilitate contact between the non-governmental community and the Committee on the Rights of the Child with particular emphasis on securing all relevant information for the State reporting process." NGO Group, *Aims, Priorities and Objectives*, *at* http://www.defence-for-children.org (last visited Oct. 24, 2000). This organization, founded in 1983 to assist in the Convention's drafting process, currently consists of over thirty-seven child focused organizations. Stuart N. Hart & Laura Thetaz-Bergman, *Role of Nongovernmental Organizations in Implementing the Convention on the Rights of the Child*, 6 Transnat'l L. & Contemp. Probs. 373, 388 (1996).

13. *See* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, *supra* note 9, at 114.

14. *See* CRC, *supra* note 1, at art. 44.

15. *See* U.N. Committee on the Rights of the Child, General Guidelines for Periodic

a thematic structure for these state party reports, including "[g]eneral measures of implementation; [d]efinition of child; [g]eneral principles; [c]ivil rights and freedoms; [f]amily environment and alternative care; [b]asic health and welfare; [e]ducation, leisure[16] and cultural activities; and [s]pecial measures of protection."[17] These guidelines provide the primary source for interpretation of the CRC.[18]

In addition to reviewing reports submitted by State Party governments, the Committee also receives reports from non-governmental organizations.[19] These "alternative reports" are useful because they provide Committee members[20] information not otherwise available to the Committee that is necessary to identify inconsistencies between the government's assessment of the situation and the conditions on the ground.[21] Furthermore, these reports permit Committee members to ask States Parties more probing, better focused, and more critical questions than without the supplemental information.[22]

III. SEX TOURISM

In light of Costa Rica's reports pursuant to the CRC, the Committee on the Rights of the Child declared that it was "profoundly worried by the high incidence of commercial sexual exploitation of children in Costa Rica."[23] Given that more than one million children worldwide are involved in child

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Reports, CRC/C/58, (Nov. 20, 1996); U.N. Committee on the Rights of the Child, General Guidelines for Periodic Reports, CRC/C/58 (1993).

16. The Code states that "[u]nderage persons will have the right to play and participate in activities, sports and cultural events that will permit them to occupy their free time to their benefit and will contribute to their integral human development." Code, *supra* note 3, at art. 73.

17. THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, *supra* note 9, at 127-28.

18. *See* Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 177 (1998).

19. *See* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, *supra* note 9, at 118-19. A study completed by the NGO Group (*see supra* note 12) found that these alternative reports do indeed influence the Committee on the Rights of the Child. Hart & Thetaz-Bergman, *supra* note 12, at 389-90.

20. "The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to principal legal systems." CRC, *supra* note 1, at art. 43(2). "The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals." *Id.* at 43(3).

21. *See* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING, *supra* note 9, at 119. For a complete listing of the thematic structure, *see id.* at 127-28.

22. *See id.* at 119.

23. DEFENSORÍA DE LOS HABITANTES DE LABORES, REPORTAJE ANUAL, 1999-2000, *at* http://www.crnet.cr/~defensor/ (last visited March 7, 2001).

prostitution, creating an annual US $10 billion industry,[24] the problem is not unique to Costa Rica.[25] Indeed, "[c]hild prostitution . . . affects all countries,"[26] and as Vitit Muntarbhorn, a former United Nations Special Rapporteur of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography, noted, when strides are made to end child prostitution in one area of the world, the problem is further aggravated in another part of the world.[27] For example, United Nations Secretary-General Kofi Anan reported that increasing enforcement of restrictions in Southeast Asia, such as in Thailand and Sri Lanka, is shifting sex tourism to Latin America.[28] This shift has resulted in sex tourists constituting approximately five percent of the four million tourists that annually visit Central America.[29] In Costa Rica, the number of sex tourists in 1998 constituted ten thousand of Costa Rica's one million tourists.[30]

These tourists often come from the United States, Great Britain, Germany and Australia.[31] A study of foreign tourists detained in Costa Rica for sexually abusing children between 1992 and 1994 revealed that twenty-five percent were from the United States, eighteen percent were from Germany, fourteen percent were from Australia, twelve percent were from Britain, and six percent were from France.[32] A main reason why individuals travel

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24. *See* ROGER J.R. LEVESQUE, SEXUAL ABUSE OF CHILDREN: A HUMAN RIGHTS PERSPECTIVE 1, 75 (1999). For another work by Roger Levesque, see Roger J.R. Levesque, CULTURE AND FAMILY VIOLENCE: FOSTERING CHANGE THROUGH HUMAN RIGHTS LAW (2001), a discussion of "definitions, legitimacy of standards, and methods for intervention to address family violence."

25. Vitit Muntarbhorn, SEXUAL EXPLOITATION OF CHILDREN 8, ¶ 65 (1996).

26. *Id.*

27. *Id.* at 3, ¶ 20.

28. Note by the Secretary-General, *Sale of Children, Child Prostitution and Child Pornography*, Fifty-third Sess., A/53/311, ¶ 20 (1998). Despite this trend, Levesque notes that United Nations information indicates that there are 800,000 children in Thailand, 400,000 in India and 350,000 children in Brazil involved in prostitution. *See* Levesque, *supra* note 24, at 75. However, this problem is also evident in the United States. *Id.* Levesque, citing government statistics, stated that there are approximately 900,000 children in the United States engaged in prostitution. *Id.* at 1.

29. *See Central America Shuts Eyes to Prostitution of Children*, TORONTO STAR NEWSPAPER, Sept. 18, 2000, *available in* LEXIS.

30. Casa Alianza Presentation to the United Nations, *supra* note 8.

31. *See* MARÍA CECILIA CLARAMUNT, SEXUAL EXPLOITATION IN COSTA RICA: ANALYSIS OF THE CRITICAL PATH TO PROSTITUTION FOR BOYS, GIRLS AND ADOLESCENTS 35 (1999). These "sending" countries present a significant problem because they create the demand for child prostitution. *See* Jonathan Todres, *Prosecuting Sex Tour Operators in the U.S. Courts in an Effort to Reduce the Sexual Exploitation of Children Globally*, 9 B.U. PUB. INT. L.J. 1, 3 (1999).

32. *See* Casa Alianza, *Presentation to the Inter American* [sic] *Commission on Human Rights on the Subject of the Commercial Sexual Exploitation of Children in Costa Rica*, http://www.casa-alianza.org/EN/human-rights/sexual-exploit/docs/0003audiencia.shtml (visited March 7, 2001).

overseas to engage in sexual relations with child prostitutes is for the impunity that host governments extend to such tourists through the lax enforcement of anti-child exploitation laws.[33]

In Costa Rica's capital, San José,[34] the government estimates that there are at least three thousand child prostitutes.[35] Three primary types of intermediaries assist child prostitutes: bar and hotel owners, taxi drivers and pimps.[36] For example, Jorge Bubert Serrano was recently sentenced for pimping child prostitutes through an "escort service" that involved some of Costa Rica's five-star hotels.[37] Serrano advertised his child prostitution scheme on the internet, by placing brochures in hotels and classified advertisements in newspapers, and, more alarmingly, in "Naturally Costa Rica," a tourist magazine endorsed by two Costa Rican government agencies including the nation's Chamber of Tourism.[38] This operation existed for fourteen years.[39] One report[40] noted that the child prostitutes exhibited positive feelings regarding taxi drivers because the drivers brought the children customers and that "without them, everything would be more difficult."[41] Child prostitution is also present in other areas of Costa Rica.[42] Paniamor[43] identified, in particular, that ports catering to tourist yachts, such as Limón and Golfito, suffer from child prostitution.[44]

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33. *See* Heather C. Giordanella, *Status of 2423(b): Prosecuting United States Nationals for Sexually Exploiting Children in Foreign Countries*, 12 TEMP. INT'L & COMP. L.J. 133, 148-49.

34. San José has a population of 1.2 million (*See* U.S. Department of State, *supra* note 7) and serves as both the national capital and capital of the San José Province. *See* U.S. Central Intelligence Agency, *supra* note 4.

35. *See* U.N. Committee on the Rights of the Child, 596th Sess., Summary Record, ¶ 51.

36. *See* Claramunt, *supra* note 31, at 89.

37. *See* Casa Alianza, *Casa Alianza Disappointed after Pimp Get [sic] Just Five Years in Prison*, at http://www.casa-alianza.org/EN/lastminute/jail.htm (visited Aug. 17, 2001).

38. *Id.*

39. *Id.*

40. TATIANA TREGUEAR L. AND CARMEN CARRO B., INVESTIGACIÓN DIAGNÓSTICA: NIÑAS PROSTITUIDAS: CASO COSTA RICA 29 (1994). For an additional work by these authors, *see generally* TATIANA TREGUEAR L. AND CARMEN CARRO B., FUNDACIÓN PROCAL, NIÑAS MADRES: RECUENTO DE UNA EXPERIENCIA (n.d.) (discussing the situation of adolescent single mothers in Costa Rica).

41. *Id.* at 89.

42. *See* Milena Grillo R., *La movilización social como estrategeia para prevenir la explotación sexual commercial de niños y niñas: construcción de una propuesta desde la Fundación Paniamor en Costa Rica*, REVISTA PRONIÑO, *at* http://www.paniamor.or.cr/revista7.shtml (last visited Oct. 28, 2000).

43. PANIAMOR, created in 1987, is a private, non-profit, non-partisan organization that aims to "attain compliance of the rights of people under the age of 18 in Costa Rica." Paniamor, *What is Paniamor?*, *at* http://www. paniamor.or.cr/english/quees.shtml (last visited Jan. 29, 2001).

44. *See* Milena Grillo R., *supra* note 42.

IV. CAUSES OF CHILD PROSTITUTION

In light of this sex tourism problem, it is helpful to consider the reasons why children enter into prostitution.[45] Although these reasons are diverse,[46] United Nations Children's Fund (UNICEF) has drawn a proportional correlation between the lack of education and child prostitution.[47] It is thus particularly troubling that thirteen percent of all Costa Rican children do not attend school.[48] This high percentage of children not attending school is present despite the fact that the Costa Rican legislature declared that "underage individuals will have the right to receive an education oriented towards the development of their potential."[49] The Public Education Ministry was created in an effort to "guarantee" that minors continue this education,[50] that the state guarantees the quality and equality of education,[51] and that education is free and obligatory.[52]

Secondly, the strength of the child's family is imperative in preventing child prostitution.[53] For example, a Hawaiian study that traced the lives of children who lived in poverty found that "unconditional acceptance by an adult" was the single constant factor in helping children avoid prostitution, drugs, and delinquency.[54] In Costa Rica, Paniamor cited two separate studies to conclude that physical, emotional, and sexual violence within the family constituted a common denominator in leading children towards prostitution.[55] Family abuse can also cause a child to run away and thus make the child

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45. *See* World Congress against Commercial Sexual Exploitation of Children, *Contributing Factors*, *at* http://www.childhub.ch/webpub/csechome/217e.htm (last visited Oct. 22, 2000).

46. *Id.*

47. *See id.* Indeed, "[e]ducation, at its best, is an empowering tool for children, enabling them to develop the necessary confidence, self-esteem, capacity for reasoning and social skills to protect their rights and dignity and to become productive, fully participating adult members of society." *Id.*

48. *See* Defensoría de los Habitantes de Labores, *supra* note 23. This percentage accounts for approximately 120,000 of the 952,395 Costa Rican children nationwide. *Id.* An average of 5,600 children abandon school every month and 281 children daily. *See id.* This same report states that the reasons for leaving school include the following: 55% due to limited access to schools and the prerequisites and expulsion; 35% due to work, the need to provide help at home, and the inability to afford school supplies such as books and uniforms or to pay for transportation. *See id.*

49. Code, *supra* note 3, at art. 56.

50. *See* Code, *supra* note 3, at art. 57.

51. *See id.* at art. 58(a).

52. *See id.* at art. 59.

53. *See* Levesque, *supra* note 24, at 81-82.

54. *Id.*

55. *See* Fundación Paniamor, *Plan Marco de Acción*, *at* http://www.paniamor.or.cr/novedades/comision/comision.shtml (last visited March 8, 2001).

"vulnerable to commercial sexual exploitation."[56] UNICEF noted for example that forty-one of the fifty girl prostitutes interviewed in its study had experienced sexual abuse in their homes.[57] Although sixty-two percent of the interviewees reported undergoing physical abuse,[58] thirty-two percent by their father or mother,[59] sexual abuse need not be directed at the child to lead to long-term consequences to the child.[60] Seventy-eight percent of the child prostitutes interviewed by UNICEF witnessed "[s]pousal violence against the mother," while seventy-four percent saw "physical violence committed by the father against siblings."[61]

Thirdly, poverty is a contributing factor to child prostitution. For example, 76.7% of the girls interviewed for NIÑAS PROSTITUIDAS: CASO COSTA RICA stated that they relied upon prostitution as their sole means of income.[62] If children cannot financially support themselves or their families by working in "legitimate" jobs, then some children will, out of economic necessity, resort to prostitution.[63] Indeed, some families send their children into prostitution as a form of family income.[64] This grave situation, combined with the fact that over twenty percent of the Costa Rican population lives in "excessive poverty,"[65] led one government agency to declare that "[p]overty reduction is one of the principle challenges that faces the country."[66]

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56. *Id.*

57. Claramunt, *supra* note 31, at 117, citing a study completed by Treguear and Carro 1997.

58. *See id.* at 54.

59. *See id.* at 55, table 8.

60. *See id.* at 53, table 7.

61. *Id.* Additionally, this same study reported that 77% witnessed "[v]erbal violence committed by the father, mother or alternate figure against siblings"; 25% witnessed "[v]erbal violence against the mother" and 34% witnessed "[s]exual violence against anyone in the family group." *Id.* The leading family characteristics for child prostitutes are:

> [p]oor and large families with many children living under the same roof[;] [p]arental abandonment, generally the father . . .[;] [a]lcoholism and drug addiction in the father or substitute father[;] [f]amily violence . . .[;] [h]istory of prostitution for the mother, sisters, brothers, aunts or grandmothers[;] and [i]ncome earned in informal sectors of the economy, making it impossible to have a minimum salary or guaranteed labor benefits.

Id. at 56.

62. *See* TATIANA TREGUEAR L. & CARMEN CARRO B., *supra* note 40, at 32. Additionally, 3.3% relied upon "prostitution and factory work, 6.7% relied upon prostitution . . ., 3.3% relied upon prostitution and begging, and 10% relied upon prostitution and theft for income." *See id.*

63. *See* Eric Thomas Berkman, *Responses to the International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP. L. REV. 397, 401 (1996).

64. *See* Casa Alianza, *Cry of a Child*, *available at* http://www.casa-alianza.org/EN/human-rights/sexual-exploit/docs/99053.shtml (visited March 7, 2001).

65. *See* Defensoría de los Habitantes de Labores, *supra* note 23.

66. *Id.*

V. CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 4

In assessing Costa Rica's compliance with specific CRC articles, it is important to view CRC obligations in light of Article 4. This article, in combination with the non-discrimination requirement of Article 2,[67] sets forth the overall standard by which to judge States Parties under the CRC.[68] Article 4 declares that

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.[69]

This article stipulates two different standards under which states must perform their duties.[70] This distinction mirrors the differing obligations established under the International Covenant on Economic, Social and Cultural Rights[71] (IESCR) and the obligations under the International Covenant on

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67. *See* Todres, *supra* note 18, at 177. CRC Article 2 states that

> States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

CRC, *supra* note 1, at art. 2.

Similarly, article 3 of the Code states that

> [t]he provisions of this code are applicable to every underage person, without any distinction, independent of ethnicity, culture, gender, language, religion, ideology, nationality or any of his or her other characteristics, of those of his or her father, mother, legal representative or any other assigned person [to the child].

See Code, *supra* note 3, at art. 3.

68. SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 100 (1999).

69. CRC, *supra* note 1, art. 4. Similarly, the Code states that "[i]t will be the general obligation of the State to adopt the administrative, legislative, budgetary and any other necessary means to guarantee the plan effect of the fundamental rights of underage persons." Code, *supra* note 3, at art. 4.

70. *See* DETRICK, *supra* note 68, at 103.

71. RACHEL HODGKIN AND PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 55 (1998). The International Covenant on Economic, Social, and Cultural Rights in relevant part states that "[e]ach State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

Civil and Political Rights[72] (ICCPR).[73] Just as the IESCR only requires states to "progressively" implement the economic, social, and cultural rights protected under the agreement, under the CRC states are to take "all appropriate . . . measures" to the "maximum extent of their available resources" to ensure the economic, social, and cultural rights recognized by the CRC.[74] Thus, the Convention requires states parties "to move as expeditiously and effectively as possible towards [the rights protected by the CRC]."[75]

Similarly, just as the ICCPR obligates states parties to provide immediate protection of its enumerated rights, the CRC declares that states "shall undertake[76] all appropriate . . . measures" to guarantee its civil and political rights. [77] This difference in standards aims to "save" CRC civil and political rights from the mere "progressive" implementation acceptable for economic, social and cultural rights.[78] Termed differently, states parties must only make a "good faith effort" to take appropriate measures regarding economic, cultural and social rights.[79]

Sharon Detrick suggests two methods to determine whether a CRC guarantee is an economic, social, or cultural right or a civil or political right. First, she proposes that phrases such as "subject to available resources" and "in accordance with national conditions and within their means" indicate economic or social rights.[80] She suggests that the articles regarding the survival and development of the child,[81] the right of disabled children to

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International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 2, 993 U.N.T.S. 3 [hereinafter IESCR].

72. "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 2(1) [hereinafter ICCPR].

73. *See* DETRICK, *supra* note 68, at 102-04.

74. *See id.*

75. *Id.*

76. The phrase "shall undertake" was intended by the Drafting Work Group to impose only a good faith effort to achieve the enumerated rights, rather than demand the actual realization of such rights. *See* Paul A. Goetz, *Is Brazil Complying with the U.N. Convention on the Rights of the Child?*, 10 TEMP. INT'L & COMP. L.J. 147, 166 (1996).

77. DETRICK, *supra* note 68, at 102-03.

78. *See* DETRICK, *supra* note 68, at 103. This distinction was a compromise made during the CRC drafting process. *See* Hodgkin and Newell, *supra* note 71, at 55. During this process, "in accordance with their available resources" was put forth in Article 4 to qualify states' obligations. *Id.* However, to preserve the guarantees provided for under the ICCPR that are not subject to such restrictions, the limitation in the CRC was restricted to economic, social, and cultural rights. *Id.*

79. See Hodgkin & Newell, *supra* note 71 and accompanying text.

80. DETRICK, *supra* note 68, at 103.

81. *See* CRC, *supra* note 1, at art. 6(2). "States Parties shall ensure to the maximum extent possible the survival and development of the child." *Id.*

special care,[82] the achievement of the highest attainable standard of health,[83] the right to an adequate standard of living,[84] and the right to an education[85] are examples of such rights.[86] Second, Detrick recommends that a right may be identified as an economic, social or cultural right based upon its similarity to IESCR rights.[87]

VI. CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 34

Costa Rica is not in full compliance with Article 34. This article declares that States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

> 1. The inducement or coercion of a child to engage in any unlawful sexual activity;
> 2. The exploitative use of children in prostitution or other unlawful sexual practice . . . (c) The exploitative use of children in pornographic performances and materials.[88]

The Commission on the Rights of the Child stated that conformity with this article can be determined by considering the existence of

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82. *See* CRC, *supra* note 1, at art. 23(2).
States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. *Id.*

83. CRC, *supra* note 1, at art. 24(4). "States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right [to the highest attainable standard of health]. In this regard, particular account shall be taken of the needs of developing countries." *Id.*

84. CRC, *supra* note 1, at art. 27(3). "States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing." *Id.*

85. *See* CRC, *supra* note 1 at art. 28(1). "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity. . . ." *Id.*

86. *See* DETRICK, *supra* note 68, at 103.

87. *Id.*

88. CRC, *supra* note 1, at art. 34. Similarly, the IESCR provides in Article 10(3) that "[c]hildren and young persons should be protected from economic and social exploitation." *See* IESCR, *supra* note 71, at art. 34(3). In interpreting the ICCPR, the U.N. Human Rights Committee stated that Article 24(1) includes "measures to prevent children from being exploited by means of forced labour or prostitution." DETRICK, *supra* note 68, at 589-90.

1. The development of legislation aimed to ensure protection of child victims of sexual exploitation and sexual abuse, including through access to legal and other appropriate assistance and support services;
2. The consideration of sexual exploitation of children, including child prostitution and child pornography, and the possession of child pornography as criminal offences under penal law.[89]

Costa Rica's Code of the Child and the Adolescent complies with the Committee's CRC interpretation that children have a mechanism for legal access to pursue sexual exploitation claims. The Code stipulates that each child is to be provided an audience to state his or her grievance[90]; that the child is represented[91]; that such representation is gratuitous to defend the child's rights[92]; and that the child is afforded procedural equality.[93] The Code further supports children's access to the legal system by allowing any public servant or private individual to file a complaint regarding a violation of a right proscribed in the Code.[94] The Children's Trust (El Patronato Nacional de la Infancia, also known as PANI)[95] helps to ensure children's access to the legal system. Article 3 of the Code requires PANI to represent children when charges are brought against the child's parental authority[96] and to serve as an "assistant" in all other child sexual exploitation cases.[97]

PANI also helps Costa Rica comply with the Committee's CRC interpretation by providing exploited children assistance and support services. This organization serves as "the chief institution and leader in the protection, attention, promotion, and defense of the rights of the child, the adolescent, and his or her family."[98] In pursuit of this goal, the organization seeks to guarantee those rights provided to minors in the Costa Rican constitution, the CRC, and the Code.[99] To help complete these obligations, the Code requires that PANI operate local offices to provide individualized care and assistance to

89. *See* DETRICK, *supra* note 68, at 594.
90. *See* Code, *supra* note 3, at art. 114(f).
91. *See id.* at art. 114(e).
92. *See id.* at art. 114(a).
93. *See id.* at art. 114(c).
94. *See id.* at art. 117.
95. This organization was created in 1930 by Law 39 in response to the Declaration of the Rights of the Child of 1924. *See* El Patronato Nacional de la Infancia [hereinafter PANI], *Reseña Histórica, available at* http://www.pani.org/historia/html (last visited Oct. 27, 2000).
96. *See id.* at art. 111.
97. *See id.*
98. PANI, *Visión, available at* http://www.pani.org/myv.html (last visited Oct. 27, 2000).
99. *See id.*

children.[100] Through this requirement, PANI attended to 14,276 cases during 1997.[101] These cases included sexual mistreatment,[102] family conflicts,[103] psychological mistreatment[104] and abandonment,[105] among other classes.[106] To fulfill these responsibilities, PANI works with "public institutions, international organizations, non-governmental organizations and other community groups."[107]

In spite of these national efforts, the government is failing to provide the mechanisms necessary to ensure that CRC rights are extended to children and are not just rights protected on paper. Costa Rica partially fails its obligations under Article 34 by failing to fund PANI adequately.[108] Although legislation passed in 1996 requires that the national government budget seven percent of the taxes collected during the previous fiscal year to PANI,[109] the government is yet to provide the organization this promised funding.[110] Between 1997 and

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100. *See* Code, *supra* note 3, at art. 135. For example, PANI is to provide

> (a) orientation, support and temporary support to the family; (b) enroll the child in school and provide assistance to formally establish the teaching of the child; (c) include offical programs or auxiliary commentaries to children's families and to minors; (d) order medical, psychological or psychiatrical treatment; (e) provide official programs . . . for the treatment of alcoholism; (f) provide provisional care to substituted families; (g) provide temporary shelter in either private or public institutions.

Id.

101. *See* PANI, UNIDAD DE INFORMACIÓN Y ARCHIVO, CASOS ATENDIDOS SEGÚN MOTIVO, AÑOS: 1993-1997, *available at* http://www.pani.org (last visited Oct. 27, 2000).

102. A total of 1,055 cases were attended to during 1997. *See id.*

103. In 1997, the organization attended to 2,730 cases. *See id.*

104. PANI tended to 36 such cases during 1997. *See id.*

105. Approximately 1,778 cases were attended to during 1997. *See id.*

106. *Id.* The other classifications of cases include administrative depositions, "child problems," "adolescent problems," child care conflicts, child well-being, inadequate nutrition, registration, adoptions, paternity investigations, parent legitimacy, social valorization, unknown, unclassifiable. *Id.*

107. *See* PANI, *Coordinación Interinstitucional*, *available at* http://www.pani.org/coordinacion.html (last visited Oct. 27, 2000). For example, PANI works with "la Comisión Nacional Contra la Explotación Sexual y Commercial de Niños, Niñas y Adolescentes; el Comité Directivo Nacional para la Erradicación del Trabajo Infantil y la Protección a la Persona Adolescente Trbajadora; la Comisión de Proyecto de Promoción y Defensa de los Derechos de los Pueblos Indígenas; el Comité de Estudio y Tratamiento de la Violencia Infanto-Juvenil, y el Comité Permanente de Coordinación e Interacción del Sistema Penal Juvenil." *Id.*

108. *See* "Ángela Ávalos Rodríguez, *PANI sin plata para niñez*, LA NACIÓN, Sept. 12, 1998, *at* http://www.nacion.co.cr/ln_e/1998/septiembre/12/pais4.html (last visited Nov. 4, 2000).

109. *See* La Asamblea Legislativa de la República de Costa Rica, Ley Orgánica del Patronato Nacional de la Infancia, Decreto 7648, Artículo 34(a), *available at* http://cr.derecho.org/legislacion/Derecho_Civil/1-7648 (last visited Oct. 18, 2000).

110. *See* Defensoría de los Habitantes de Labores, *supra* note 23.

2000, Costa Rica failed to provide PANI approximately US $68.3 million.[111] This shortfall "without doubt directly effected the restructuring and modernization process of [PANI] as desired by the legislature."[112] Specifically, the agency cannot fill sixty-three job vacancies, mainly social worker and psychologist positions, nor can the agency open twenty-one local offices in San José and eleven throughout the country.[113] Consequently, if the agency does not have offices or personnel, then it cannot fully achieve the goals required by the CRC.[114] In response to this shortfall, the Costa Rican Constitutional Court ordered that Costa Rica pay PANI the unpaid balance.[115]

Costa Rica also fails to provide adequate institutional support to its police sex crimes unit and thus is unable to enforce the nation's anti-child prostitution legislation effectively.[116] The unit lacks vehicles, it does not have a budget to travel outside the city of San José, and it does not have evidentiary gathering equipment such as video cameras.[117] Even when the authorities are able to locate individuals victimizing children as prostitutes, the police do not always work to support the law. For example, a court convicted Rogelio Ramos, the Director of Intelligence of the "Special Support Police," in January 2001 for aiding a brothel owner escape arrest for prostituting children.[118] Corruption within the police also extends to allegations of officers requiring detained young girls to perform oral sex in police vehicles.[119]

Additionally, Costa Rica has failed to criminalize possession of child pornography as required by CRC Article 34(c). Although the production of child pornography[120] and distribution of child pornography[121] are criminalized under the Costa Rican penal code, the possession of child pornography is legal.[122] "One could argue that the possession of child pornography should not be prohibited because of the fear that such a prohibition would infringe upon

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111. EFE News Service, *Costa Rica: Children Costa Rica Ordered to Turn $68 Million Over to Children's Fund*, Mar. 21, 2001.

112. *See* Defensoría de los Habitantes de Labores, *supra* note 23.

113. *See* Ávalos Rodríguez, *supra* note 108.

114. *See* Casa Alianza Presentation to the United Nations, *supra* note 8.

115. *Id.*

116. *See* Casa Alianza, *Dozens of Reports of Child Sexual Exploitation in Costa Rica*, at http://www.casa-alianza.org/EN/lmn/docs/19990811.00316.htm (visited March 7, 2001).

117. *See id.*

118. Posting of Bruce Harris, media@casa-alianza.org, to rapid-response-request@casa-alianza.org (Jan. 31, 2001) (copy on file with author).

119. *See* Casa Alianza, *supra* note 32.

120. *See* Law 7899, *infra* note 162, at art. 173. "Whoever fabricates or produces pornographic material, using minors or their image, shall be sanctioned with a prison sentence of three to eight years." *Id.*

121. *See id.* at art. 174. "Whoever sells, distributes, broadcasts, or exhibits pornographic material of minor children or individuals who cannot care for themselves, shall be sanctioned with one to four years in prison." *Id.*

122. *See* Casa Alianza, *Child Sexual Exploitation*, *at* http://www.casa-alianza.org (last visited Oct. 29, 2000).

the Costa Rican constitutional right of freedom of speech." However, this defense is insufficient because, as noted in Article 27 of the Vienna Convention, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[123] Furthermore, under the Costa Rican constitution, ratified treaties are self-executing.[124] Consequently, ratified treaties "[take] precedence over national legislation"[125] and thus "a provision of the Convention [takes] precedence over any legal or regulatory provision that [is] incompatible with it and [has] not yet been repealed."[126] Thus, Costa Rica is in violation of the obligation to criminalize possession of child pornography.

In spite of these shortcomings, Costa Rica need not literally implement "all appropriate" measures to be in compliance; rather, it must merely take steps to fulfill progressively these obligations to be compliant with CRC Article 34.[127] Since Article 34 is classified as an economic, social, or cultural right, the State's obligation is one of "progressive" implementation, rather than literal full compliance.[128] The Committee has acknowledged that the economic burden facing the country as a whole is creating a difficult situation for Costa Rica to implement fully the CRC.[129] First, the Committee noted that the country has a large external debt,[130] which the U.S. Central Intelligence Agency estimates is US $3.9 billion.[131] Further highlighting this problem is the fact that over twenty percent of the population lives in "excessive poverty."[132] Therefore, the government could argue that it is complying with the Convention because it is progressively making efforts to eradicate child prostitution, as evidenced by its legislative reforms that bring national laws into conformity with the Convention's requirements.

However, as noted above, Costa Rica has not even made partial payments to PANI, much less provided the total budget amount promised. Additionally, the government's potential financial constraint argument will logically fail if the government follows through with President Miguel Angel

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123. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 27, 1155 U.N.T.S. 331.

124. *See* La Constitución Política de la República de Costa Rica, art. 7. "Treaties, international conventions and accords, upon approval of the Legislative Assembly, shall have from their promulgation or the day they designate, superior authority over [domestic] laws." *Id.*

125. *See* Summary Record of the 91st Meeting, *supra* note 5, ¶7.

126. *Id.*

127. DETRICK, *supra* note 68, at 593.

128. *See id.*

129. *See* Summary Record of the 91st Meeting, *supra* note 5, ¶41.

130. *See* U.N. Committee on the Rights of the Child, Concluding Observations on the Rights of the Child: Costa Rica, ¶ 6 (1993).

131. U.S. Central Intelligence Agency, *supra* note 4. This figure is a 1998 estimate. *Id.*

132. Defensoría de los Habitantes de Labores, *supra* note 23.

Rodríguez' proposal[133] to revoke the legislation requiring that the national government fund PANI. If the government stops funding PANI, then it logically will no longer work to "progressively" implement this article and will thus be in full non-compliance with Article 34's requirements.

Furthermore, as Vitit Muntarbhorn noted, "[t]he seemingly easy option of reforming the law will never suffice unless the issues of high standards of law enforcement and effective measures to counter criminality and corruption within the system are also addressed."[134] Thus, mere paper legislation is insufficient; actual enforcement of laws is necessary to give the alleged protections significance. Although Costa Rica should be commended for the legislation that aims to fulfill the CRC's goals, the government is not adequately funding PANI and the sex crimes unit. Therefore, the government is not in full compliance with CRC Article 34.

VII. CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 24

Costa Rica's failure to fund PANI and the sex crimes unit jeopardizes the health rights protected under the CRC. Article 24 obligates "States Parties [to] recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."[135] As noted above, this guarantee is an economic, social, and

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133. Casa Alianza, *Action Needed: Costa Rica Cutting Funding for Chidren, available at* http://www.casa-alianza.org/EN/lastminute/8282001.htm (last visited Oct. 9, 2001).

134. Muntarbhorn, *supra* note 25, at 3, ¶ 24.

135. CRC, *supra* note 1, at art. 24(1). "The enjoyment of the highest attainable" degree "of health" is also guaranteed by Article 12 of the IESCR ("States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health") (*See* IESCR, *supra* note 71) and by Article 25 of the Universal Declaration on Human Rights:

> (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control . . . (2) Motherhood and childhood are entitled to special care and assistance.

G.A. Res. 217 A(III), U.N. Doc. A/810 at 71 (1948). *See* DETRICK, *supra* note 68, at 399. Additionally, the Convention on the Rights of the Child requires States Parties in art. 24(2)

1. To diminish infant and child mortality;
2. To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
3. To combat disease and malnutrition including within the framework of primary health care, through inter alia the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;
4. To ensure appropriate pre-natal and post-natal health care for mothers;
5. To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic

cultural right.[136] Therefore, Costa Rica is only required to "progressively" fulfill Article 24's obligations.[137]

In evaluating Costa Rica's degree of compliance with this article, it is noteworthy that the World Health Organization defined "health" as "a state of complete physical, mental and social well-being."[138] "[G]ood health should enable individuals to develop to the maximum of their physical and mental potential, and to live economically and socially productive lives in harmony with the environment."[139] Health thus encompasses more than the mere absence of disease.[140]

Child prostitutes suffer a range of mental and physical consequences as a result of sexual exploitation. Mentally, prostituted children "see their value reduced from a person to a classification of his or her body type and sexuality."[141] The children often suffer from chronic depression and anxiety.[142] Additionally, they frequently "live in fear of violence and sadistic acts by their clients, fear of being beaten by the gangsters and pimps who control the sex trade, and fear of being apprehended by the police."[143] UNICEF's study declared that "it was easy to identify ongoing experiences of terror, abandonment, abuse, and humiliation" among child prostitutes.[144]

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knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;

6. To develop preventative health care, guidance for parents and family planning education and services.

CRC, *supra* note 1, at art. 24(2). Similarly, CRC Article 6(2) requires that "States Parties shall ensure to the maximum extent possible the survival and development of the child." CRC, *supra* note 1, at art. 6(2).

136. *See supra* note 83 and accompanying text. IESCR Article 12(1) states that "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." IESCR, *supra* note 71, at art. 12(1).

137. *See* DETRICK, *supra* note 68, at 402. "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." IESCR, *supra* note 71, at art. 12(1).

138. VAN BUREN, *supra* note 10, at 297.

139. *Id.* (citing the Declaration of Alma-Ata 1978, endorsed by the General Assembly of the United Nations).

140. *See id.* at 298. This "wholistic" approach to health was also followed by the drafters of the International Covenant on Economic, Social and Cultural Rights. *Id.*

141. Rosa Fallas Bonilla, *Adolescentes prostituidas, enfermedades de transmisión sexual y Sida: un episodio más de una historia de una historia de violencia*, REVISTA PRONIÑO, *at* http://www.paniamor.or.cr/revista7.shtml (last visited Oct. 28, 2000).

142. *See* Melissa R. Saad, *Civil Commitment and the Sexually Violent Predator*, 75 DENV. U.L. REV. 595 (1998). Although the UNICEF study did not include questions regarding mental health, the report noted that the following percentage of interviewed children showed particular signs of depression: 86% suffered "sadness"; 73.6% suffered "irritation"; 69.4% had a "problem concentrating"; and 64.5% suffered "feelings of guilt." *See* Claramunt, *supra* note 31, at 81, Table 23.

143. Berkman, *supra* note 63, at 402.

144. Claramunt, *supra* note 31, at 80.

Unfortunately, the effects of prostitution can have a life-long impact, rather than just resulting in a temporary inhibited mental state.[145] "Sexually abused children stand a fifty-five percent greater chance of being arrested later in life, a 500% greater chance of being arrested for sex crimes, and a 3,000% greater chance of being arrested for adult prostitution."[146] These problems are in addition to exploited children's avoidance of adult intimacy or sexual relations in their adult lives and vulnerability to eating disorders.[147] Even more startling is the fact that these child-victims often become child molesters themselves, thus perpetuating the problem for future generations. [148]

Exploited children also suffer physically.[149] This is evident primarily in their susceptibility to acquire sexually transmitted diseases,[150] including AIDS.[151] Indeed, the risk of attaining these diseases is heightened by the fact that only five of the children included in Treguear's study took precautions to minimize the risk of contracting a sexually transmitted disease.[152] Such a failure is the result of both a lack of information regarding the need for protection and the fact that the client often determines what protection may and may not be used.[153] Children also face more immediate and direct physical threats such as "[p]hysical attacks by customers," as reported by sixty-two percent of the children in UNICEF's study.[154] Due to these physical and mental health effects, Costa Rica's failure to prevent child prostitution under Article 34 triggers its non-compliance with Article 24.

A commendable aspect of the Code regarding children's mental health is the Code's requirement that a psychiatrist or a psychologist "accompany underage victims, especially those of sexual crimes, as many times to the judicial authority as necessary."[155] Additional protection is provided to child-victims questioned by police[156] as well as when the child is deposed by an alleged child exploiter.[157] Furthermore, special protection is extended to cover

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145. *See* Saad, *supra* note 142, at 605.

146. *Id.*

147. *See id.*

148. *See id.*

149. See Berkman, *supra* note 63, at 402.

150. *See id.* at 399.

151. *See* Levesque, *supra* note 24, at 86. "Indeed, AIDS is now a major threat to the health and survival of prostituted children, and its impact is expected to grow." *Id.*

152. *See* TREGUEAR and CARRO, *supra* note 40, at 70.

153. *See id.* at 71.

154. *See* Claramunt, *supra* note 31, at 78, Table 22.

155. Code, *supra* note 3, at art. 124.

156. Officials of the Judicial Investigative Organ or the Administrative Police, whichever may be in the case in question, are immediately capable of interrogating minors. During the interrogation, the officials will be limited to receive the minimal amount of information essential to ascertain the facts and the child's guarantee to dignity, honor, reputation, family and life. Code, *supra* note 3, at art. 124.

157. Code, *supra* note 3, at art. 121.

In order to avoid or diminish the risks that could arise regarding the psychiatric

the child's right to express his or her opinion[158] during the deposition.[159] However, such assistance is insufficient to constitute full compliance under Article 24 because it does not address the more direct health problems that occur due to child prostitution. Therefore, Costa Rica is not in full compliance with Article 24.

VIII. CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 19

Costa Rica is not in full compliance with Article 19. Article 19 holds that

> 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
> 2. Such protective measures should, as appropriate, include effective procedures for . . . reporting, . . . investigation, . . . and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.[160]

Costa Rica complies with this article's requirement to provide legislation to protect children from sexual abuse. The Committee on the Rights of the Child suggests compliance with the article's first section may be indicated by

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> health of the victims of the investigation, the [psychiatrist] assigned [to the child] will present recommendations to the judicial authority in charge of the case, who will take [the recommendations] under consideration when the defense requests to depose the child in any stage of the legal proceedings.

Id.

158. This right during judicial proceedings is protected by CRC Article 12(2) which states that "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." CRC, *supra* note 1, at 12(2).

159. Code, *supra* note 3, at art. 125.

> Judicial or administrative authorities shall avoid, as far as possible, repetitive or persistent interrogating of underage victims and will restrain their questioning for the decisive stage of the process. When a wider deposition of an underage victim proceeds, [the authorities] will always bear in mind the child's right to his or her opinion.

Id.

160. CRC, *supra* note 1, at art. 19.

"[w]hether legislation (criminal and/or family law) includes a prohibition of all forms of physical and mental violence, including . . . abuse, . . . or exploitation, . . . within the family."[161] Costa Rica met this requirement by enacting Law 7899 that established stiffer penalties for relatives of child-victims who "corrupt" or pimp children than for strangers who commit the same crime against the same child-victim.[162] A "corruptor" related to the child-victim will face four to ten years in prison,[163] rather than three to eight years in prison for corrupting a child not related to the perpetrator.[164] Similarly, a pimp related to the child-victim will face four to ten years in prison for such action[165] while a non-relative pimp will face only two to five years in prison.[166] Therefore, by implementing such deterrent legislation, Costa Rica complies with this article's first section.

Additionally, Costa Rica complies with the requirement to promote the reporting of child prostitution. That is, the legislature in enacting the Code stipulated that school officials must report cases of sexual abuse.[167] Article 66 of the Code further adds that "authorities of public or private schools . . . are required to notify the Public Education Ministry . . . of cases of physical maltreatment, sexual abuse or attempts to 'corrupt,' that involve a student-victim."[168]

Although the Code provides a broad range of individuals the opportunity to report instances of child exploitation, including the children themselves, public officials, or any private individual,[169] Costa Rica is failing to provide the institutional support for the investigation and follow-up of such reports. Thus, Costa Rica is not in full compliance with the Article's second section. The Committee on the Rights of the Child suggests that providing "special training . . . for relevant professionals[,]" and having "[e]ffective measures . . . for the . . . reporting, . . . investigation, . . . and follow-up of instances of maltreatment covered by Article 19" may indicate conformity with this section.[170] In assessing whether Costa Rica complies with these measures, it is important to note that Article 19 is an economic, social, and cultural right.[171] Consequently, Costa Rica need only apply this article "progressively."[172]

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161. *See* DETRICK, *supra* note 68, at 324.

162. *See* La Asamblea Legislativa de la República de Costa Rica, Ley Contra la Explotación Sexual Comercial de las Personas Menores de Edad, Ley 7899, publicado en el Diario Oficial La Gaceta No. 159 del 17 agosto de 1999 [hereinafter Law 7899].

163. *See* Law 7899, *supra* note 162, at art. 168.

164. *See id.* at 167.

165. *See id.* at art. 170.

166. *See id.* at art. 169.

167. *See* Code, *supra* note 3, at art. 6.

168. *Id.* at art. 66.

169. *See supra* note 94 and accompanying text.

170. Hodgkin and Newell, *supra* note 71, at 239.

171. *See id.* at 247.

172. See *supra* notes 67-87 and accompanying text.

As noted above, because Costa Rica does not adequately fund the sex crimes unit,[173] the unit cannot adequately investigate alleged cases of child prostitution due to the lack of equipment, nor follow-up due to lack of a budget to travel outside San José.[174] This indicates that Costa Rica is not in full compliance with the requirement that the country investigate and follow-up alleged cases of child sexual exploitation.

However, Costa Rica is making some strides to assist law enforcement personnel to combat sex tourism linked to child prostitution. For example, Costa Rican police are gaining special training from the United States Federal Bureau of Investigation regarding crimes that are committed against minors on the internet.[175] This training is important given the fact that when Casa Alianza representatives spoke with Costa Rican Judicial Investigative Police officials regarding sex crimes occurring in Costa Rica, the officials did not understand what the internet was.[176]

Despite this, Costa Rica's failure to adequately fund the sex crimes unit has resulted in the unit's not having the resources necessary to help end child prostitution. Thus, even if the unit is able to track-down pedophile-sex-tourism-internet sites, the unit lacks the more basic investigatory equipment, and so logically it cannot be expected to fulfill its responsibilities. Consequently, Costa Rica is not in full compliance with this article.

X. THE UNITED STATES RESPONSE

Like other western countries,[177] the United States implemented legislation to combat child sex tourism. This is accomplished through the Violent Crime Control and Law Enforcement Act of 1994.[178] This Act permits the U.S. Justice Department to prosecute United States citizens or permanent

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173. See *supra* notes 116-117 and accompanying text.

174. See *supra* notes 116-117 and accompanying text.

175. *See* Casa Alianza, *FBI Trains Costa Rican Authorities on Child Cyber Crimes, at* http://casa-alianza.org/EN/lmn/docs/20000504.00412.htm (last visited Nov. 4, 2000).

176. *See* Ann Birch and Ana Salvadó, Casa Alianza, presentation at The Third Hearings of the International Tribunal for Children's Rights on International Co-operation in the Struggle against the International Dimensions of Child Sexual Exploitation, *Sexual Exploitation of Children and the Internet[:] the Use of Internet to Prevent and Denounce Child Sexual Exploitation and to Promote the Rights of the Child*, at http://www.casa-alianza.org/EN/human-rights/sexual-exploit/docs/9902audiencia.shtml (last visited Mar. 7, 2001).

177. For a discussion of legislation passed in Australia, Sweden, France, Germany, and Britain, *see* Levesque, *supra* note 28, at 84. For a comparison of Argentina, Canada, United Kingdom, Holland, Japan, Mozambique, New Zealand, Poland, Russia, and Switzerland vis-à-vis the CRC, *see* MICHAEL FREEMAN, ED., CHILDREN'S RIGHTS: A COMPARATIVE PERSPECTIVE (1996).

178. *See* Elizabeth Bevilacqua, *Child Sex Tourism and Child Prostitution in Asia: What can be Done to Protect the Rights of Children Abroad under International Law?*, 5 ILSA J. Int'l & Comp. L. 171, 175 (1998). *See id.* President Bill Clinton signed this Act on September 13, 1994. *See id.*

aliens who travel across the national boundaries to engage in sexual relations with a minor.[179] The legislation states that

> a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A [18 USCS §§ 2241 et seq.] if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 15 years, or both.[180]

This legislation is particularly important because it may serve as a deterrent to individuals who travel abroad to engage in sexual activity with children.[181] Although United States citizens and permanent aliens traveling abroad to exploit children sexually may still perceive a situation of impunity for themselves under the domestic laws of foreign countries, knowledge that Section 2423(b) provides extraterritorial liability for their actions overseas may prevent pedophiles from engaging in such conduct.[182]

Marvin Hersh was the first person convicted under Section 2423(b).[183] During trial, the prosecution provided evidence that Hersh, a former Florida Atlantic University computer sciences professor, smuggled into the United States a Honduran child using a fake passport and birth certificate showing the child to be his son.[184] As a result of this conviction, Hersh, who had traveled to Mexico, the Dominican Republic, and Honduras for twenty years seeking young boys, received a 105-year prison sentence with no chance of parole.[185]

XI. RECOMMENDATIONS

In light of the above observations, this author recommends the following action be taken:

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179. *See* Heather C. Giordanella, *Status of 2423(b): Prosecuting United States Nationals for Sexually Exploiting Children in Foreign Countries.* 12 TEMP. INT'L & COMP. L.J. 133 at 133-34 (1998).

180. Title 18, U.S.C.S. §2423(b) (2001) [hereinafter Crime Bill].

181. *See* Giordanella, *supra* note 179, at 148-49.

182. *See id.* at 149.

183. *See* 105-year Term is Proper Penalty, SUN-SENTINEL (Fort Lauderdale, Fla.), May 27, 2000 at 12A.

184. *See id.*

185. *See id.*

1. The United Nations should establish a Special Rapporteur on Child Sexual Exploitation in Costa Rica. The United Nations needs to examine closely the situation in Costa Rica regarding child sexual exploitation. Although UNICEF conducted statistical studies regarding child sexual exploitation, an in-depth analysis is required for a more complete view of the current situation. In addition to gaining a more up-to-date perspective of child sexual exploitation, the special rapporteur's report would also likely aid researchers, help apply pressure upon public policymakers in Costa Rica to take a more aggressive stance against child sexual exploitation, and potentially promote social mobilization against this grave problem.
2. Costa Rica should increase funding for PANI and the police sex crimes unit. The lack of funding for both of these institutions places children, the very individuals who the two agencies are in part intended to protect, at risk.
3. The Committee on the Rights of the Child should make "alternative reports" available to the general public on the internet. As noted above, these reports can provide additional data, and new insights into issues before the Committee, as well as additional constructive criticism. Although some of the questions and issues raised in these reports are presumably included in the Committee reports, the Committee reports often lack specificity and do not fully explain allegations put forth by non-governmental organizations. Consequently, because the reports are not available to the public, or if they are, then not available to the degree necessary so that researchers may reasonably be able to access the reports, such information is essentially lost after the Committee members read the report and meet with the state party in question. Allowing public access to the reports would likely advance the goals of the CRC by promoting research, sparking debate, and potentially leading to influencing the necessary governmental officials to carry out the CRC goals. Making these reports available on the internet would facilitate worldwide dissemination of the reports and thus increase their usefulness.

XII. CONCLUSION

Costa Rica's strides made within the past several years in working towards fulfilling and providing the guarantees of the CRC are commendable. These strides, such as the passage of the Code and Law 7899, suggest that the government is indeed attempting to fulfill its obligations to the international community, to its constituency, and most importantly, to children. Costa Rica, however, is not presently in complete compliance with its CRC obligations, and more action is necessary to protect children throughout Costa Rica. Fortunately, the areas in which the country needs to improve upon most urgently, increased funding for PANI and the police sex crime unit, are both tangible and easily identifiable goals. Consequently, it will be relatively easy for politicians and other government officials to focus on these issues to show that the country is moving forward to protect one of the most vulnerable groups of society. It is time for Costa Rica to bring the paper rights found in the CRC and in national legislation for implementation at the ground level so that children may have what has been promised to them—their childhood.

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EVOLVING BIOTECHNOLOGY PATENT LAWS IN THE UNITED STATES AND EUROPE: ARE THEY INHIBITING DISEASE RESEARCH?

"Genetic knowledge will change the world profoundly."[1]

I. INTRODUCTION

Imagine a day when our fear of terminal illness no longer exists. Pretend for a moment that geneticists can mend our tragedy with their knowledge and skill. Are these scenarios plausible for our future? Should we struggle to make this reality even if it means giving up a part of ourselves and the formula of the human race?[2] If the answers to these questions are affirmative, then perhaps the efforts via the Human Genome Project (HGP)[3] and related biotechnology patent laws are serving us well. However, if the answers are negative, perhaps the steps which are being taken to reach these objectives must be better authenticated by balancing ethical concerns with economic incentives for researchers through strategic legislation and patent law modification.

Part II of this note will explore the history of the HGP, while noting critical developments in the multinational project. Particularly, part II will provide scientific information on genetics and its vocabulary as a predicate to recent advances that are related to disease research, and specifically gene therapy research. In part III, biotechnology patent laws in Europe and the United States will be traced across time, while highlighting the present status of biotechnology patent law in both places. International ethical concerns relating to gene patenting as applied to disease research will be weighed against the necessary economic incentives for researchers in part IV of this note. Part V will discuss how biotechnology patent law in Europe and the United States implicates disease research, focusing on the impact broad patents may have on this area of science. Lastly, part VI will provide suggestions for patent law modification and legislative intervention to prevent the inhibition

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1. *The Human Genome: Future Perfect?*, ECONOMIST, July 1-7, 2000, at 16.

2. The formula for the human race can be equated to the human genome sequence. The draft version of the human genome was published in 2000. *See The Human Genome*, ECONOMIST, July 1-7, 2000, at 1. Contrary to the earlier hypothesis that the human genome consisted of approximately 140,000 genes, scientists have concluded it may consist of only 40,000 genes. Roger Highfield, *Human Gene Count was Exaggerated*, DAILY TELEGRAPH, Sept. 26, 2000, at 9, *available at* LEXIS, The Daily Telegraph File.

3. "The human genome project is a multinational project aimed at obtaining a detailed map and a complete DNA sequence of the human genome." Darryl R. J. Macer, *Whose Genome Project?* 5 BIOETHICS 183, 183 (1991), *available at* http://zobell.boil.tsukuba.ac.jp/~macer/Papers/WGP.html.

of disease research while simultaneously acknowledging ethical concerns and the need for economic incentives.

II. BACKGROUND AND DEVELOPMENTS

A. *Genetics Lesson*

1. Understanding Gene Expression

The genome, which is divided into sequences of DNA[4] known as genes, encodes the information for polypeptide[5] sequences of protein and codes the information for its own gene expression.[6] The replication and expression of a cell's hereditary information makes up the totality of a cell's genetics.[7] It is gene expression that manifests human physical characteristics and disease. Therefore, the genetic processes within a cell should be understood before the logistics of the HGP and the related controversy over gene patenting pursuant to disease research can be appreciated.

The genetic processes within a cell include DNA replication,[8] transcription,[9] and translation.[10] The ultimate goal of these processes is protein synthesis.[11] The purpose of DNA replication is to synthesize new DNA

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4. DNA is a macromolecule that is double-stranded, helical-structured, and contains a cell's hereditary information. *See* RONALD M. ATLAS, PRINCIPLES OF MICROBIOLOGY 235 (Wm. C. Brown Publishers, 2d ed. 1996). It consists of "subunits," or nucleotides, which are arranged in a specific order. *See id.* The order of the nucleotides illustrates the cell's genetic information and contains the mechanisms that control gene expression. *See id.*

5. A polypeptide is "[a] chain of amino acids linked by peptide bonds, but of lower molecular weight than a protein." *Id.* at 1229. The number and order of the amino acids within a polypeptide chain are significant because they determine both the structure and functional properties of protein molecules. *See id.* at 1182.

6. *See id.* at 280.

7. *See id.* at 234.

8. DNA replication is a precise process that entails synthesizing daughter DNA molecules that have the same nucleotide sequence as the parental genome. *See id.* at 235.

9. Transcription is the synthesis of relevant RNA (mRNA, rRNA, and tRNA) from a DNA template. *See id.* at 1241. A template is "[a] pattern that acts as a guide for directing the synthesis of new macromolecules." *Id.* at 1240.

10. *See generally id.* Translation is "[t]he assembly of polypeptide chains with mRNA serving as a template." *Id.* at 1242.

11. *See id.* at 273. Protein synthesis, the creation of proteins, occurs during the process of translation. *See id.* These formed protein molecules are important because they can functionally express genetic information. *See id.* The relationship between DNA, RNA, and protein was discovered in 1953 and is often is illustrated in diagram form:

$$\circlearrowright \text{DNA} \xrightarrow[\text{TRANSCRIPTION}]{} \text{RNA} \xrightarrow[\text{TRANSLATION}]{} \text{PROTEIN}$$

See JAMES D. WATSON ET AL., RECOMBINANT DNA 36 (Scientific American Books, 2d ed.1992).

molecules that have the identical nucleotide[12] sequence as the genome of the parental organism. This is done by a semiconservative process,[13] which means that once the process is completed, each of the two new daughter strands will also contain one strand from the original parental double strand.[14] Once DNA replication is completed, transcription can occur.[15]

Transcription occurs by allowing one strand[16] of the newly replicated DNA to serve as a template for the code of the synthesis of RNA,[17] which is important because it directs protein synthesis.[18] Transcription consists of (1) unwinding the double helix DNA molecule for a short nucleotide sequence, (2) alignment of the RNA nucleotides opposite the complementary DNA nucleotides which are being transcribed, and (3) linkage of these nucleotides via phosphodiester bonds by a DNA-dependent RNA enzyme.[19] Ultimately, the termination process releases the RNA and the corresponding enzyme.[20]

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12. Nucleotides are the "building blocks of nucleic acid." *See id.* at 14. DNA (deoxyribonucleic acid) and RNA (ribonucleic acid) are both specialized types of nucleic acids. *See id.* Nucleotides consist of a phosphate group and either a purine or pyrimidine base. *See id.* The union of a large number of nucleotides is known as a polynucleotide. *See id.* DNA and RNA consist of long polynucleotide chains. *See id.*

13. Matthew Meselson and Franklin Stahl of the California Institute of Technology offered proof that DNA replication occurred semiconservatively. *See id.* at 23. The two scientists first grew cultures in an environment which contained heavy isotopes of carbon (13C) and nitrogen (15N). *See id.* Thus, the DNA in the cells grown in the "heavy" culture was heavier than the DNA grown in a "lighter" environment, containing natural isotopes of carbon (12C) and nitrogen (14N). *See id.* Because the heavier DNA had a higher density, it could be separated from the lighter DNA via centrifugation, a scientific procedure that involves high speed spinning to separate two substances with different densities. *See id.* Upon its separation, the cells containing "heavy" DNA were placed in the "light" medium, where it was allowed to multiply for one generation. *See id.* DNA with a density half way between the "heavy" and "light" densities of the original DNA replaced the "heavy" DNA, thus indicating that replication is not a conservative process where complimentary strands of the double helix stay together throughout the process. *See id.* Rather, it is a semiconservative process where the two strands separate during replication and each serve as templates for two new daughter strands. *See id.*

14. *See* ATLAS, *supra* note 4, at 244.

15. *See id.* at 264.

16. The strand of DNA, which is used for the synthesis of RNA, is commonly known as the "sense strand." *See id.* at 258.

17. RNA is a single strand of ribonucleotides that acts as an "informational mediator" between DNA containing stored genetic information and proteins which functionally express this information. *See id.* at 259.

18. *See id* at 258. Specifically, it is messenger RNA, or mRNA, which contains the code which is transcribed from the DNA and which will be "used to specify a sequence of amino acids in protein synthesis." *See id.* at 260. It is transfer RNA, or tRNA, which decodes the mRNA sequence, translating it into a correct amino acid sequence. *See id.* at 261.

19. *See id* at 264. Figure 6-28 illustrates the four processes which occur via the DNA-dependent enzyme, or RNA polymerase. *See id.* The steps include: initiation, elongation, continued elongation, and termination. *See id.*

20. *See id.*

Translation utilizes the RNA produced through transcription.[21] Specifically, the RNA molecules act as templates, which order the amino acids within polypeptide chains of proteins.[22] Ultimately, translation provides protein molecules with genetic information that they can functionally express.[23]

2. *The Genetic Basis for Human Disease*

Disease is linked to mutation, or the permanent change of DNA.[24] Mutations that affect the germ cells[25] may give rise to inherited disease since the information is passed from the parent to the offspring.[26] Mutations that occur in somatic cells[27] play an important role in the origin of cancer.[28]

Thus, if geneticists can pinpoint a site of gene "error," they could theoretically replace such an error with a "normal" gene, ultimately causing

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21. *See id.* at 273.

22. *See* WATSON, *supra* note 11, at 36.

23. *See* ATLAS, *supra* note 4, at 273.

24. *See* STANLEY L. ROBBINS ET AL., PATHOLOGIC BASIS OF DISEASE 125 (W.B. Saunders Company, 5th ed. 1994). Mutations can occur in many ways. One of the causes of mutation is chemical or radiation exposure. *See Sidebar: What is Gene Therapy?*, WNETSTATION, http://www.thirteen.org/innovation/show1/html/2sb-therapy.html (last visited Oct. 28, 2000). There are three major types of mutation that can occur, each differing in the extent of genetic change. ROBBINS, *supra*, at 125. Chromosome mutations are the result of genetic material rearrangement and thus cause visible structural changes in the chromosome. *See id.* at 126. Genome mutations entail loss or gain of an entire chromosome. *See id.* at 125-26. Frameshift mutations occur when a single nucleotide is substituted, inserted, or deleted, causing the entire frame of the DNA strand to be read differently. *See id.* at 126. All mutations do not result in a clinically abnormal phenotype, or disease. *See* PATHOPHYSIOLOGY OF DISEASE: AN INTRODUCTION TO CLINICAL MEDICINE 4 (Stephen J. McPhee et al. eds., 1995).

25. Germ cells differ from somatic cells in that they are specialized reproductive cells. *See* ATLAS, *supra* note 4, at 1237.

26. *See* ROBBINS, *supra* note 24, at 125. Mendelian disorders are inherited diseases that are the result of an expressed mutation with one gene that has a huge effect. *See id.* at 127. Mendelian disorders fall into three genetic categories: (1) autosomal dominant disorders, (2) autosomal recessive disorder, and (3) x-linked disorders. *See id.* at 128-29. Autosomal dominant disorders are likely to result when one parent is affected by the disorder because they are manifested in a heterozygous state. *See id.* at 128. Examples of autosomal dominant disorders include Huntington's disease and polycystic kidney disease. *See id.* at 129 (Table 5-1). Autosomal recessive disorders, the largest class of mendelian disorders, often result from parents who do not have the disease. *See id.* at 129. Autosomal recessive disorders include: cystic fibrosis, sickle cell anemia, and spinal muscular atrophy. *See id.* (Table 5-2). X-linked disorders are sex-linked disorders affecting the X chromosome. *See id.* at 129-30. Examples include: duchenne muscular dystrophy and fragile X syndrome. *See id.* at 130 (Table 5-3).

27. A somatic cell is "[a]ny cell of the body of an organism except the specialized reproductive germ cell." ATLAS, *supra* note 4, at 1237.

28. *See* ROBBINS, *supra* note 24, at 125. Mutations in somatic cells may also give rise to congenital malformations. *See id.*

reversal of the expressed disease.[29] This hypothesis is the basis for gene therapy.[30]

3. *Developments in Gene Therapy*

One aspect of disease research focuses on gene therapy. First attempted in 1990,[31] gene therapy has primarily been used to treat a condition known as severe combined immune deficiency, or SCID.[32] The condition results from an adenosine deaminase (ADA) deficiency, which is an inherited genetic disorder.[33] Those children who lack the gene for ADA develop SCID, causing harm to their lymphocytes, ultimately preventing the immune response.[34] In order to treat this condition, scientists isolate damaged lymphocytes, extract the DNA, add the gene for ADA to the damaged cells via recombinant DNA technology, and inject these cells back into the patient.[35] Expression of the ADA allows for development of the once missing immune response.[36]

While success has been limited for gene therapy,[37] scientists continue to use varied strategies on major diseases. While the list of diseases is numerous,

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29. *See Sidebar: What is Gene Therapy?*, *supra* note 24.

30. *See id.* There are two kinds of gene therapy, ex-vivo and in-vivo. *See* Sabra Chartrand, *Patents: Fighting Disease with Gene Therapy*, http://www.bio.Indiana.edu/studies/ungrad/L104AK/nytimesSS100697.html (Oct. 6, 1997). Ex-vivo gene therapy, which is both expensive and complex, entails removing a cell from an individual and in turn infecting that cell with a virus which has been modified through the addition of a gene that will carry out a specific job within the body. *See id.* The cell that has been changed is then injected back into the patient, such that the added gene will hopefully carry out its job. *See id.* In-vivo gene therapy, which is much cheaper than ex-vivo gene therapy, involves the direct insertion of a virus, which has been disabled of its harmful effects and has been combined with a gene that will perform a specific task. *See id.* Once injected into the patient, the patient's body absorbs the modified DNA at the time when the disease in question becomes a threat, preventing the disease from being manifested. *See id.*

31. *See* Gina Kolata, *In a First, Gene Therapy Saves Lives of Infants*, *http://www.frenchanderson.org/history/therapy.html* (last visited Oct. 21, 2000). The story discusses a life-saving achievement in France via the use of gene therapy in infants with SCID, while presenting the reality that this therapy may not be immediately useful to other diseases. *See id.*

32. *See* ATLAS, *supra* note 4, at 555. Scientists have used a harmless viral vector (via in-vivo gene therapy) to deliver a normal gene to patients with cystic fibrosis. *See* ROBBINS, *supra* note 23, at 125.

33. *See* ATLAS, *supra* note 4, at 555.

34. *See id.*

35. *See id.*

36. *See id.*

37. *See The Human Genome: Ingenious Medicine*, ECONOMIST, July 1-7, 2000, at 5. While scientists have focused heavily on mendelian disorders (disorders affecting a single gene) relative to gene therapy, there has been little progress. *See id.*

some include: cystic fibrosis,[38] AIDS,[39] and pancreatic cancer.[40]

B. The Human Genome Project

The HGP originated in the United States in 1988.[41] HGP began when the U.S. Department of Energy (DOE) decided to draft an ordered set of DNA segments from known chromosomal locations, develop innovative computational methods for analyzing DNA data, and design new techniques and instruments for DNA detection and analysis.[42] However, no one person or group is entirely responsible for the events which inspired HGP, as efforts towards mapping the human genome have been progressing for decades.[43] In

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38. "Cystic fibrosis is a common generalized disorder of exocrine gland function, which impairs clearance of secretions in a variety of organs." *See* ESSENTIALS OF MEDICINE 147 (Thomas E. Andreoli et al. eds., 3d ed. 1993). The strategy used in cystic fibrosis patients involves delivering a normal gene to somatic cells via a harmless viral vector. See ROBBINS, *supra* note 23, at 125.

39. "AIDS is a disease defined by the presence of any of a variety of indicator diseases and the presence of antibodies directed to the virus that causes AIDS." PATHOPHYSIOLOGY OF DISEASE, *supra* note 24, at 42. *See generally HIV Gene Therapy: Antisense Enables Long-Term Survival of Transduced Immune Cells*, GENE THERAPY WEEKLY, *available at* http://www.newsrx.com/main/weekly-reports...ckto=thisweekstopnews&absoluteposition=15 (last visited Oct. 28, 2000)(complex study involving in-vivo gene therapy in HIV positive patients).

40. Researchers performed a study to see if gene therapy could cause an antitumor effect against pancreatic cancer. *See Pancreatic Cancer: Sm-Like Oncogene is Novel Target for Gene Therapy*, GENE THERAPY WEEKLY, *available at* http://www.newsrx.com/main/weekly-reports...ckto=thisweekstopnews&absoluteposition=16 (last visited Oct. 28, 2000). Prior to this study, researchers found that a CaSm oncogene is overly expressed in the majority of pancreatic tumors and thus is required to maintain this tumoral phenotype. *See id.* Therefore, the CaSm oncogene is a prime site for gene therapy. *See id.* In the study, scientists injected the pancreatic cancer cells with a viral vector. *See id.* Ultimately, the study, performed on mice, showed a reduced tumor growth and extended median survival. *See id.*

41. *See* Byron V. Olsen, *The Biotechnology Balancing Act: Patents for Gene Fragments and Licensing the "Useful Arts,"* 7 ALB. L. J. SCI. & TECH. 295, 297 (1997).

42. *See* Macer, *supra* note 3. *See also* George Cahill, *A Brief History of the Human Genome Project*, MORALITY AND THE NEW GENETICS: A GUIDE FOR STUDENTS AND HEALTH CARE PROVIDERS, CH. 1 (Bernard Gert et al. eds., 1996). Under the sub-heading titled "Enter the Department of Energy," the author explains that the DOE's contribution to the HGP came about because of experience and politics. *See id.* Since DOE laboratories had been working with the biological effects of irradiation pursuant to the earlier atomic bomb project, they had already provided significant information to the HGP. *See id.* In fact, such advancement included the ability to physically separate chromosomes by their size and staining. *See id.* Politics played a role in the DOE's involvement in HGP. *See id.* After the atomic bomb project expired, large numbers of biologists and physicists remained. *See id.* The HGP provided these scientists with a new project. *See id.*

43. *See* Macer, *supra* note 3. The beginnings of the genome project can be at least traced back to Mendel's genetics on peas, the mapping of the trait for colour [sic] blindness to the X-chromosome Dros-ophilia by T.H. Morgan and workers, to Avery and colleagues that found DNA was the physical substance of genes, to Crick, Franklin, Watson, and Wilkins who

fact, efforts like John Adams's phenomenon on recessive inheritance,[44] Mendel's genetics on peas,[45] and Crick and Watson's discovery of DNA's structure[46] were all significant predicates to the HGP.

Soon after the DOE's initial involvement, the National Institute of Health (NIH)[47] joined the project because it is a major funder of U.S. biomedical research.[48] However, the project extends outside the United States. In fact, by 1997, twenty-six countries were involved in the project.[49] While the project may be international, the U.S. funds an estimated fifty percent of the HGP, which is predicted to end in 2005.[50]

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determined the structure of DNA, to those who discovered the genetic code, to Sanger and others who developed DNA sequencing, and to many others who contributed to our knowledge of genetics and molecular biology. *Id.*

44. *See* Cahill, *supra* note 42. The author describes British physician John Adams's contribution to genetics under the sub-heading "Emerging Concepts." *See id.* Adams observed that certain traits, or diseases, could descend through a family with phenotypically normal parents. *See id.* This served as a crucial brick in the "genetic foundation for inherited disease." *Id.*

45. *See id.* Beneath the sub-heading "Mendel and Pea Counting," the author explores mathematician-monk Gregor Mendel's work on garden peas. *See id.* His efforts in breeding peas gave birth to the notion that inheritance is quantitative, as it consists of "factors," which determine the manifestation of certain physical characteristics. *See id.* "Mendel correctly postulated that two copies of each factor are present in each of the parents and only one copy of each factor in the sex products – the 'gametes', or egg and sperm (pollen in plants) respectively." *Id.*

46. *See* ATLAS, *supra* note 4, at 28-29. James Watson and Francis Crick relied on the simple laws of structural chemistry, their intuition, and the examination of existing evidence to deduct that DNA is a double helical structure. They hypothesized that DNA was helical and accordingly used DNA X-ray diffraction patterns to test this educated guess. Further, they also built models to test their belief that DNA is helical. The often less mentioned scientists, Franklin and Wilkins, also played a role in developing the structure of DNA. *See* Macer, *supra* note 3.

47. The NIH was founded in 1887 and today serves as the "focal point" for U.S. medical research with the mission of discovering knowledge that will lead to better health for all. *See U.S. Department of Health and Human Services: National Institute of Health, Questions and Answers about NIH,* http://www.nih.gov/about/Faqs.htm#NIH (last visited Oct. 2000). The goal of the NIH is to "help prevent, detect, diagnose, and treat disease and disability, from the rarest genetic disorder to the common cold." *Id.* It carries out its mission by "conducting research in its own laboratories; supporting the research of non-Federal scientists in universities, medical schools, hospitals, and research institutions throughout the country and abroad." *Id.*

48. *See* Macer, *supra* note 3.

49. *See* Melissa Sturges, *Who Should Hold Property Rights to the Human Genome? An Application of the Common Heritage of Humankind,* 13 AM. U. INT'L L. REV. 219, 230 (1997).

50. Macer, *supra* note 3. While the project is supposed to end in 2005, there could be other programs that extend from the HGP. *See The Human Genome Project: Ingenious Medicine, supra* note 37, at 5. Presently, the knowledge from the HGP is developing the area of science known as genomics. *See id.* at 7. Genomic knowledge is helping drug discovery in a variety of ways. *See id.* First, the information gained can identify new targets for small-molecule drugs. *See id.* Second, it aids understanding as to why these small-molecule drugs do not work in everyone. *See id.* Third, it helps scientists better understand side effects. *See*

With finances, time, and efforts from around the world being utilized to further the project, the question arises: "Whose DNA is being sequenced?"[51] For all practical purposes, it is every human being's DNA that is being sequenced.[52] While the DNA that is being sequenced is a combination of various human tissue cell lines, the outcome will represent the sequence of our species as humans rather than one specific individual.[53] Ultimately, all human beings will be able to say that the sequence is ninety-nine percent similar to their own.[54]

In 2000, HGP scientists announced that they had a rough draft of the human genome, or the DNA located in a human cell.[55] Thus, the basis for the HGP goal, which was to "establish physical gene maps of all twenty-four unique human chromosomes in order to create a framework for understanding the genetic bases for human . . . disease," seemingly has been established.[56] Now the eyes of all nations turn toward the future.

While scientists may now have the human genome draft, applying this knowledge to prevent or cure disease will require even more effort.[57] Sydney Brenner, director of the Molecular Sciences Institute in Berkley, California, warns that individuals should not expect a "quick payoff."[58] In fact, when Brenner was asked about the use of this information for the future, he pointed out that it was a "big leap from just having the raw sequence to an

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id. Fourth, it helps introduce therapeutic proteins, a new class of drugs. *See id.* Despite helpful information provided by genomics, some predict that proteomics may be the next wave of scientific genius. *See id.* at 5. This field would "ignore" DNA and RNA altogether and focus specifically on the produced proteins. *See id.* Some biotechnology companies have begun to invest dollars in this field already. *See id.*

51. Macer, *supra* note 3.

52. *See id.*

53. *See id.*

54. *See id.* It is estimated that "0.3-0.5% of the nucleotides in our DNA vary between different people." *Id.*

55. *See The Human Genome*, *supra* note 2, at 1. Scientists also claim that they have already completed 30 other species' genomes. *See id.* In addition, there are nearly 100 more scientists escalating toward completion. *See id.*

56. Matthew Erramouspe, *Staking Patent Claims on the Human Blueprint: Rewards and Rent-Dissipating Races*, 43 UCLA L. REV. 961, 963 (1996).

57. *See generally The Human Genome: Ingenious Medicine*, *supra* note 36, at 5-6. This article suggests that scientists may soon be working extensively in the area of proteomics. *See id.* at 5. Essentially, proteomics would require scientists to focus on the proteins themselves. *See id.* In fact, earlier this year, Celera Genomics raised almost $1 billion for the project of identifying the human proteome, which is analogous to the sequencing of the human genome. *See id.*

58. Oz Hopkins Koglin, *Genome Sequence Just One Small Step, Expert Says*, OREGONIAN, September 27, 2000, *available at* LEXIS, Oregonian File. While Brenner does not believe that the newly sequenced genome is a "revolution," he does point out that it will accelerate research. *See id.* When asked about gene therapy, he expressed that he believed the better approach would be to study stem cells (the parent cells of all bodily tissues) rather than genes. *See id.*

interpretation of it."[59] Overall, the HGP has spawned issues in the area of patent law, leading to an international dispute over the desired status of patent laws.

C. *The Gene Patenting Debate*

The controversy over gene patenting began in early 1992, when the NIH filed two controversial patent applications for over two thousand partial gene sequences, which Dr. Craig Venter, an HGP researcher for the NIH, identified.[60] Many critics of the NIH believed that the grant of patents on partial gene sequences would inhibit necessary communication between the HGP scientists.[61] Ultimately, the U.S. Patent and Trademark Office (USPTO) rejected the two applications, and the NIH, which gave in to the criticism, failed to appeal, reversing its gene patenting policy and refusing to pursue the patent applications further.[62]

The gene patenting debate has become more complex since the NIH filed the controversial patent applications in 1992. In fact, the growing concerns over gene patenting are reflected in the evolving patent laws in the United States and Europe.

III. EVOLVING PATENT LAWS

A. *What is a patent?*

A patent is "a piece of paper signifying a grant to the inventor of certain rights."[63] There is a common misunderstanding that patents grant an inventor the right to do anything with her invention.[64] In fact, it does not give the inventor the right to make, use, or sell her invention.[65] The inventor's right to practice her invention is an inherent common-law right, which she has without a patent, as long as her practice does not infringe upon others' rights.[66] A

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59. *Id.*

60. *See* Erramouspe, *supra* note 56, at 963. *See also* Emanuel Vacchiano, *It's a Wonderful Genome: The Written-Description Requirement Protects the Human Genome from Overly Broad Patents*, 32 J. MARSHALL L. REV. 805, 813-814 (1999). Craig Venter discovered a unique method to quickly obtain resourceful human genome data. *See id.* He focused on securing partial nucleotide sequence information, which he called "expressed sequence tags," or ESTs. *See id.* While ESTs do not define functional genes or proteins, they are still useful in the sense that they provide information about functional genes. *See id.*

61. *See* Erramouspe, *supra* note 56, at 963.

62. *See id.*

63. UNDERSTANDING BIOTECHNOLOGY LAW: PROTECTION, LICENSING, AND INTELLECTUAL PROPERTY POLICIES 89 (Gale R. Peterson ed., 1993).

64. *See id.*

65. *See id.*

66. *See id.*

patent can be thought of as a negative right or a right to exclude others; however, a patent alone does not prevent others from infringing.[67] Only a lawsuit, claiming infringement, can accomplish this goal.[68]

Patents do not have value per se.[69] However, the perceived value of a patent is linked to the anticipated value of the underlying invention.[70] Moreover, patents can create value for companies who obtain them by lowering investment risk and accordingly attracting capital investment.[71]

B. United States Patent Law

The United States Constitution provides Congress with several enumerated powers, one of which states, "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[72] Congress utilized this power for the first time in the Patent Act of 1790.[73] Patents secure exclusive rights to an invention for twenty years.[74] Accordingly, the U.S. Code provides an inventor, who has secured a patent for an invention, a legal

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67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. U.S. CONST. art. I, § 8, cl. 3.

73. *See The 210th Anniversary of the First American Patent Act*, INVENTORS, wysiwyg://9/http://inventors.miningco.com...ce/inventors/library/weekly/aa073100a.htm (last visited Nov 20, 2000). George Washington signed the First United States Patent Grant on July 31, 1790. *See id.* Before Congress enacted U.S. patent laws in 1790, the King of England owned all intellectual property created by the colonists. *See id.* The first patent was granted to Samuel Hopkins, a Vermont man, for a method of creating a chemical used in making soap, glass, fertilizers, and gunpowder. *See id.*

74. *See* Erramouspe, *supra* note 56, at 965. *See also* Jacqueline D. Wright, *Implications of Recent Patent Law Changes on Biotechnology Research and the Biotechnology Industry*, 1 VA. J. L. & TECH. 2 (Spring 1997). The previous term for a patent was seventeen years from the date the Patent and Trademark Office granted the patent. *See id.* The amendment of 35 U.S.C. § 154, via the legislation employing GATT, provided all patents that were granted after June 8, 1995 with a patent term of twenty years from the earliest filing date of the patent application. *See* 35 U.S.C. § 154 (2000); *See id.* This change in patent term length afforded many advantages. First, the change in the patent term provided for consistency among other international patent systems, including Europe and Japan. *See* Wright, *supra.* Secondly, as the author contends, the twenty-year patent term is favorable to biotechnology research since it provides for longer patent protection. *See id.* Third, the twenty-year term reduces the "submarine patent" problem. *See id.* When an inventor intentionally prolongs the application process to prevent the patent from issuing, the patent application becomes a submarine patent. *See id.* Often, companies will allow an industry to use its invention before the patent is issued, wait until the industry relies on the invention, and later demand royalties after the patent has been granted. *See id.*

cause of action against those who infringe upon her patent.[75] This protection is especially important in biotechnology fields because the research involved is costly and time consuming.[76] However, before a biotechnology patent can be obtained, the invention must meet the statutory requirements of patentable subject matter. In addition, other factors, which have drastically changed the U.S. patent law system, must be considered.

1. Statutory Requirements

a. Utility

The United States Code defines the requirement of utility for an invention to be patentable by stating, "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."[77] In order to satisfy the statutory requirement of utility, the claimed invention must be operable and have practical use.[78] Operability means that the invention must be "capable of being used to effect the object proposed" in the specification.[79] The requirement of practical utility proposes the question of whether at least one objective described in the invention can be obtained by the claimed invention and then asks whether some more "specific benefit exists in currently available form."[80] Essentially, practical utility requires real-world value.[81]

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75. *See* 35 U. S. C. § 271 (2000). This statute states in part, ". . . whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent." 35 U.S.C. § 271(a) (2000).

76. *See* Wright, *supra* note 74.

77. 35 U. S. C. § 101 (2000). The U.S. now offers provisional patent applications (as opposed to the traditional utility patent) that expire in one year, have decreased costs, and do not require a PTO examination. *See* Vacchiano, *supra* note 60, at 813-814. However, the U.S. does not yet offer a "diminished" type of patent, which is often available in other countries. *See id.* A diminished patent, contrary to a U.S. provisional patent, is reduced in term and examination compared to a utility patent. *See id.*

78. *See* KENNETH J. BURCHFIEL, BIOTECHNOLOGY AND THE FEDERAL CIRCUIT 48-49 (BNA Books, Inc. 1995).

79. *Id.* (quoting Mitchell v. Tilghman, 86 U.S. (19 Wall.) 287, 396 (1873). The inventor specifies objectives of the invention in the patent application. *See* BURCHFIEL, *supra* note 78, at 48. The Federal Circuit has construed that operability is a minimum threshold to patentability since the inventor does not have to meet all of the objectives he sets forth in the specification. *See id.* In fact, he does not even have to meet a substantial number of objectives in the specification. *See id.* In this sense, the requirement of utility is limited. *See id.*

80. BURCHFIEL, *supra* note 78, at 50 (quoting Brenner v. Manson, 383 U.S. 519, 534-35, 148 USPQ 689, 695-96 (1966). The patent applicant must disclose "practical utility." *See id.*

81. *See id.*

The case most often associated with utility is *Brenner v. Manson.*[82] *Brenner* involved claims related to processes that produced steroid compounds. The USPTO denied Manson a patent on the process in question because his application failed to disclose any utility for the steroid compound which the process produced, yet it was known in the art that the class of steroids which the product belonged to were potentially useful for tumor-inhibiting effects in mice.[83] Despite Manson's argument on appeal that this product would be helpful in future research, the Supreme Court held that Manson's invention did not meet the statutory requirement of utility since the product was disclosed as being useful only "as a possible object of scientific inquiry."[84]

The utility requirement presents issues when inventors attempt to patent biotechnology, particularly genes. Genes have satisfied § 101 based on diagnostic utility.[85] Genes that have been discovered for diseases, like cystic fibrosis, have been patented because disease diagnostics itself is of utility.[86]

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82. *See* Brenner v. Manson, 383 U.S. 519, 148 USPQ 689 (1966).

83. *See id.* at 520.

84. *See id.* at 529.

85. *See* Thomas Caskey, *The Great Gene Patent Race*, CHEMISTRY & INDUSTRY, http://ci.mond.org/9520/952021.html (Oct. 16, 1995).

86. *See id.* The U.S. Patent and Trademark Office (USPTO) has recently granted several patents on genes, gene related inventions, and gene therapy methods. For example, Human Genome Sciences, Inc. (HGSI) recently received a patent on a human gene, known as the CCR5 receptor gene, that is believed to be "the critical entry point" for HIV, the AIDS virus. *See Human Genome Sciences Receives Patent on AIDS Virus Entry Point*, PR NEWSWIRE, *available at* http://www.findarticles.com/cf_1/m4PRN/2000_April_7/61379829/print.jhtml (April 7, 2000). The gene, which is found on surface cells, is the starting point for the creation of a protein that serves as a receptor for HIV. *See id.* Researchers had previously learned that individuals who do not have a functional CCR5 receptor gene are resistant to HIV infection. *See id.* Thus, the discovery of the CCR5 gene has prompted researchers to search for a compound, a drug, which would interfere with the receptor in order to possibly treat those infected with HIV. *See id.* HGSI has licensed the use of CCR5 to several of its partners to assist in the drug hunt. *See id.* Another U.S. patent, recently issued to ISIS, is a patent on the DNA sequence for human RNase H1. *See* U.S. Patent No. 6,001,653; *ISIS Promulgates Patent Plethora*, APPLIED GENETICS NEWS, Vol. 20, No. 8, March 2000. RNase H1 is a "cellular enzyme that degrades double-stranded RNA, such as that which forms when antisense oligonucleotides bind to RNA." *Id.* Most antisense drugs are believed to work via this mechanism. *See id.* The patent also extends to vectors and cells containing this DNA sequence and probes to hybridize to the gene or mRNA. *See id.* Further, the patent covers methods of creating any antisense drug or inhibitor using this mechanism, specific chemical classes that work via this method, and procedures of screeening to identify effective antisense inhibitors of genes. *See id.* ISIS has announced that it will "vigorously enforce this patent." *Id.* A third example is a broad patent that USPTO granted to Avigen Inc. and John Hopkins University. *See* U.S. Patent No. 5,962,313; *Avigen Receives a Broad Patent for AAV Gene Therapy for Lysosomal Storage Diseases*, Avigen Inc., Oct. 7, 1999, *available at* http://www.avigen.com/press_LysosomalStorageDiseases.htm [hereinafter *Lysosomal Storage Diseases*]. The patent covers "recombinant adeno-associated virus (AAV) vectors carrying lysosomal enzyme genes for the treatment of lysosomal storage diseases, including Gaucher's

However, certain gene discoveries that lack immediate use for disease therapy are often found to lack utility,[87] as in the *Brenner* decision. Ultimately, the case law definition of utility has great impact on gene patenting.[88]

b. Novelty

An invention must also meet the requirement of novelty, which essentially requires that the patent applicant be the individual who first brought the invention to society's attention.[89] Specifically, 35 U. S. C. § 102 sets forth a variety of situations that would preclude an individual from obtaining a patent. Some of those instances include:

> (1)"the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country . . ." (2) "the invention was patented or described in a printed publication in this or a foreign country . . ." (3) "he has abandoned the invention" (4) "the invention was described in a patent granted on an application for patent by another filed in the United States before the invention . . ." (5) "he did not himself invent the subject matter sought to be patented . . . ."[90]

One restriction that is often placed upon biotechnology inventions is the prohibition on patenting "products of nature."[91] This particularly applies in the

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Tay-Sachs, and Fabry's disease." *Lysosomal Storage Diseases, supra.* Moreover the patent encompasses "the delivery of the vectors to any tissue, regardless of how it is made or how the gene is regulated." *Id.* Avigen also recently received a patent relating to cancer gene therapy. *See* U.S. Patent No. 5,952,221; *Avigen Receives a Broad Patent for AAV Cancer Gene Therapy and a Patent for Adenovirus-free AAV Production*, Avigen Inc., Sept. 20, 1999, *available at* http://www.avigen.com/press_CancerPatent.htm. The patent, which relates to all kinds of cancers, covers "recombinant adeno-associated virus (AAV) vectors carrying therapeutic genes for the treatment of cancer, including genes encoding suicide proteins, antiangiogenic factors, interferons, lymphokines, tumor suppressors and growth factors. The patent is for a two gene system with one gene encoding a therapeutic protein and the other a 'gene switch' which allows the therapy to be terminated." *Id.*

87. *See id.* Diseases, like cancer, where scientists have identified the "lead" gene are important findings since the discovery may lead to methodology that could be of therapeutic use. *See id.* However, as the author points out, granting patents for these lead genes could be detrimental because it could block subsequent research with these genes. *See id.*

88. *See id.*

89. *See* 35 U.S.C. § 102 (1999). *See generally* BURCHFIEL, *supra* note 78, at 60-77 (discussion on novelty).

90. 35 U.S.C. § 102 (1999).

91. The exclusion of "products of nature" from patentability arose in the late nineteenth century when the courts refused to grant patents on newly discovered plants as well as "artificially synthesized compounds" previously derived from natural sources. BURCHFIEL,

case of recombinant processes or genetic engineering that ultimately produces the same known product.[92] Because inventions may be based on the "duplication of compounds that are found in living organisms or are produced by naturally occurring plants or animals," the product of nature doctrine is particularly important in the area of biotechnology.[93]

In re Bergstrom[94] illustrates a situation in which the product of nature doctrine was circumvented. The court in *In re Bergstrom* analyzed whether purified and separated prostaglandin compounds isolated from tissue constituted a novel invention. The court found the materials that were purified differed from the same material which was less pure in its natural state. Thus, the court held that the pure materials were "new" with respect to the natural compound and thus satisfied the novelty requirement.[95]

c. Non-Obviousness

An invention must also meet the requirement of non-obviousness before it can be considered patentable subject matter. The United States Code states:

> A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.[96]

In *Amgen Inc. v. Chugai Pharm. Co. Ltd.*, [97] a patent infringement case, the court had to determine whether a patent on a purified and isolated DNA sequence and host cells transformed with this DNA sequence were valid under §103. The prior art generally taught that the use of fully degenerate probes of high redundancy could be used to screen a human genomic library.

The inventor used a known baboon EPO gene as a probe, which had been thought to be unsuccessful to those of high skill in the art. In determining the patent's validity under §103, the court used an "obvious to try" and "reasonable expectation of success" analysis in finding the patent to

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supra note 78, at 61. *See* American Wood Paper Co. v. Fiber Disintegrating Co., 90 U.S. (23 Wall.) 566, 594-595 (1874) (holding that a substance extracted from a natural source and the method by which it was obtained can not be called a new manufacture).

92. *See* BURCHFIEL, *supra* note 78, at 60.

93. *Id.* at 61.

94. *See* In re Bergstrom, 427 F.2d 1394, 166 USPQ 256 (C.C.P.A. 1970).

95. *See id.* at 1402.

96. 35 U.S.C. § 103 (2000).

97. *See* Amgen v. Chugai Pharm. Co., 927 F.2d 1200, 18 USPQ 1016 (Fed. Cir. 1991).

be non-obvious.[98] An expert witness for the inventor stated that the "overall homology of baboon DNA and human DNA was 'roughly 90 percent.'"[99] Citing this testimony, the court noted that while it may be feasible or even "obvious to try" probing a human gDNA library with a baboon cDNA probe, the reasonable likelihood of success was not certain.[100] Thus, the DNA sequence was not obvious; accordingly, the host cells containing this non-obvious sequence also met § 103.[101]

2. *Factors Affecting U.S. Patent Law*

a. *Creation of the Court of Appeals for the Federal Circuit*

One of the initial markers of the U.S. patent law system evolution was the creation of the Court of Appeals for the Federal Circuit.[102] Established on October 1, 1982, the court has exclusive jurisdiction of appeals from district court judgments in cases arising under U.S. patent laws and both direct and indirect appeals from decisions of the Patent and Trademark Office Board of Patent Appeals and Interferences.[103] Prior to the creation of the U.S. Court of Appeals for the Federal Circuit, all patent infringement suits were tried in federal district courts with appeals being heard in one of eleven regional or circuit U.S. Courts of Appeal.[104] The U.S. Supreme Court rarely granted certiorari from these courts.[105]

Two reasons prompted the formation of the Federal Circuit. First, early Supreme Court decisions seemed to reflect an anti-patent mentality.[106] At one point, the law required an invention be a "flash of creative genius"[107] and to "push back the frontiers of chemistry, physics, and the like" in order to be patentable.[108] Congress overruled the "flash of creative genius" standard with

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98. *See id.* at 1208. The district court also used an "obvious to try" analysis coupled with a "reasonable expectation of success" analysis. *Id.* It ultimately determined that "there was no reasonable expectation of success in obtaining the EPO gene by the method . . . ." *Id.* at 1209.

99. *See id.* at 1208.

100. *See id.*

101. *See id.* at 1209.

102. *See* Wright, *supra* note 74.

103. *See* BURCHFIEL, *supra* note 78, at 5.

104. *See* PETERSON, *supra* note 63, at 8.

105. *See id.*

106. *See* BURCHFIEL, *supra* note 78, at 6. The anti-patent attitude reflected the New Deal's antipathy for monopolization. The Supreme Court raised the level of scrutiny on patents suspect to contribute to monopoly. *See generally Cuno Eng'g Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 51 USPQ 272 (1941).

107. *Cuno Eng'g Corp.*, 314 U.S. at 91, 51 USPQ at 275; BURCHFIEL, *supra* note 78, at 6.

108. *Great Atl. and Pac. Tea Co. v. Supermarket Equip. Co.*, 340 U.S. 147, 154, 87 USPQ 303, 306 (1950); BURCHFIEL, *supra* note 78, at 7.

the present day objective non-obviousness standard.[109] While the Supreme Court briefly noted this standard, it seemed to revert back to its previous, more conservative views on patents in later cases.[110]

Second, lower courts had issued extremely inconsistent decisions on patent issues. In fact, at one point a patent was almost four times as likely to be enforced in the Seventh Circuit than in the Second Circuit.[111] This led to confusion[112] and forum shopping.[113] Ultimately, the creation of the Federal Circuit promoted uniformity[114] in patent law while allowing specialized judges to hone a complex area of law.[115]

The Federal Circuit has had a noticeable effect on biotechnology patent law.[116] The Federal Circuit has displayed a "pro-patent" mentality quite

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109. *See* BURCHFIEL, *supra* note 78, at 7.

110. *See id.* at 8. *See also Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 189 USPQ 449 (1976). *See generally Anderson's-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57, 163 USPQ 673 (1969) (reverting to the traditional standard for patentability).

111. *See* BURCHFIEL, *supra* note 78, at 9.

112. *See id.* Confusion in patent law gave way to the Hruska Commission, created to provide suggested reform options. *See id.* The Hruska Commission proposed that the existing federal appellate system remain the status quo, but specialized courts of appeals should be created for the specialized areas of patent law, environmental, and tax law. *See id.* The Justice Department suggested a similar plan, which would involve merging the Court of Claims and the Court of Customs and Patent Appeals to create a new court, which would have exclusive jurisdiction over appeals from the district courts in patent, environmental, and tax law. At the time, both these courts had substantial experience in patent law cases. *See* PETERSON, *supra* note 63, at 9. While Congress did not create special courts for tax or environmental law, it did respond with the Federal Circuit for the area of patent law. BURCHFIEL, *supra* note 78, at 9. Accepting the Justice Department's proposal, the U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims were combined to form the Federal Circuit as a result of the Federal Courts Improvement Act. *See* PETERSON, *supra*, at 9. Congress hoped the new system, which has been called a "bold experiment," would help the United States compete internationally in the industrial arena. *See* BURCHFIEL, *supra*, at 10.

113. *See* PETERSON, *supra* note 63, at 9. Because some circuits had a seemingly hostile view toward patents while other circuits were considered patent-friendly, the practice of forum shopping began. *See id.* at 8. Those who owned patents attempted to have their cases tried in a jurisdiction that had a patent-friendly attitude. *See id.* at 9. Meanwhile, alleged infringers sought out patent-hostile circuits. *See id.* The combined uncertainty caused patents to lose their value. *See id.* Many chose to no longer seek patents because they did not want to invest in getting a patent when a hostile jurisdiction could quickly take it away. *See id.*

114. *See* BURCHFIEL, *supra* note 78, at 10. Congress definitely had national patent uniformity in mind when it created the Federal Circuit. *See id.* In its beginning, the Federal Circuit made it clear that any decision, other than its own, including the Supreme Court's earlier decisions inconsistent with the reasons that prompted the creation of the Federal Circuit, would all serve as merely persuasive authority. *See id.* Thus, the Federal Circuit has the power to remove the Supreme Court from any or all parts of the administration of the patent legal system. *See id* at 11. Since its creation, the Federal Circuit has succeeded in providing the much-needed uniformity in patent law nationwide. *See id. See also* PETERSON, *supra* note 63, at 10 (noting "substantial improvement" in uniformity on appeals for patent cases).

115. *See id.* at 12.

116. *See* Wright, *supra* note 74.

different from early Supreme Court decisions.[117] This approach allows for the protection of biotechnology inventions, creating the incentive to continue research and development.[118] Moreover, the Federal Circuit has issued decisions awarding high damages to patent owners in patent infringement cases.[119] Large damage awards are an additional protection for biotechnology inventors because they discourage others from infringing upon the inventor's patent.[120]

b. Legislation: Past, Present, and Future

Another factor that significantly affects patent law is changing legislation.[121] Specifically, legislation implementing the General Agreement on Tariffs and Trade (GATT) has impacted the U.S. patent system. Legislation arising from GATT has created statutory modification of the length of the patent term, introduced provisional patent applications, and altered the "date of invention" in foreign countries.[122]

The patent term length changed from seventeen years from the date of patent issuance from the USPTO to twenty years from the earliest filing date

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117. *See id.*

118. *See id.* The new approach, as compared to the patent system before the creation of the Federal Circuit, has increased the overall value of patents. *See* PETERSON, *supra* note 63, at 10. This increased value means more people are seeking patents. *See id.* An increase in patent purchases allows for more licensing opportunities and accordingly more favorable opportunities for these licenses. *See id.* This is positive for biotechnologists, as well as other kinds of scientists, who rely on licenses to use others' inventions in order to further research innovation. *See generally id.* at 30-32 (discussion on licenses for biological materials).

119. *See* PETERSON, *supra* note 63, at 10. Federal trial courts have followed this pattern of awarding huge damages. *See* Wright, *supra* note 74. For example, in a 1990 patent infringement case involving camera technology, Polaroid won $870 million dollars from Kodak. *See id.* In some cases, these large damages have driven companies into bankruptcy. *See id.*

120. *See* Wright, *supra* note 74.

121. *See id.* Specifically, the author argues that legislation implementing GATT has had a huge effect on patent law. She also looks at legislation that was being proposed at the time she wrote the article. *See id.* The legislation, titled the Moorehead Bill, focused on publication of patent applications eighteen months after the earliest effective filing date. Wright, *supra* note 74. The author cites advantages and disadvantages to patent publication. Publication could be advantageous because it can promote innovation within the biotechnology field. *See* Wright, *supra* note 74. Early publication could prevent repetitive experiments while indicating areas of research containing positive results, deterring other researchers away from research "dead ends." *See id.* Publication could also provide inventors "prior art" status, cause potential submarine patents, which allow companies to "hide" their patent and later demand royalties, to be disclosed, and provide U.S. inventors with the opportunity to see information within patent applications filed abroad. *See id.* This is important since information in U.S. patent applications, which are also filed in a country with publication laws or under the Patent Cooperation Treaty, is disclosed eighteen months after filing. *See id.*

122. *See id.*

of the patent application via the GATT enabling legislation.[123] Some have argued that the change in the patent term places the United States in equilibrium with other nations who similarly have twenty-year patent terms.[124] However, others contend that the twenty-year patent term is bad policy because it provides uncertain inventors with an even lengthier patent term.[125] Specifically, the twenty-year patent has been criticized because its lengthiness alone, as compared to the seventeen-year patent, would be less likely to promote biotechnology research.[126]

Provisional patent applications have also been created as a result of GATT legislation.[127] These applications afford advantages specifically to small businesses because the process involves less cost and fewer legal requirements.[128] Essentially, the provisional patent application ensures an inventor one year to carry out further research before he decides whether or not he wishes to invest in a more expensive non-provisional patent.[129]

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123. *See id.* The legislation implementing GATT amended 35 U.S.C. § 154, stating that any patent granted after June 8, 1995, shall have a patent term twenty years from the earliest filing date of the application. *See* 35 U.S.C. § 154 (2000). While the twenty-year patent is more extensive in length than the previous seventeen-year patent, the twenty-year patent begins at an earlier date. Wright, *supra* note 74.

124. *See id.* Both Europe and Japan have twenty-year patent terms, but also have smaller workloads. *See id.* The European Patent Office and Japanese Patent Office do not have the large volume of patents that USPTO deals with annually. *See id.*

125. *See HR 359 and S 284 Would Restore a Minimum 17 Year Patent Term: Why a (20 Years) From Filing Patent Term is Bad Policy*, Intellectual Property Creators, Oct., 6, 1998, *available at* http://www.hecklel.org/congress/104cong/issues104/iss359.htm [hereinafter Patent Term]. The author contends that a twenty-year term could cause several attempts to delay the issuance of a patent, unlike the seventeen-year patent which the applicant receives no matter how long the process takes, ultimately discouraging others from interfering with the process. *See id.* In contending that the twenty-year patent may be delayed, the author predicts: (1) "Patent examiners would give lower priority to examining the more important patents or offer limited claims to get a patent issued because of the work involved and the risk of issuing a controversial patent." (2) "Those effected by the patent could enter into delaying tactics by giving prior art on the patent to the patent office at times most designed to delay a patents [sic] issuance. This tactic will be even more common if 18 month publication becomes law." *Id.*

126. *See id.* The author argues that patent applicants often have a great deal of uncertainty concerning their inventions and by adding to the length of the patent, the uncertainty is also extended. *See id.* This could be detrimental to innovation. *See id.*

127. *See id.* The only requirements for a provisional patent application are a specification, a cover sheet, and drawings. *See id.* However, the provisional patent application must be "enabling," such that a person of ordinary skill in the art could build or perform the invention/method from the detail specified in the application. *See id.*

128. *See* Wright, *supra* note 74.

129. *See id.* The one-year term of the provisional patent application is not figured into the twenty-year patent term if the inventor chooses to pursue the twenty-year patent. *See Frequently Asked Questions about Provisional Patent Applications,* Brown, Pinnisi & Michaels, PC, *available at* http://www.lightlink.com/bbm/provapp.html (Dec. 7, 1999)[hereinafter FAQ]. Reasons for seeking a provisional patent application include: (1) If there is no time to prepare a formal application and there is going to be a publication or sale of the invention. However,

Both GATT and the North American Free Trade Agreement (NAFTA) facilitated the amendment of 35 U.S.C. § 104.[130] The change meant that inventors who created an invention in NAFTA or World Trade Organization member countries would be entitled to the same rights of priority in establishing a date of invention in the United States as those inventors who actually created an invention within the United States. [131]

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in the area of biotechnology, USPTO examiners "hold the position that a disclosure which is non-enabling as a patent application is nevertheless enabling as a publication." *Id.* Thus, filing a provisional application here might not meet the inventor's desired protection. *See id.* (2) It allows time to study the market and work out uncertainty in the invention. *See id.* (3) Provisional patent applications provide an inventor with time to arrange financing. *See id.*

130. *See* Wright, *supra* note 74. The provision of the United States Code entitled "Invention Made Abroad" states:

I. In general
  A. Proceedings. In proceedings in the Patent and Trademark Office, in the courts, and before any other competent authority, an applicant for a patent, or a patentee, may not establish a date of invention by reference to knowledge or use thereof, or other activity with respect thereto, in a foreign country other than a NAFTA country or a WTO member country, except as provided in sections 119 and 365 of this title.
  B. Rights. If an invention was made by a person, civil or military --
    1. while domiciled in the United States, and serving in another country in connection with operations by or on behalf of the United States,
    2. while domiciled in a NAFTA country and serving in any other country in connection with operations by or on the behalf of that NAFTA country, or
    3. while domiciled in a WTO member country and serving in another country in connection with operations by or on behalf of that WTO member country, that person shall be entitled to the same rights of priority in the United States with respect to such invention as if such invention had been made in the United States, that NAFTA country, or that WTO member country, as the case may be.
      a. Use of Information. To the extent that any information in a NAFTA country or a WTO member country concerning knowledge, use, or other activity relevant to proving or disproving a date of invention has not been made available for use in a proceeding in the Patent and Trademark Office, a court, or any other competent authority to the same extent as such information could be made available in the United States, the Director, court, or such other authority shall draw appropriate inferences, or take other action permitted by statute, rule, or regulation, in favor of the party that requested the information in the proceeding.

II. Definitions. As used in this section—
  A. the term "NAFTA country" has the meaning given that term in section 2(4) of the North American Free Trade Agreement Implementation Act [19 USCS § 3301(4)]; and
  B. the term "WTO member country" has the meaning given that term in section 2(10) of the Uruguay Round Agreements Act [19 USCS § 3501(10)].

35 U.S.C. § 104 (2000).

131. *See* Wright, *supra* note 74.

While the GATT legislation provided significant modifications to the patent law system, no major changes have occurred since 1953, which was the first change since the creation of the patent law system in the 1700s.[132] However, new legislation, titled the American Inventors' Protection Act (AIPA)[133] has overhauled the patent system. One representative stated that the purpose of the AIPA is "[t]o advance American technology, strengthen our nation's global competitiveness, and to reward inventors on a more timely basis . . . ."[134] The AIPA has changed patent law in three major ways. One provision provides for optional limited contested reexamination, which ultimately allows for more third-party participation on reexamination of patents.[135] A second important change is the provision for publication of U.S. patent applications.[136] Another important feature guarantees the term of the patent to compensate for USPTO delays.[137]

Critics of the AIPA have suggested that it will reshape the U.S. Patent System in favor of big corporations who want quicker access to invention information.[138] Specifically, many fear that the requirement, which demands publication after eighteen months, may promote others to steal invention ideas before the inventions are protected by a patent.[139] However, these fears are combated by proponents of the AIPA who point out that this legislation could make patent laws more congruent with European and Japanese patent laws, increasing U.S. companies' ability to compete internationally.[140]

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132. *See* Cyndia Zwahlen, *Small Business; Mind to Market; Big Firms, Independents at Odds on Patent Plan*, L.A. TIMES, Oct. 13, 1999, at 8, *available in* LEXIS, Los Angeles Times File.

133. *See* H.R. 1907, 106th Cong. (1999) (enacted).

134. Rep. Coble made the statement. *See Summary of Patent Reform Legislation in the 106th Congress*, TECH. L.J., *available at* http://techlawjournal.com/cong106/patent/Default.htm (last visited Sept. 21, 2000).

135. *See Highlights the American Inventors' Protection Act of 1999*, Greenblum & Bernstein, P.L.C., *available at* http://www.gbpatent.com/announce/highlights.htm. Prior to AIPA, a third party could initiate a reexamination of a patent, but could not be involved with subsequent proceedings before UPSTO. *See id.* Because of AIPA, third parties can now be involved in these subsequent proceedings and also now have available appeal procedures to the Board of Appeals. *See id.*

136. *See id.* This provision is a significant change. *See id.* Previously, patent applications were held in confidence. *See id.* Now, if the inventor chooses foreign filing in addition to UPSTO filing, "all pending U.S. patent applications will be published at 18 months from the earliest convention or PCT filing date." *Id.* Provisional royalties will be rewarded to the applicant between the times of publication and patenting as long as the patent issued reflects the claims published. *See id.*

137. *See id.* This guarantee for the term of a patent compensates for UPSTO delays from "interferences, secrecy orders or appeals, as well as when the PTO fails to grant the patent within three years." *Id.*

138. *See* Zwahlen, *supra* note 132, at 8.

139. *See* John Schwartz, *Inventors Say Proposed Patent Law Will Lead to Stealing Ideas*, WASH. POST, Nov. 4, 1999, at A8, *available in* LEXIS, Washington Post File.

140. *See* Zwahlen, *supra* note 132, at 8.

B. *European Patent Law*

1. *Harmonisation of Patent Law in Europe*

European patent law functions on many levels. It is important to initially note that there is no unitary European patent law system.[141] Thus, a discussion of European patent law is inclusive of a combination of European countries' national patent systems that all contain their own administrative and judicial history.[142] However, European patent law also contains many efforts to *harmonise* these European countries' patent systems through treaty efforts like the Paris Convention (PC),[143] Patent Co-operation Treaty (PCT),[144] and the European Patent Convention (EPC).[145] The discussion below will focus

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141. *See* PHILIP LEITH, HARMONISATION OF INTELLECTUAL PROPERTY IN EUROPE x (Adrian Chandler ed. 1998).

142. *See id.* at xi.

143. *See* Paris Convention, 1883. The PC, which has been revised several times since its signing in 1883, established an International Union for the Protection of Industrial Property. *See Paris Convention for the Protection of Industrial Property*, 1 B.D.I.E.L. 677, *available in* LEXIS. The PC assists patent and trademark protection by establishing minimum standards of industrial property protection. *See id.* As of January 1, 1988, the following countries were parties to PC: Algeria, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Central African Republic, Chad, China, Congo, Cote d'Ivioire, Cuba, Cyprus, Czechoslovakia, Democratic People's Republic of Korea, Denmark, Dominican Republic, Egypt, Finland, France, Gabon, German Democratic Republic, Germany (Federal Republic of), Iraq, Ireland, Israel, Italy, Japan, Jordan, Kenya, Lebanon, Libya, Liechtenstein, Luxembourg, Madagascar, Malawi, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Philippines, Poland, Portugal, Republic of Korea, Romania, Rwanda, San Marino, Senegal, South Africa, Soviet Union, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syria, Togo, Trinidad and Tobago, Tunisia, United States, Uruguay, Viet Nam, Yugoslavia, Zaire, Zambia, and Zimbabwe. *See Id.*

144. *See* Patent Cooperation Treaty, June 19, 1970. The PCT allows applicants to file an international patent application signifying which member countries in which they seek protection. *See Patent Cooperation Treaty*, 1 B.D.I.E.L. 831, *available in* LEXIS. The application is filed within the applicant's own country. *See id.* As of January 1, 1988, the following countries were party to the treaty: Australia, Austria, Barbados, Belgium, Benin, Brazil, Bulgaria, Cameroon, Central African Republic, Chad, Congo, Democratic People's Republic of Korea, Denmark, Finland, France, Gabon, Germany (Federal Republic of), Hungary, Italy, Mali, Mauritania, Monaco, Netherlands, Norway, Republic of Korea, Romania, Senegal, Soviet union, Sri Lanka, Sudan, Sweden, Switzerland, Togo, United Kingdom, and United States. *See id.* Presently there are around seventy member states. *See* LEITH, *supra* note 140, at 46.

145. *See* European Patent Convention, October 7, 1977 [hereinafter EPC]. As of October 1987, there were thirteen member states: Austria, Belgium, France, Germany (Federal Republic of), Greece, Italy, Liechtenstein, Luxembourg, Netherlands, Spain, and Sweden. Presently, there are eighteen member states. *See* LEITH, *supra* note 141, at 25. *See generally* SINGER: THE EUROPEAN PATENT CONVENTION (Raph Lunzer ed. 1995) (discussing each provision of the

primarily on the EPC because it plays a definitive role in biotechnology business.

The EPC, a treaty among eighteen European nations, was created to promote European state collaboration regarding protection of patentable matter.[146] The EPC gave rise to the European Patent Office (EPO).[147] Essentially, the EPC allows an inventor to go through one office, the EPO, in order to obtain a bundle of national patents, which are subject to the corresponding national laws of the relevant EPC member states.[148] Ultimately, an inventor who wants to obtain a patent on an invention in multiple European nations should file with the EPO, whereas an inventor seeking a patent in only a few countries should file directly with those nations' patent offices.[149]

A positive result of the EPC has been the modification of some individual European nation's patent laws to correspond with neighboring nations.[150] While the EPC is not ensuring patent uniformity, it certainly is causing some positive movement towards supranational agreement.[151] This prevents forum-shopping among states and lends hope to the ultimate goal of patent law uniformity among developed countries worldwide.[152]

2. *Substantive Requirements for Patentable Material*

The substantive requirements for patentable subject matter under EPC are slightly different than the statutory requirements which must be met under U.S. law. The substantive requirements under the EPC are: (1) novelty,[153] (2)

EPC).

146. *See* LEITH, *supra* note 141, at ix.

147. *See What is the EPC (European Patent Convention)?*, Oppedahl & Larson LLP, *available at* http://www.patents.com/patents.htm#pct [hereinafter *What is the EPC?*].

148. *See* LEITH, *supra* note 141, at x.

149. *See What is the EPC?*, *supra* note 147.

150. *See* LEITH, *supra* note 141, at x.

151. *See id.* The vast majority of member states have made their domestic patent laws conform to the EPC. *See id.* For example, the United Kingdom passed the 1977 Patents Act to bring their domestic laws in line with the EPC. *See id.*

152. *See* LEITH, *supra* note 141, at vi.

153. *See* EPC, *supra* note 145, at art. 54. Article 54 states:

1. An invention shall be considered to be new if it does not form a part of the state of art.
2. The state of the art shall be held to compromise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application.
3. Additionally, the content of European patent applications as filed, of which dates of filing are prior to the date referred to in paragraph 2 and which were published under Article 93 on or after that date, shall be considered as compromised in the state of the art.
4. Paragraph 3 shall be applied only in so far as a Contracting State designated in respect of the later application, was also designated in respect of the earlier

inventive step,[154] and (3) industrial application.[155] In addition, there are certain exceptions to patentability, which means that if an invention falls within the category of exceptions it cannot be patented.[156]

The exceptions to patentability are specifically important to the field of biotechnology. The exceptions illustrate the once conservative view[157] on Euro-Biotech patenting, as Article 53(a) leaves open an exception for those inventions that violate public policy or morality.[158] Further, Article 53(b) prohibits patents on biological methods for the production of animals or plants.[159] In order to better understand Article 53 and its relation to evolving biotechnology patent laws in Europe, an overview of conflicting case law must be discussed.

3. *EPC Article 53 Case Law: Harvard Mouse & Plant Genetic Systems v. Greenpeace*

Case law discussing Article 53 issues in the past has been somewhat contradictory and perhaps foreshadowed the need for European patent reform

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application as published.

5. The provisions of paragraphs 1 to 4 shall not exclude the patentability of any substance or composition, comprised in the state of the art, for use in a method referred to in Article 52, paragraph 4, provided that its use for any method referred to in that paragraph is not comprised in the state of the art.

EPC, *supra*.

154. *See id.* at art. 56. Article 56 states: An invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. If the state of the art also includes documents within the meaning of Article 54, paragraph 3, these documents are not to be considered in deciding whether there has been an inventive step. *Id.*

155. *See id.* at art. 57. Article 57 states: "An invention shall be considered as susceptible of industrial application if it can be made or used in any kind of industry, including agriculture." *Id.*

156. *See id.* at art. 53. Article 53 states:

European patents shall not be granted in respect of:

1. inventions [sic] the publication or exploitation of which would be contrary to "ordre public" or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;
2. plant or animal varieties or essentially biological processes for the production of plants or animals; this provision does not apply to microbiological processes or the products thereof.

Id.

157. This can be considered a conservative viewpoint when compared to the United States, which does not have similar statutory exceptions.

158. *See* EPC, *supra* note 145, at art. 53(a).

159. *See id.* at art. 53(b).

to respond to an increasingly technological world.[160] This contradiction has been particularly apparent in the field of transgenics.[161] A comparison of the well-known *Harvard mouse* case,[162] a transgenic animal case, and *Plant Genetic Systems v. Greenpeace*,[163] a case concerning transgenic plants, illustrates the contradiction.

The *Harvard mouse* case concerned a transgenic mouse that was susceptible to cancer. The invention came about when Harvard researchers introduced the myc gene, which is an activated oncogene,[164] into the non-human mammalian genome of a mouse. The case proceeded through three phases of legal action. Initially, the EPO Patent Examining Division excluded Harvard's patent application by excluding it under 53(b), calling the invention an "animal variety."[165] The Examining Division referred to the EPO Board of Appeals when it was unable to decide whether or not the Harvard mouse should be excluded under 53(a) for violating public policy.[166]

In this second phase, the EPO Board of Appeals returned the case to the EPO Examining Division clarifying that it must determine whether the claim actually constituted an "animal variety."[167] The Board ordered that if the Examining Division came to the conclusion that the claim did not include an "animal variety," then the invention should not be barred from patentability.[168] In addition, the Board ordered the Division to determine whether Article 53(a)

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160. *See* Breffni Baggot, *Patenting Transgenics in the European Union*, BIOTECH PATENT NEWS, *available at* http://www.townweb.com/biotech/baggot_eu.html.

161. *See id.* Transgenics is an area of science that involves introducing DNA from foreign sources into plants or animals, to illicit a positive change. *See* ATLAS, *supra note* 4, at 862. Via this recombinant DNA technology, plants have been altered to make them more resistant to pests and pathogens and also enhancing their nutritional capacity to increase crop yields. *See id.* However, transgenics extends beyond plants. *See* WATSON, *supra* note 11, at 478. While it has been performed on mice for approximately a decade, scientists have recently successfully extended the study to larger livestock animals. *See id.* After learning about the transgenic mouse, scientists attempted to mirror the procedure in farm animals. *See id.* They used a technique known as differential interference contrast microscopy in order to visualize the location of the often opaque nuclei of the fertilized egg in the farm animal. *See id.* Early experiments showed positive results but low frequency of occurrence. *See id.* One early study showed that a transgenic animal would only occur 1 in 200 trials. *See id.* at 279. However, today the success rate has improved. *See id.* Particularly, scientists have introduced genes to allow for the expression of growth hormone. *See id.* This has produced leaner swine, which leads to a better meat product. *See id.*

162. *See* Case V 0006/92, Harvard (Apr. 3, 1992) [hereinafter V 0006/92].

163. *See* Case T 0356/93, Plant Genetic Systems v. Greenpeace, Ltd. (Feb. 21, 1995) [hereinafter PGS].

164. An oncogene is a gene that can lead to "malignant transformations of animal cells," or a cancer-causing gene. ATLAS, *supra* note 4, at 1224.

165. *See* Case V 0004/89, Harvard (July 14, 1989).

166. *See id.*

167. *See* T 0019/90, Harvard (Oct. 3, 1990).

168. *See id.*

barred the claim from patentability.[169] Accordingly, the Board suggested that the Division weigh the suffering of animals and possible risks to the environment against the usefulness to mankind.[170]

The Division, in the third phase, made a decision concerning the Board's orders.[171] In determining whether the invention, a mouse, actually constituted an "animal variety," the Division compared the term animal to "animal variety."[172] It noted that an "animal variety" constituted a "sub-unit of a species" and thus ranked lower than a species.[173] However, an animal, here a rodent, fell within a taxonomic classification unit much higher than a species.[174] Thus, 53(b) did not exclude the *Harvard mouse*.[175]

In deciding the issue of whether the mouse should be barred relative to 53(a) because of public policy, the Division employed the balancing test suggested by the Board.[176] The Division noted the high value of the interest to develop anticancer treatments.[177] It also pointed out that there would be no danger to the environment since skilled researchers under controlled conditions do the experimentation.[178] Finally, it hypothesized that animal suffering would actually decrease since fewer animals would be needed because of the wide availability of the patented mouse.[179] Ultimately, the Division granted the patent, making it the first patent on a transgenic non-human mammal.[180]

After the Harvard mouse ruling, Plant Genetic Systems filed a patent application for transgenic plants.[181] The EPO initially granted the patent, but Greenpeace opposed the patent.[182] The Board then reviewed the patent, analyzing separately the following three categories: (1) the plant cells and seeds, (2) the process for producing the transgenic plant, and (3) the transgenic plants.[183] Ultimately, the court held that the plant cells and seeds and the process for producing the transgenic plants were patentable.[184] However, the court found the transgenic plant not patentable because it fell under the realm

169. *See* Baggot, *supra* note 160.
170. *See id.*
171. *See*, V 0006/92, *supra* note 162.
172. *See id.*
173. *See id.*
174. *See id.*
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id.*
179. *See id.*
180. *See id.*
181. *See* EPO Application No. 87400141.
182. *See* PGS, *supra* note 163.
183. *See id.*
184. *See id.*

of "plant variety" according to Article 53(b).[185]

Harvard mouse and *Plant Genetic Systems* raised questions as to how EPO viewed Article 53 since it had granted a patent for a transgenic animal, but not for a transgenic plant. The inconsistencies made investors cautious about seeking protection for intellectual property in the uncertain European patent legal system.[186]

4. *European Patent Directive on the Legal Protection of Biotechnological Inventions*

In May 1998, the European Parliament approved a European Patent Directive on Biotechnology ("Directive"),[187] a product of more than ten years of controversy over patenting life forms.[188] When the Directive went into effect in July 1998, it required that all European member states implement its rules accordingly.[189] At the time of the Directive's adoption, no other rules

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185. *See id.*

186. *See* Baggot, *supra* note 160.

187. Critics of the Directive, including Greenpeace, have labeled this Directive a "Biopiracy Directive." *See Bio-piracy Encouraged By EU biotechnology Patent Directive*, Genetic Engineering Press Releases, May 12, 1998 *available at* http://www.greenpeace.org/pressreleases/geneng/1998may12.html. One critic stated that biopiracy is the "unauthorized patenting of genetic resources taken form developing countries by mighty Western multinationals and institutions . . . ." Niccolo Sarno, *Biotechnology-Europe: Parliament Clears 'Biopiracy' Directive*, World News Inter Press Service, May 12, 1998 *available at* http://www.oneworld.org/ips2/may98/00_36_002.html. (statement made by Magda Aelvoet, co-president of the EP's Green group). Essentially, critics argue that the Directive will allow stealing of genetic resources in developing countries. *See id.* This could have many implications. *See id.* Specifically, it could force farmers, who once used freely available seeds, to pay royalties in the future if the genetic make-up of the seeds are changed and patented. *See id.*

188. *See* Dan Leskien, *The European Patent Directive on Biotechnology*, BIOTECH. DEV. MONITOR, No. 36, September/December. The European Parliament (EP) rejected the precursor of this Directive in March of 1995 because it did not exclude germ line therapies and only excluded human genes. *See id.* However, the new Directive differs only slightly from the 1995 rejected proposal. *See id.* The new Directive qualifies the treatment on any of the human body's elements to be patented, "even if the structure of that element is identical to that of a natural element." *Id.* Thus, the Directive requires that member states "grant patents for naturally-occurring genes isolated from the human genome, provided they have been properly characterized and are 'new' in the sense of having no previously recognized existence." *Id.* Despite taking a more liberal approach to biotechnology patenting, the Directive does exclude the following areas: (1) the human body and its elements; (2) processes from cloning human beings; (3) processes for modifying the genetic identity of human beings in the germ line; (4) the use of human embryos for industrial or commercial purposes; and (5) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to humans or animals, and also animals resulting from such processes. *See* European Directive on the Legal Protection of Biotechnological Inventions, May 1998 [hereinafter Directive].

189. *See* Leskien, *supra* note 188.

had established the scope of biotechnology patents.[190] The Directive explicitly set forth a broad scope for biotechnology patents involving: biological material,[191] biotechnological processes,[192] and products containing or consisting of genetic information.[193] The Directive also made a mark in European history by allowing an explicit legal right to plants and animals, while diverging from the EPO's interpretation of the EPC regarding Article 53 plant and animal varieties.[194] For example, under the Directive, the transgenic plant in *Plant Genetic Systems* would be patentable.[195] Upon the Directive's adoption, many of its rules were contrary to the more conservative view of biotechnology patents as seen in the EPC, yet it did not cause EPC member states to circumvent their obligations to the convention.[196]

On June 16, 1999, a decision from the Administrative Council of the *European Patent Organisation* amended the Implementing Regulations to the EPC, which reflected the initiative of the Directive.[197] For example, the decision added a Chapter entitled "Biotechnological Inventions" which included general definitions,[198] the scope of biotechnological inventions,[199]

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190. Neither the EPC nor patent laws within its member states specifically discuss the scope of biotechnology patents. *See id.*

191. *See* Directive, *supra* note 188, at Ch. II, Art. 8, § 1. Under the section entitled "Biological material," the Directive sets forth a broad scope for these kinds of inventions: "Patents on biological material possessing specific characteristics shall extend to any biological material derived from patented material, provided the patented material still possesses those same characteristics." *Id.*

192. *See id.* at Ch. II, Art. 8, § 2. The section entitled "Biotechnological Processes" states: "Likewise, patents on processes that enable a biological material to be produced possessing specific characteristics shall extend to all material directly and indirectly obtained through that process. Patent protection shall also cover all biological material directly derived from that material provided that the derived material possesses those same characteristics." *Id.*

193. *See id.* The section labeled "Products Containing or Consisting of Genetic Information" states: "Finally, patents on products containing or consisting of genetic information shall extend to all material (except human beings) in which the product is incorporated and in which the genetic information is contained and performs its function." *Id.*

194. *See id.*

195. *See id.*

196. *See* Leskien, *supra* note 188. Except in Cyprus, Liechtenstein, Monaco, and Switzerland, the EPC does not prevent its member nations from granting patents which are excluded under Article 53 of the EPC. *See id.*

197. *See Decision of the Administrative Council Amending the Implementing Regulations to the European Patent Convention*, Doc. OJ 7/1999 (June 16, 1999) [hereinafter *Decision*].

198. *See* EPC, *supra* note 145, at Ch. VI, Rule 23b. Rule 23b sets forth general definitions. *See id.* For example, "biotechnological inventions" are "inventions which concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used." *Id.* at (2). Plant variety means:any plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a plant variety right are fully met, can be: (a) defined by the expression of the characteristics that results from a given genotype or combination of genotypes, (b) distinguished from any other plant grouping by the expression of at least one of the said characteristics, and (c) considered as a unit with regard to its suitability for being

clarifications of Article 53 exceptions,[200] and information on patenting the human body and its elements,[201] including genes. These additions to EPC reflect the initiative of the Directive and therefore demonstrate the reality of European patent law evolution.

5. *European Patent Reform on the Horizon*

The European Patent Law System continues to evolve. In fact, in late November 2000, a Diplomatic Conference took place with the overriding objective being the cautious modernization of the European Patent System through the EPC revisions.[202] One of the goals was to insure that the EPC remains parallel to technical and legal advancements that may occur in the

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propagated unchanged." *Id.* at (4). "'Microbiological process' means any process involving or performed upon or resulting in microbiological material." *Id.* at (6).

199. *See id.* at Rule 23c. Rule 23c, entitled "Patentable biotechnological inventions" states: Biotechnological inventions shall also be patentable if they concern:

1. biological material which is isolated from its natural environment or produced by means of a technical process even if it previously occurred in nature;
2. plants or animals if the technical feasibility of the invention is not confined to a particular plant or animal variety;
3. a microbiological or other technical process, or a product obtained by means of such a process other than a plant or animal variety.

Id.

200. *See id.* at Rule 23d. Rule 23d, entitled "Exceptions to patentability" states: Under Article 53(a), European patents shall not be granted in respect of biotechnological inventions which, in particular, concern the following:

1. processes for cloning human beings;
2. processes for modifying the germ line genetic identity of human beings;
3. use of human embryos for industrial or commercial purposes;
4. processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

Id.

201. *See id.* at Rule 23e. Rule 23e, labeled "The human body and its elements," states:

1. The human body, at various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions.
2. An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of the element is identical to that of a natural element.
3. The industrial application of a sequence or a partial sequence of a gene must be disclosed in the patent application.

Id.

202. *See Diplomatic Conference to Revise the European Patent Convention*, Official Journal, Sept. 27, 2000, *available at* wysiwyg://78http://www.European-patent-office.org/news/pressrel/2000_09_27_e.htm.

future.[203] The desire to continually update the EPC is arguably a positive step for the biotechnology industry in Europe.

IV. ETHICAL CONCERNS V. ECONOMIC INCENTIVE

An analysis of biotechnology patent laws as they apply to disease research would be incomplete without noting related ethical issues in light of the incentives necessary to promote scientific innovation. It is important to begin by acknowledging that the ethical concerns surrounding this controversy extend far beyond the U.S. borders, while the majority of economic rewards for biotechnology advancements, secured by patents, are going to large research corporations here in the United States. The discussion below weighs major ethical issues against incentives for scientific advancement.

A. Ethical Concerns: Exploitation and Common Heritage

One of the major ethical concerns associated with gene patenting is the fear that third world individuals will be exploited by researchers who seek to patent their genes.[204] Patenting of genes from individuals of third world countries has cultural, moral, and social implications.[205] Because many third world countries are isolated from the rest of the world, individuals from these countries may be immune to diseases that plague individuals in developed countries.[206] This unique immunity makes these individuals' genes attractive to researchers.[207] Similarly, since researchers have now completed a draft of the human genome, interest in third world countries may intensify, as scientists seek to understand genetic diversity as it relates to disease.[208] Before the controversy over patenting third world genes can be discussed, the perspective these countries have on the HGP must be considered.

With the draft of the human genome now complete, the question arises as to whether this project was an affirmative universal decision. Because geneticists estimate that any two people are ninety-nine percent similar genetically, the draft, for all practical purposes, represents the genetic makeup of all humans.[209] With the United States contributing over three billion dollars to the effort,[210] and other developed countries substantially contributing big

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203. *See id.*

204. *See generally* Debra Harry, *Indigenous People Should Control Research That Could Affect Them*, ST. LOUIS POST, Sept. 24, 2000, at F3, *available at* LEXIS, St. Louis Post-Dispatch File.

205. *See id.*

206. *See* Sturges, *supra* note 49, at 244.

207. *See id.*

208. *See* Harry, *supra* note 204.

209. See Macer, *supra* note 3.

210. *See id.*

money, it seems that third world countries have little voice at all. Thus, those countries that did not wish to have the genome identified for conflicting religious, philosophical, or cultural reasons, never had the chance to "opt out" of the research. While this ethical stop sign may be countered by the proposition that the HGP may someday provide the medical aid these third world countries need, ethical questions surrounding related gene patenting must be considered.

Individuals in countries which are less developed than the United States and many of the European countries often have views on gene patenting that differ from developed countries.[211] Individuals from less developed countries often believe that intellectual property should belong to the public as a whole rather than to the private sector.[212] Moreover, they feel that gene patenting is interrupting nature and reducing life to a commodity.[213] Researchers justify their actions by pointing out that the individuals give consent and are compensated with royalties for their cell line donations.[214] However, this must be considered in light of third world poverty and the standard of education in these countries. One might expect individuals in third world countries to forego their cultural and moral beliefs if they do not have the educational foundation to comprehend what they are giving up. Moreover, even if these individuals understand that which they are giving the researchers, they may be so plagued by poverty that they will choose the royalties despite their belief system.

In addition to cultural and moral concerns, there may also be social implications to consider. As scientists seek out genes from individuals from third world countries to study diversity as it relates to disease,[215] several fears arise. For instance, Jonathan King, a professor at MIT and member of the board of Council for Responsible Genetics states,

> [w]e are concerned that the emphasis on gene sequences will be used to imply that genes are at the basis of a variety of human disease and conditions, when in fact the great body of evidence establishes that the majority of human ill health is not inherited but is due to external insult including pollution, infection, inadequate or inappropriate diet, physical accident, excess stress or social disruption such as wars. Preventing damage to human genes from carcinogens is a far more effective public health strategy than allowing the disease to develop and then attempting gene therapy.[216]

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211. *See* Sturges, *supra* note 49, at 244.
212. See *id.*
213. See *id.*
214. *See id.*
215. *See* Harry, *supra* note 204.
216. *Id.*

The Indigenous Peoples Council on Biocolonialism[217] has developed a model ordinance to assist tribal governments on these types of matters.[218]

Within this concern of exploitation of indigenous people lies an important topic also to be addressed, the Common Heritage Principal.[219] This ethical concern and the fear of exploitation of indigenous people are issues that should be considered before patent law is reformed.

One of the disputes over gene patenting arises from the question of how genetic property interests should be distributed.[220] Presently, the private sector in wealthy countries maintains control over much genetic material. Many argue that this is not appropriate because genetic material, in the case of the human genome, belongs to all of us through our ancestry.[221] Accordingly, the genome should be accessible to everyone under the international theory of the Common Heritage Principal.[222] If the Common Heritage Principal were applied to gene patenting, public consent would be mandatory before patents could be obtained.[223] It is important that all of the ethical concerns over gene patenting be weighed against the need for innovation and the corresponding necessary economic incentive.

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217. The Indigenous Peoples Council on Biocolonialism recently drafted an Act that is "intended to foster cooperation and set the stage for research that the Tribe sees as beneficial." *Indigenous Research Protection Act,* Indigenous Peoples Council on Biocolonialism, Sept. 30, 2000 *available at* http://www.ipcb.org/pub/irpaintro.html. The Act, entitled "Indigenous Research Protection Act," is a suggested format for legislation for Tribal countries that have yet to pass such an Act. *See id.* The Act provides that tribes may ban research altogether or regulate it on their own terms. *See id.* The Act sets forth its own purposes:

1. protect the people, culture and natural resources of the Tribe and the Tribe's future generations from unauthorized scientific research; and
2. to reduce the adverse effects of research and related activities on the Tribal community; and
3. to ensure that researchers recognize Tribal control of research activities and that the Tribe owns all data and information generated or produced by such research; and
4. to establish and provide a statutory basis for a process to review and govern any research, collection, database, or publication undertaken on the Reservation.

Indigenous Research Protection Act §2.1 (a-d).

218. *See* Harry, *supra* note 204.

219. "The Common Heritage of Mankind principle is an international legal concept which conveys equal property interests to all people." Sturges, *supra* note 49, at 245.

220. *See generally* Sturges, *supra* note 49 (applying the Common Heritage Principal to intellectual property rights).

221. *See id.* at 249.

222. *See id.*

223. *See id.* at 250.

B. *Incentive & Innovation*

Due to the efforts of the HGP, there seems to be increasing hope that this newly acquired knowledge will be applied positively to the field of medicine. However, the scientists who are attempting to find useful purposes for the HGP knowledge spend large amounts of time and money and therefore seek patents to protect their investment.[224] Because great medical benefits could arise through this research, and the known way to secure this research is via patents, one might argue that it is unethical to prohibit gene patents. Moreover, it seems fundamentally unfair to deprive hard-working researchers, who have the means to promote public health, from the possibility of receiving profits for their efforts.

While most would agree that scientific innovation should be promoted, the controversy on certain gene patents continues. The reward theory, an economic patent theory, proposes that without reward, inventors would have no incentive to invent.[225] Along the same line, if inventors do not have the benefit of patent protection, competition could cause prices to decrease, leaving little profit to the original inventor who invested time and money.[226] Such a discouraging market could ultimately decrease innovation since investors would no longer wish to expend energy to reach a low-profit outcome. This could be detrimental to biotechnology research.

V. BIOTECHNOLOGY PATENT LAWS AND DISEASE RESEARCH: BROAD PATENTS

As patent laws continue to evolve in the United States and Europe, becoming increasingly pro-patent, it is important to reflect upon the trends in the law and analyze their impact on disease research. One product of

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224. In the past, scientists have spent approximately seven billion dollars on research and development in the biotechnology industry. *See* Wright, *supra* note 74.

225. *See* Erramouspe, *supra* note 74, at 973. The author also discusses another economic patent theory known as rent dissipation theory. In discussing the rent dissipation process, the author argues:

> [s]ome patents will confer rewards that exceed the inventor's development costs. Where these excessive rewards are expected, inventors will often compete with each other to be the first and only inventor to win the patent. These competitions can be socially unproductive because they often duplicate inventive activity and divert resources into the inventive sphere even though society would be better served were these resources used elsewhere. At a limit, the total net social benefit derived from an invention can be depleted entirely in a race to develop the invention quickly, perhaps too quickly.

Id. at 976.

226. *See id.* at 973.

evolving patent laws is a broad patent.[227] This growing movement toward patent offices granting broad patents on biotechnology inventions is of great concern.[228] A broad patent is a patent that covers a wide scope of innovation, rather than just a sole invention.[229] Broad patents are often the goal of commercially-motivated companies since they can result in huge royalties from competing companies who seek licenses to use the patented inventions.[230] Many argue that this movement towards broad patents is having a detrimental effect on disease research.[231]

Broad patents can have negative consequences.[232] Because these patents are wide in scope, "stacking" of patent claims often occurs when multiple aspects of a biotechnology product are broadly patented.[233] This stacking means that researchers who do not hold the patent but who wish to use the information for further research must obtain corresponding "stacked" patent licenses.[234] Each of these licenses can cost huge dollars, often too much money for small corporations to afford.[235] The result for those who cannot afford the high costs means not entering this realm of research, simply hampering innovation.[236] For those who can afford the high costs, their dollars are spent on these expensive licenses or perhaps on legal counsel if they infringe upon the broad patent claims. Thus, in light of the changes in U.S. and European patent law, the ethical considerations of biotechnology patents, the necessity for incentive, and the desire for innovation, suggestions for legal reform can be discussed.

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227. *See* Jeroen van Wijk, *Broad Biotechnology Patents Hamper Innovation*, BIOTECH. & DEV. MONITOR, No. 25, 1995, *available at* http://www.gene.ch/www.pscw.uva.nl/monitor/2506.htm.

228. *See id.*

229. *See id.*

230. *See id.* "Deoxyribonucleic acid (DNA) for new genes, expression promoters, and enhancers, DNA probes, hybridomas, antibodies, plasmids, vectors, cell lines with high expression of certain genes or that display particular receptors, transgenic animals . . . are all examples of physical property which can be licensed." PETERSON, *supra* note 63, at 30.

231. *See* Wijk, *supra* note 227.

232. *See id.* The author also points out that not all broad patents are damaging. *See id.* For example, research carried out with a non-commercial objective, such as university or non-profit research projects, can receive a broad patent without hampering innovation. *See id.* However, those commercial corporations will use litigation to protect their broad patents, which can be expensive and draining on research. *See id.* The advantage cited for broad patents is that of high incentive, since broad patents can be a goldmine of royalties. *See id.*

233. *See* John Murray, *Owning Genes: Disputes Involving DNA Sequence Patents*, 75 CHI.-KENT. L. REV. 231, 254 (1999).

234. *See id.*

235. *See* Wijk, *supra* note 227.

236. *See id.*

VI. PROPOSAL FOR LEGAL REFORM: ACKNOWLEDGING ETHICAL CONCERNS, ENHANCING INCENTIVE, AND PROMOTING INNOVATION

Biotechnology patent law reform is difficult because it should involve a careful balancing of competing interests, including ethical concerns worldwide, research economic incentive, and public need for innovation in the arena of disease research. In an effort to address competing interests and with the fear that existing protocol within patent law in both the United States and Europe will hamper disease research, legal suggestions for reform can be presented:

Ethical Concerns: While Europe has already expressed its consideration of ethical issues by creating and maintaining Article 53 of the EPC, the United States does not seem to have a comparable legal safeguard.[237] While the United States may support organizations like the Indigenous Peoples Council on Biocolonialism, it does not have statutory safeguards that represent the portion of our nation who disagree with biotechnology patenting altogether. Thus, the legislature should enact a statutory ethical safeguard similar to Article 53(a) of the EPC so the patent and judicial system must appropriately consider and possibly adhere to public policy concerns before granting a controversial patent.

Economic Incentive: Although broad patents provide great economic incentive for companies, this must be considered alongside their alleged negative effect upon disease research. To resolve the dilemma between the simultaneous need for incentive and disease research, patent offices could replace broad patents with cross-licensing agreements.[238] For example, if a company had a specific patent on a gene or sequence, then that company would receive a portion of the profits when the specific gene or sequence they discovered was used in a mass-market drug.[239] This is a feasible alternative because future drugs are likely to work because they influence the behavior of many genes.[240] Cross-licensing agreements would still make profits attainable, and thus incentive high, while also allowing crucial information to be shared in order to promote disease research.

Promoting Innovation: In order to promote innovation, patent offices should develop a more sophisticated provisional patent application process.

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237. Differing from Europe, the United States generally promotes the commercialization of human elements (cells, tissues, genes). *See* Macer, *supra* note 3.

238. *See Gene Patent Reform Vital; The Patent Office's Current Approach Threatens to Impede Research. Gene Discoveries Must Be Shared For the Sake of Society*, L. A. TIMES, at 7, *available in* LEXIS, Los Angeles Times File. The suggestion is made by a legal scholar from the University of Michigan, Rebecca Eisenberg. *See id.* The article discusses the trend toward broad patents, expressing a fear that commercially-motivated companies will hide gene sequences like trade secrets, severely impeding disease research. *See id.*

239. *See id.*

240. *See id.*

Presently, provisional applications allow inventors to secure up to a year of provisional patent protection if they are unsure of the invention's marketability.[241] After that year expires, inventors can secure a twenty-year patent term if they so desire. A reform of this system, by providing more kinds of provisional patents, each varying in the number of years of protection proportionate to the invention's anticipated level of utility and likelihood of development or marketability, could help promote innovation.

For example, imagine a small company seeking a provisional patent on a particular biotechnology invention whose further development is uncertain, while it is projected to be of high utility. Because of the high costs of traditional twenty-year patents, a company may wish to seek a provisional patent application,[242] yet at the same time fear that the one-year provisional application period may not provide the time needed to decide if a twenty-year patent is warranted. At the end of the one-year, the company may prematurely enter into the twenty-year patent,[243] possibly contributing to patent "stacking" despite the invention's uncertainty.[244] With a reformed provisional patent system, UPSTO or EPO could establish a system objectively measuring predictable utility, then measure the inventions possible utility and assign an according specific term of years for this provisional patent. This would ultimately give uncertain companies the time they need to explore all avenues before prematurely seeking a twenty-year patent that could exclude others from the invention for a long period of time. Ultimately, this could decrease the number of twenty-year patents being granted to uncertain inventions, and hopefully decrease the monopolization of biotechnology so that innovation can be maximized.

VII. CONCLUSION

Disease research provides hope of escape from threatening illnesses for future generations and ourselves. Thus, biotechnology patent laws should be reformed to parallel the importance of this research. While many argue that cures for cancer, AIDS, and other life-threatening diseases are years away, worldwide patent law systems should take appropriate steps to make sure that time is sooner rather than later. This means finding the best way to provide all researchers with the incentive to explore and discover, while promoting innovation worldwide. This is difficult to juggle, particularly when competing legitimate ethical concerns must be considered to prevent exploitation of indigenous people.

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241. *See FAQ, supra* note 129.

242. *See* Wright, *supra* note 74.

243. *See Patent Term, supra* note 125. (noting the uncertainty inventors often have when seeking a patent or provisional patent application).

244. *See* Murray, *supra* note 233, at 254.

Legal patent reform is necessary to insure that disease research is maximized. Both the United States and Europe have recognized this need and are presently seeking a resolution. However, this resolution may be short-lived as technology advances quickly. Ultimately, in this constantly evolving process of attempting to establish a mirror between patent laws and technology, we must unite internationally to promote innovation, yet recognize the importance of all of our cultural, social, and religious value systems at the same time.

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