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COMMENTS

NOTES

BEYOND UNIVERSALISM AND RELATIVISM: THE EVOLVING DEBATES ABOUT "VALUES IN ASIA"

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From its humble and legally fragile beginnings, the international human rights movement has developed into a potent political force capable of influencing a nation's domestic politics. The growing power of the international human rights movement has led unsurprisingly to a backlash both in Asia and the West.[1] Perhaps the most serious threat to the movement to date came when increasingly assertive Asian governments, buoyed by years of economic growth, issued the 1993 Bangkok Declaration challenging the universalism of human rights and criticizing the international human rights movement for being Western-biased.

This Article advances three main theses. First and foremost, it is time to move beyond universalism and relativism. The debate, often engaged in at an exceedingly abstract level, is no longer fruitful, in Asia or elsewhere. Most of the contested issues concerning human rights are too specific to be resolved by falling back on claims of "universalism" or "relativism."[2]

Second, the "Asian values" debate was not a single debate, not only about values in Asia, and not only about universalism versus relativism. Rather it was a series of debates about a range of issues. It is a mistake to reduce the many complex debates to the politically charged and easily resolved issue of whether authoritarian governments (sometimes) have invoked culture to deny citizens in their countries their rights. It does a disservice to the difficulty of the issues and the increasingly sophisticated and nuanced views of those who are trying to take diversity seriously to simply dismiss them as apologists for dictators. Put more bluntly, it is intellectually lazy and emblematic of the arrogant and narrow-minded ethnocentricism that has led

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1. *See, e.g.*, Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002). *See also infra* notes 136-137 and accompanying text (discussing concerns on the part of U.S. legal scholars that the human rights movement is encroaching on U.S. sovereignty).

2. As discussed *infra*, there are many different versions or understandings of "universalism" and "relativism."

many in Asia, and elsewhere, to view the human rights movement as the latest neo-colonial attempt to impose with missionary zeal the values, institutions, and ways of life popular in the West on the Rest.

Third, the Asian values debates have evolved and will continue to evolve. We are now in the second round, with no indication that many of the issues will go away any time soon. In fact, just the opposite: although countless pundits have pronounced the debates about "Asian values" over, it now appears the battle is going to be a multi-round epic struggle along the lines of the fifteen-round "Thrilla in Manila" between Muhammed Ali and Joe Frazier. Of course, East-West comparisons have a long if often dubious history,[3] and are likely to be with us as long as Americans waking up in Tokyo, Beijing, or Jakarta realize they are not in Kansas or Parisians in Paris, or Londoners in London, and vice versa.[4] The current second round of debates on Asian values, or its more politically correct updated variant "values in Asia",[5] is one strand of this larger East meets West dialogue. It is now time to assess where we are and where we are going. While the Bangkok declaration led to a flurry of books and articles, there has been no systematic attempt to assess the second round of debates or where the debates are likely to head in the future.[6]

This article proceeds in three parts corresponding to the chronological evolution of the debate. The first round of the Asian-values debates began with the provocative remarks of Lee Kuan Yew and Mahathir Mohammed, gained geopolitical support from China's issuance of its White Paper on Human Rights in 1991, and reached its apogee with the issuance the 1993 Bangkok Declaration, the political manifesto for round one. While a wide range of issues was discussed, the first round had two main, related, but nonetheless distinct, focal points.[7] The first area of contention was human rights,

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3. For an engaging account of the use and abuse of the Chinese legal system as a foil for Western theorists over the centuries, see Teemu Ruskola, Legal Orientalism, 101 MICH. L. REV. 179 (2002).

4. To be sure, New Yorkers who wake up in Kansas, or L.A. for that matter, will realize they are not in New York. Of such differences, comparisons are made.

5. Both "Asian values" and "values in Asia" are misleading to the extent that the debate is not only about values. Nevertheless, values are central to many of the debates. Accordingly, I follow the accepted practice in referring to the debates in such terms.

6. One work, published after this article was first written, provides an excellent overview of the issues from a political, historical, and religious perspective. *See* MICHAEL D. BARR, CULTURAL POLITICS AND ASIAN VALUES: THE TEPID WAR (2002) (arguing that the debates over Asian values are far from over as Asian countries attempt to negotiate their own form of modernity).

7. *See, e.g.*, Yash Ghai, *Human Rights and Governance: The Asia Debate*, Asia Foundation Center for Asian Pacific Affairs, Occasional Paper No. 4, Nov. 1994; HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION (James T.H. Tang ed., 1995); HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES (Michael Davis ed., 1995); WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998); AMARTYA SEN, HUMAN RIGHTS AND ASIAN VALUES (1997); Bilahari Kim Hee P.S. Kausikan, *An East Asian Approach to Human Rights*, 2 BUFF. J. INT'L L. 263 (1995-96); Bilahari. Kausikan, *Governance that Works*, J. DEMOCRACY 24, Apr.

especially the issue of universalism versus relativism, but also including other issues such as the priority of rights and the compatibility of Confucianism, Buddhism, and Islam with democracy and human rights. The other main area of contention was economics: in particular whether authoritarian or democratic regimes are better able to achieve sustained economic growth and whether Asian versions of capitalism are superior to the varieties of capitalism found in Western liberal democracies. Despite the attempts of some scholars to discuss the issues in an even-handed and nuanced fashion, the first round of debates was heavily politicized and suffered from excessive abstraction and the lack of a solid empirical foundation for many of the sweeping claims made by both sides.

The second round of debates arose in response to the Asian financial crisis.[8] The financial crisis struck a body blow to advocates of Asian values, sending them reeling into the ropes (most notably with respect to economic issues, less so on rights issues, with the issue of democracy somewhere in between). As the scope of the financial crisis became apparent, many opponents of Asian values rushed to their corners claiming victory for universalism and blaming the crisis on Asian values. However, as Asian economies struggled to their feet and fought their way back to prosperity, advocates of Asian values raised themselves off the mat and mounted a counterattack. Some questioned to what extent Asian values were a cause of the crisis.[9] On the contrary, Asian values were said to have played an important role in the

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1997, at 24; HUMAN RIGHTS: CHINESE AND DUTCH PERSPECTIVES (Peter Baehr et al. eds., 1996); Roger T. Ames, *Continuing the Conversation on Chinese Human Rights*, 11 ETHICS & INT'L AFF. 177 (1997); DEALING WITH HUMAN RIGHTS: ASIAN AND WESTERN VIEWS ON THE VALUE OF HUMAN RIGHTS (Martha Meijer ed., 2001) (containing essays from the mid-1990s, despite the recent publication date). For a collection of excellent essays addressing many of the key issues in the first round of the debate, see THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999). For a review of this work and an analysis of first round issues, see Randall P. Peerenboom, *Human Rights and Asian Values: The Limits of Universalism*, 7 CHINA REV. INT'L 295 (2000). Asian values is one of the main themes in NEGOTIATING CULTURE AND HUMAN RIGHTS (Lynda S. Bell et al. eds., 2001), a work that came out after the Asian financial crisis but mainly addressed issues raised in the first round.

8. DEMOCRACY, MARKET ECONOMICS & DEVELOPMENT: AN ASIAN PERSPECTIVE (Farrukh Iqbal & Jong-Il You eds., 2001) [hereinafter DEMOCRACY, MARKET ECONOMICS & DEVELOPMENT]. For other second round works, see Kenneth Christie & Denny Roy, The Politics of Human Rights in East Asia (Peter Van Ness ed., 2001); Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291, 323 (2000); BARR, *supra* note 6; MARINA SVENSSON, DEBATING HUMAN RIGHTS IN CHINA, 1899-1999: A CONCEPTUAL AND POLITICAL HISTORY (2002); STEPHEN ANGLE, HUMAN RIGHTS AND CHINESE THOUGHT: A CROSS-CULTURAL INQUIRY (2002) (taking as his point of departure two claims made by Liu Huaqiu, head of the Chinese delegation to the 1993 U.N. World Conference on Human Rights in Vienna). *See also* 41-42 KOREA J., 2001-02 (containing essays on Asian values). The journal has decided to pursue the theme of Asian values over a two to three year period. *See Editor's Note, Asian Values and the New World Order*, 41 Korea J., 2001, at 264.

9. Even opponents of Asian values question this. *See, e.g.*, Francis Fukuyama, *Asian Values in the Wake of the Asian Crisis*, *in* DEMOCRACY, MARKET ECONOMICS & DEVELOPMENT, *supra* note 8, at 149-68.

recovery. The high incidence of family businesses and the relational nature of much business in Asian countries helped cushion the shock of the Asian financial crisis by providing a social welfare network in countries where the social security system is typically weak and by making it possible to raise capital to start over, thus contributing to a speedy economic recovery. Others have argued that there are still many aspects of (East) Asian capitalism worth maintaining.[10]

The fall of Suharto and subsequent democratization in Indonesia, the strengthening of democracy in Thailand, and the higher pre-crisis growth rates in the Philippines put advocates of the view that a strong (soft-authoritarian) ruling regime was necessary to ensure economic growth and stability on the defensive. On the other hand, many Asian countries that have democratized continue to suffer major socioeconomic problems and struggle to maintain social order and stability.[11] Meanwhile, China continues to prosper, and Singapore and Hong Kong did not suffer from the crisis as much as other economies in Asia.[12] Furthermore, Asian values continue to be invoked on human rights issues even in democratic Asian states in support of a different balance between the interests of the individuals and group and to oppose what some considered to be the hegemony of liberalism.[13]

In contrast to the first round, the second round of debates has been much less politicized. It has been dominated by academics rather than politicians, and the academics have been able to draw on several insightful discussions of

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10. Daniel A. Bell, *East Asian Capitalism: Towards a Normative Framework*, GLOBAL ECON. REV., Fall 2001, at 73. *See also* K.S. Jomo, *Rethinking the Role of Government Policy in Southeast Asia*, *in* RETHINKING THE EAST ASIA MIRACLE 461-508 (Joseph Stiglitz & Shahid Yusuf eds., 2001).

11. *See infra* notes 78-80 and accompanying text.

12. China has reported growth rates over 7% for the last several years with predictions for future growth in the near term in the same range. *See* People's Daily, *IMF: China's Growth Rate to Reach 7 Percent in 2002*, *available at* http://fpeng.peopledaily.com.cn/200204/19/eng20020419_94353.shtml (last visited Nov. 3, 2003). *See also* G. Pascal Zachary, *From Iceland to Botswana, Small Nations Prosper*, WALL ST. J., Feb. 25, 1999, at B1 ("Singapore, the smallest country in Southeast Asia, has been the least hurt by the region's economic crisis."). Hong Kong's growth rate of GDP fell in 1998, but rebounded to 3.1% in 1999 and 10% in 2000 and then fell sharply in 2001 to 0.1% due to the general economic slowdown in industrial countries. Growth picked up in 2002 and increased again in 2003 despite the negative impact of SARS. *See Asia Development Bank's Outlook for Hong Kong*, at http://www.adb.org/ documents/ books/ado/2002/hkg.asp (last visited Nov. 3, 2003).

13. *See* Nikhil Aziz, *The Human Rights Debate in an Era of Globalization: Hegemony of Discourse*, *in* DEBATING HUMAN RIGHTS, *supra* note 8, at 32; Takashi Oshimura, *In Defense of Asian Colors*, *in* THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM 141 (2000), *available at* http://www.mcpa.org/rol/perspectives.htm (last visited Nov. 3, 2003) (claiming that the individualist orientation of [liberal democratic] rule of law is at odds with Confucianism and the "communitarian philosophy in Asia"); Joon-Hyung Hong, *The Rule of Law and Its Acceptance in Asia*, *in* THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM 145 (2000) (noting the need to define rights and rule of law in a way that is acceptable to those who believe in "Asian Values").

the main issues in the first debate.[14] In addition to the role of Asian values in the financial crisis and subsequent recovery, one of the main issues in the second round has been whether there is sufficient common ground within Asia with respect to values, human rights, and economic issues for the term "Asian values" to be useful or whether we should move beyond Asian values. This issue was raised by opponents of Asian values in the first round, but it has now become more central, with the discussion more focused and mutually engaged; rather than talking past each other, both sides are critically examining the arguments for and against invoking Asian values. In addition, there has been a transition in the second round from the concern about whether indigenous traditions, particularly Confucianism, are compatible with the hallmarks of modernity—capitalism, democracy, rule of law, and human rights—to the acknowledgement or stipulation that they simply must be if they are to be relevant, and thus they must adapt or be adapted accordingly.[15] Therefore, the focus has shifted to articulating Confucian or other Asian *variants* of capitalism, democracy, rule of law, and human rights, rather than radical alternatives to them. In the process, scholars have begun to pay greater attention to economic, political, and legal *institutions* and *practices*. With this shift toward more concrete situations, the futility of abstract discussions of universalism versus relativism has become even more apparent.

In the third and concluding section, I consider where the debates are likely to head next and offer some thoughts on what is needed to advance the discussion and help resolve some of the persisting impasses. In my view, there is a need for both theoretical and empirical work. To date, the efforts to develop Confucian or other Asian alternatives to liberal democracy (broadly understood to include libertarians, classical liberals, and welfare liberals) have suffered from a certain ad hoc nature, resulting in piecemeal tweakings of liberalism that do not add up to a coherent alternative political theory. To build a more coherent theory, we first need to complement the broad quantitative studies that have found regional differences in rights performance with more detailed empirical work that clarifies the differences in institutions and

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14. *See, e.g.*, THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 7. *See also* Joseph Chan, *The Asian Challenge to Universal Human Rights: A Philosophical Appraisal*, *in* HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION, *supra* note 7, at 25-38; Ghai, *supra* note 7; Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

15. As discussed *infra*, fundamental Islam is a notable exception to this trend to seek accommodation with modernity. Despite the presence of Muslim majorities in Indonesia and Malaysia, Islam has not been central to debates over Asian values. This may be explained in part by Lee Kuan Yew's preference for Confucianism and Mahathir's emphasis on the values of hard work of Chinese communities throughout Asia, which have fuelled prosperity among Chinese in Malaysia and elsewhere. It may also have been due to a reluctance to fan the flames of Islamic fundamentalism. While critical of aspects of liberal modernity, particularly with respect to social values, Lee, Mahathir and the leaders of other Asian states have endorsed capital markets and the economic base of modernity.

practices within Asia, differences in outcomes on specific issues, and the reasons for such differences.[16] The insights gained from these more finely honed empirical studies may then be synthesized and systematized to develop a comprehensive, coherent alternative theory to liberalism that is consistent with modernity.

While it is not possible to sum up in a tidy fashion all of the many issues discussed in the various rounds of the debates, and while in some cases hard and fast conclusions must await further empirical work, certain points stand out. Clearly, the debates about Asian values are not over, though the debates have moved beyond broad and unhelpful claims about universalism versus relativism. Although the range of diversity needs empirical verification, there is considerable diversity within Asia and between Asian and Western countries with respect to values, levels of economic development, institutions, laws, and outcomes in particular cases. Furthermore, while empirical studies show no clear winner with respect to the general issue of whether democratic or authoritarian regimes are more likely to lead to economic growth, several more specific conclusions may be drawn that lend some support to a "growth-first" approach. What is clear is that democracy is no panacea. It will not necessarily lead to economic growth or even to a significant improvement in the protection of human rights in many cases.[17]

It also bears highlighting that advocates of allegedly universal human rights often criticize Asian countries for practices that are common in Western countries and indeed are an inevitable part of any legal system. All legal systems localize international human rights in a variety of ways. All must deal with tradeoffs between first generation civil and political rights and second generation social, economic, and cultural rights, and between individual freedom and group rights or social stability.[18] In general, the forms and legal techniques of reconciliation are the same or similar in Asian and in Western countries, though the substantive outcomes of how each country reconciles such conflicts differ for many reasons. Despite the likelihood of greater convergence as a result of pressures from the international human rights movement and the forces of globalization more generally, there will be areas of divergence between countries in Asia and elsewhere in the world, and within Asia, in part because of differences in values and in part because of the path-dependency of institutions, customs, and lifeforms. Thus, "Asian values"

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16. *See infra* notes 24-26 for several multiple-country studies that have found significant differences by region across a range of rights.

17. Democracy appears to be related to both economic growth and human rights in a non-linear way, with the human rights benefits of democracy occurring only once democracy is consolidated. See *infra* notes 111-113, 161.

18. As discussed *infra*, many democratic countries, including several in Asia, no longer confront the broad issue of whether economic growth requires the postponement of democracy. Nevertheless, they regularly deal with a range of more specific issues that involve the conflict between first and second or third generation rights.

or "values in Asia" will remain an issue. Replacing references to "Asian values" with "values in Asia," while more politically correct, will not alter the fundamental reality that differences in values (whether in Asia or Western countries) undermine to some degree the universality of the human rights regime as an empirical matter and present a challenge to the normative claim that human rights should be interpreted and implemented in a similar manner everywhere. In many cases, differences in values and other contingent circumstances will and should lead to differences in the ways human rights are interpreted and implemented. The overly politicized arguments of some Asian governments in the first round should not lead to the premature and false conclusions that differences in values either do not exist or do not matter.

THE FIRST ROUND

Rights Issues

1. Universalism versus relativism

Clarifying Terminology: A Brief Introduction to the Philosophical Literature

The first round of the Asian values debates proceeded, for the most part, without drawing on the rich, if sometimes confusing and ultimately inconclusive, philosophical literature on universalism and relativism.[19] I discuss some explanations for why this is so when I consider the attempt to move the debate away from universalism and relativism in the second round. Nevertheless, it may be helpful to set out some of the more common definitions and positions in the philosophical literature in order to provide a context for the discussion of universalism and relativism in the various rounds of the debates. Doing so will also bring out more clearly both points of agreement and contention among the various disputants.[20]

Descriptive relativism holds that the moral beliefs, standards, values, or principles of individuals, groups or societies conflict in fundamental ways, and thus disagreements will remain in some cases even after all factual and

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19. Some commentators took a philosophical approach though they do not necessarily delve at all or very deeply into the debates about moral realism or the various forms of normative or metaethical relativism. *See, e.g.*, Michael Barnhart, *Getting Beyond Cross-Talk: Why Persisting Disagreements Are Philosophically Nonfatal*, *in* NEGOTIATING CULTURE AND HUMAN RIGHTS, *supra* note 7, at 45-67.

20. A good place to start for a general overview of the philosophical literature is MORAL RELATIVISM: A READER (Paul K. Moser & Thomas L. Carson eds., 2001). For a discussion of universalism and relativism as applied specifically to human rights, see JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 109-42 (1989); Alison Dundes Renteln, *The Unanswered Challenge of Relativism and the Consequences of Human Rights*, 7 HUM. RTS. Q. 514 (1985).

logical disputes are resolved.[21] These fundamental differences may be due to culture; variation in the personality, psychology, or experiences of individuals; or to other factors such as levels of economic development, the relative stability or instability of the state, and the likelihood of civil war or terrorism. Virtually no one denies the truth of descriptive relativism.[22] Broad multi-country studies have found significant regional differences with respect to democratization,[23] labor rights,[24] women's rights[25] and personal integrity rights.[26] Most of the debate therefore is over two other forms of relativism, normative and metaethical relativism, or other related issues.

Normative relativism is the view that something is wrong or blameworthy if some person or group holds them to be wrong or blameworthy. One common objection to individual normative relativism (or moral subjectivism) is that if it were true, there would be little point in arguing over moral issues, though we obviously do, assuming there were no factual or logical issues in dispute. Of course, those sympathetic to individual moral relativism would generally agree with this observation, but not see it as a problem for their position. Clearly there are pragmatic reasons for trying to persuade others of

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21. *See* Richard Brandt, *Ethical Relativism*, *in* THE ENCYCLOPEDIA OF PHILOSOPHY, Paul Edwards, ed., Vol. 3, 75 (1967).

22. *But see* Karl Duncker, *Ethical Relativity? (An Inquiry into the Psychology of Ethics)*, 48 MIND 39 (1939) (arguing that the "inner laws" of ethical valuation preclude different ethical valuations of the same act). Based on the then popular Gestalt theory, this kind of radical challenge to descriptive relativism challenges whether seemingly similar acts are really similar by specifying the "situational meaning" of the act and the different non-moral beliefs that affect how the act is interpreted in a particular context. Even if successful at undermining the relativist position that there are moral disagreements about *the same thing*, this approach is too successful in that it would undermine the universalist position which requires common moral valuations of *the same thing*, not situational-specific and thus different things. *See* MICHELLE MOODY-ADAMS, *The Empirical Underdetermination of Descriptive Cultural Relativism, in* FIELDWORK IN FAMILIAR PLACES 29-43 (1997).

23. Steven Levitsky & Lucan Way, *Autocracy by Democratic Rules: The Dynamics of Competitive Authoritarianism in the Post-Cold War Era* (2002), *available at* http://apsa proceedings.cup.org/index.htm.

24. Layna Mosley & S. Uno, *Racing to the Bottom or Climbing to the Top? Foreign Direct Investment and Human Rights* (2002), *available at* http://apsaproceedings.cup.org/ index.htm. (finding strong regional relationship between regions and labor rights, and that the Asian and Pacific regions were not as protective of labor rights as Western Europe, Central and Eastern Europe, although they were more protective than the Middle East, North Africa and Latin America and on par with Sub-Saharan Africa).

25. Clara Apodaca, *Measuring Women's Economic and Social Rights Achievement*, 20 HUM. RTS. Q. 139 (1998) (finding that regional coefficients play a larger role than GNP in the achievement of women's economic and social rights, although the regional identification of Asian and African explains less variation than the Middle East regional designation).

26. David Reilly, *Diffusing Human Rights* (2003), available at proceedings@apsanet.org (finding that regional variations were important with respect to factors relating to personal integrity); Frank B. Cross, *International Determinants of Human Rights and Welfare: Law, Wealth or Culture*, 7 IND. INT'L & COMP. L. REV. 265 (1997) (finding that cultural values are important and that Western nations have a higher level of freedom from government intrusion even after controlling for GDP and other factors).

one's views. However, once all the factual and logical issues have been cleared up and each side has set out its reasons, and yet the parties continue to disagree, there is little to be gained from further argumentation about who is right or whose view is better. Stamping one's foot and insisting that one is "really" right or calling the other person irrational will not advance matters. At that point, one must either choose to impose one's views on the other through various forms of coercion or just walk away, perhaps agreeing to disagree. A second objection to individual normative relativism is that many people find it odd to think that if someone sincerely believed after careful thought and discussion that rape was morally acceptable, it would be so, at least for that person.[27] If individual normative relativism fails, then it may seem that group or social normative relativism should also fail, as the latter simply aggregates many individual views. Even if a particular group believes that rape is morally acceptable, why should greater numbers matter to whether something is morally right or wrong?[28] Extreme normative relativism would hold that *all* issues depend on the views of the group or individual. Moderate normative relativism would hold that *some* normative issues depend on the views of the group or the individual.

Metaethical relativism includes a variety of different positions that share common ground in rejecting the idea that there is one correct answer to moral issues.[29] Extreme metaethical relativists assert that there is never a correct (or objectively true) answer to any moral issue. Moderate metaethical relativists hold the view that there may be a correct (or objectively true) answer to some moral issues and not others. In rejecting a single correct answer, metaethical

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27. On the other hand, the views of great religious leaders are often at odds with the established norms of the time. As noted *infra*, if numbers are irrelevant with respect to the correctness of moral issues, then they are irrelevant whether one is a rapist or a saint. That everyone condemns a rapist, or groups that endorse rape as wrong, can no more prove rape is wrong than the fact that many people at one time believed slavery was morally acceptable can prove slavery was acceptable.

28. An anti-foundational pragmatic or conventionalist response would be that right or wrong means relative to the justification practices of some individual or group of people. So-called "moral facts" are just those beliefs that are particularly hard to dislodge. Moral objectivity in this view means the moral judgment in question commands near universal acceptance within the relevant group. *See generally* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979). As a descriptive matter, different groups and individuals will have different justificatory practices. In some cases, reasonable people will continue to disagree even after all the points of contention have been fully discussed. Again, the issue then becomes what one is willing to do beyond non-coercive persuasion to change the other's views and ensure compliance.

29. Metaethical relativists may be *noncognitivists* (including *emotivists*) who view ethical statements as expressing the attitudes of the speaker but not something that is or can be true or false. It should be noted that *noncognitivists* need not deny that people may seek to persuade others as to their views or are capable of giving reasons for their moral beliefs or even of using coercion to force others to accept their beliefs.

relativists are *antirealists*.[30] Some antirealists are *naturalists* who believe that talking about objective truth and falsity in morals assumes a correspondence theory of truth that is inappropriate or otherwise analogizes moral statements to statements of facts that are amenable to scientific testing and verification. The problem is that moral problems do not seem much like scientific problems. Reasonable people will give up their belief that the earth is flat if you show them a picture of the earth from the moon. However, moral problems do not lend themselves to the same kind of testing. As we all know, moral debates often continue endlessly without any irrefutable or compelling proof or argument for either side.[31]

In contrast to antirealists who argue that there is no single correct answer (or objective truth) to (some) moral issues, *arealists* are agnostic on the issue of moral realism and objectively true answers to some, or all, moral issues. For some arealists, the issue is an *epistemological* issue: even if there is a single correct answer, we cannot know it or be (reasonably) sure we know it. For others, the issue is more a *justificatory* (or *pragmatic*) one; even if we think we know the single correct answer, we cannot *persuade* others that we know it. Given that reasonable people can, and often do, disagree about the morality of certain acts, moral realism is irrelevant in practice; it provides no help when we need it the most—when we are dealing with controversial moral issues where reasonable people continue to disagree after both sides have fully aired their views.[32] To a considerable extent, Rawls' recognition of the fact of pluralism has shifted the philosophical focus away from the endless debates over moral realism toward the possibility of achieving an overlapping consensus on controversial normative issues.[33] Although his arguments were originally designed for the domestic American political context, both he and others have applied the fact of pluralism and the idea of an overlapping con-

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30. Whether antirealism commits one to metaethical relativism is much debated. For the argument that antirealists have difficulty avoiding metaethical relativism, see Moser & Carson, *supra* note 20, at 287-88.

31. In analogizing to science, naturalism also shifts the emphasis away from philosophical theorizing and a priori or abstract analysis to empirical studies of the consequences of specific moral beliefs or claims in particular contexts. After all, the scientific method is valued precisely because it works—because it "delivers the goods," as it were by aiding in predicting and controlling events in daily life. This shift toward a more empirical-based, consequentialist approach is consistent with the type of pragmatism argued for in this Article.

32. *See infra* note 210 and accompanying text.

33. *See* JOHN RAWLS, POLITICAL LIBERALISM (1993). Pluralism is also sometimes used to refer to the view that there are multiple, irreducible fundamental values that may conflict in particular circumstances. *See* George Crowder, *Pluralism and Liberalism*, 42 POL. STUD. 293 (1994). *See also* Isaiah Berlin and Bernard Williams, *Pluralism and Liberalism: A Reply*, 42 POL. STUD. 306 (1994). For the challenges to universalism rising from pluralism of values in this sense, see *infra* discussing conflicts among rights and the difficulty establishing and justifying hierarchies of rights and rules to govern when certain rights may be traded off to ensure other rights.

sensus to the international political order and human rights.[34] While descriptive relativism does not entail normative or metaethical relativism or arealism, it does lend support to the arealist position in that the existence of widespread disagreement suggests that there is reasonable disagreement over many human rights issues in Asia and elsewhere and that, as a practical matter, appeals to moral realism will not help settle the debates.

That said, what follows from the existence of reasonable disagreement is much debated.[35] For some, as discussed shortly, it suggests that states, groups within states, or individuals should be given a wider margin of appreciation to set their own policies and adopt ways of life based on their preferred moral principles. Yet there remains much disagreement about what the reasonable limits of the margin of appreciation should be and what should be done when the reasonable limits are exceeded. For instance, few would object to non-coercive attempts to persuade others to change their views, but there may be disagreement about whether one may criticize others based on standards they do not hold (an external standard) or whether one should appeal only to standards shared by the individual or group (an internal standard).[36] Liberals, in particular, have problems determining what the limits of tolerance should be and explaining why it is justifiable in some circumstances to force others to accept their beliefs. The liberal principle of tolerance also sits uneasily with the view of many liberals, a view shared by many non-liberals, that to hold an ethical position requires that one be willing to universalize it and act in accordance with the rule.[37] If abortion is wrong, then it is wrong for others in other societies as well, at least if they are similarly situated. One should be willing to tell others in a similar situation that their actions must also accord with the moral principles one holds. If one is a vegetarian who believes eating meat is wrong, then one should believe that all similarly

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34. *See* JOHN RAWLS, THE LAW OF PEOPLES (1999).

35. I set aside the debate about whether in a pluralistic political context parties should bracket deeply felt but contentious beliefs that are not accessible to others. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 33. For a nuanced critique, see KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1997). *See also* Carol Gluck, *The Call for a New Asian Identity: An Examination of the Cultural Arguments and Their Implications*, Japan Programs Occasional Papers, no. 5 [Carnegie Council on Ethics and International Affairs], p. 6) (arguing that people ought to contain culture in international relations to the greatest possible extent). Roger Ames has challenged this view as naive arguing that Gluck's suggestion assumes that the existing international discourse is innocent—that it is not already burdened with ethnocentric assumptions. But "[c]ulture is pervasive and inescapable. And perhaps the only position that is fraught with more difficulty and danger than struggling to make generalizations about other cultures and attempting to deal with differences head-on, is failing to do so." Ames, *supra* note 7, at 188-190. There is also disagreement about the role and utility of philosophical discussion.

36. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 8 (1999) (arguing that we cannot, except for polemical effect, call another culture immoral unless we add "by our lights," but also rejecting "vulgar relativism that teaches that we have a duty to tolerate cultures that have moral views different from [our own]").

37. *See* BETSY POSTOW, DISHONEST RELATIVISM 45 (1979).

situated persons should be vegetarians, and one is required to show some practical commitment to acting accordingly, presumably by, at minimum, trying to persuade others to become vegetarians.[38] However, this response is problematic. First, the proviso that others must be similarly situated opens the door to considerable variation in practice. It is often difficult to state which differences are relevant and which are not. Does it matter, for instance, if one lives in Tibet where vegetables are scarce, and the main source of food is yak? Second, there is likely to be considerable disagreement about what satisfies the requirement of a practical commitment for different acts in various contexts. Presumably, attempts at non-coercive persuasion would fall toward the minimal end of the practical-commitment scale. But must one always try to persuade others to become a vegetarian, every chance one gets, or only when it is convenient or the subject happens to arise? If others refuse to become vegetarians, should one refuse to eat with them or castigate them every time one shares a meal? Would it matter if the parties had discussed the issue at length in the past without any resolution—indeed, with each side having become more convinced that he or she was right and the other wrong? Perhaps it is enough for each to act in accordance with his or her beliefs and lets others follow their own beliefs. On the other hand, some issues will seem so important and clear that one may be willing to fight for them using coercive force, if necessary, to compel others to comply.

In contrast to the various forms of relativism, surprisingly little attention has been given to stating with any clarity what the universalist position is. Yet stating precisely what the universalist position is and what the differences between universalists and relativists of various stripes are with respect to particular issues is more difficult than often assumed, particularly when both sides hold moderate, as opposed to extreme, forms of universalism or relativism. Extreme moral universalism holds that the correctness (or objective truth) of moral issues does not depend on culture or the views of any group or individual.[39] Although other circumstances, such as level of economic development, may be relevant to moral issues, there is still a single, universally correct answer that applies to all those similarly situated. As with normative and metaethical relativism, there is a moderate version of moral universalism that holds that culture is irrelevant to the correctness of some, but not necessarily all, issues. The human rights variant of extreme moral universalism is that human rights apply everywhere regardless of culture and in some cases, regardless of other contingent factors such as varying degrees of economic, political or legal development.[40] Further variants are possible

38. *See id.*

39. *See* DONNELLY, *supra* note 20, at 109.

40. The inside cover to THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 7, states that "The 'Asian values' argument within the international human rights debate holds that not all Asian states can be or should be expected to protect human rights to the same degree due

by distinguishing between the *content, justification, interpretation,* and *implementation* of rights.[41] When stated as they usually are, at a high level of abstraction and generality, many human rights appear uncontroversial. However, controversy arises when these general principles must be applied in particular circumstances. In this sense, universalism is opposed to particularism, the view that generalizations are less accurate and helpful than specific judgments about particular cases.

To sum up this quick overview, as is true in the case of most long-debated philosophical issues, there is something to be said for and against both universalism and relativism. Simply put, few dispute the key claim of descriptive relativism that different individuals, groups, and societies disagree over particular normative and human rights issues. Nevertheless, there is considerable dispute about the range of fundamental disagreement and the reasons for it.[42] As for normative relativism, the main criticisms are that it is self-refuting, inconsistent, and has problems justifying why the fact of differences (the descriptive level/"is") is normatively significant (the prescriptive level/"ought"). Conversely, universalism and moral realism have epistemological problems in moving from the possibility of there being right answers to how we know them, and justification problems in showing that such answers are indeed the right answers. Unlike scientific disputes where there is a fallible, but nonetheless generally accepted and proven, method for testing the veracity of claims, there is no such method available for resolving moral disputes. While the lack of a criterion or method for resolving disputes as to what is morally right does not prove there is no right answer to moral questions, it renders the single answer debate moot, turning it into an academic debate without any practical consequences.

Of course, there have been a variety of responses to such worries. For instance, relativists try to overcome the self-refuting, inconsistency criticism by distinguishing between first order claims (moral judgments such as the belief that it is wrong to kill innocent babies) and second order claims or metaclaims about first order claims (such as the claim that moral judgments are relative). Conversely, universalists and realists deny that natural science provides the proper standard for knowing moral truths. Rather, we may appeal to a more limited practical reasoning. Relativists counter that even when both sides have aired their views completely and all factual matters are cleared up, reasonable people will still often disagree. Moreover, turning the tables on realists, they note that even if most people (all but one?) agree that an act or

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to varying levels of economic, political, and legal development and to differing cultural views on the virtues and necessity of freedom."

41. *See* DONNELLY, *supra* note 20, at 110 (defending a weak cultural relativism that holds that culture may be an important source of the validity of a moral rule or right and that permits deviations from universal human rights standards primarily with respect to the form in which they are implemented).

42. *See* MOODY-ADAMS, *supra* note 22.

principle is morally correct or right, that they agree cannot provide the kind of proof that realists require. Universalists counter that it would be good evidence, if not conclusive, with some reiterating that the standard is not an apodictic certainty but a more fallible probabilistic one. At this point, the views of the two sides tend to merge around some form of moderate universalism or relativism. Although the moderate forms may differ in their orientations, rhetoric, and deep philosophical commitments, they tend to produce similar results in practice.

In what follows, I rely on a variety of different arguments and strategies to counter extreme forms of universalism. I first challenge the universalists' assertion that there is a broad, pragmatic consensus regarding human rights.[43] In support of particularism, I show that the broad consensus that seems to exist when rights are stated in a general, abstract form gives way to disagreement when the rights need to be specified in more particular contexts. I also argue that pluralism (the existence of multiple, irreducible fundamental values) undermines universalism in practice as countries prioritize rights differently.[44] In addition, I side with those who maintain that epistemological and justificatory problems render moral realism irrelevant. As a result, I support a pragmatic form of metaethical relativism that shifts the focus from philosophical discussions of moral objectivity, moral realism, and the logical weaknesses of normative relativism to pragmatic considerations of how best to ensure compliance with rights in specific contexts and, in particular, to considerations of how far one is willing to go to ensure compliance once persuasion fails. Most fundamentally, however, I argue that technical philosophical discussions cannot help us solve the most pressing issues in the debates over Asian values. Accordingly, I join the rising chorus of those who claim that it is time to move beyond the strident debates over extreme forms of universalism and relativism and to focus our energies instead on specific issues that arise in promoting human rights with the ultimate aim being to improve people's lives.

Descriptive Relativism, Overlapping Consensus, and the Margin of Appreciation: The Need for More Detailed Empirical Studies to Gauge the Breadth and Depth of Agreement and Disagreement

Some scholars have tried to sidestep the universalism-versus-relativism issue by claiming that the Asian-values debates are not a threat to universal human rights in that Asian governments are not out to deny human rights across the board. Thus Bauer and Bell portray the debates as an opportunity for the current human rights regime: "The challenge is about seeing how inclusive the rights regime can become while still realizing its essential

43. *See infra* text accompanying notes 50-102.

44. *See, e.g., infra* note 74.

purpose: to promote and protect vital human interests."[45] While they see the Asian-values debates as putting pressure on the human rights regime to broaden its horizons to accommodate Asian voices, they also claim that Asians must rise to the challenge and "locate themselves in the discourse of universality . . . ."[46]

Despite the wisdom in calling on both (or rather all) sides to seek out areas of consensus and to try to overcome divisions, it is a mistake to pretend that the Bangkok Declaration and the views of many advocates of Asian values are not a threat to universalism. The Bangkok Declaration's assertion that human rights must reflect the particular circumstances of particular countries at a particular time indicates that it is precisely the universality of human rights that is at stake, though not at the level of whether rights are good or bad in total.[47] It is true that Asian leaders stopped short of denying outright the universality of all human rights. As Singapore's former Minister of Foreign Affairs, Wong Kan Seng observed, "Diversity cannot justify gross violations of human rights. Murder is murder whether perpetrated in America,

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45. THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 7, at 3.

46. *Id.*

47. The Bangkok Declaration is a political compromise. On the one hand, the Declaration stresses the "universality, objectivity and non-selectivity of all human rights" and that "no violation of human rights can be justified." HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION, *supra* note 7, at 204-05. On the other hand, the Declaration declares that while "human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds." *Id.* The Declaration also emphasizes respect for sovereignty, territorial integrity and non-interference in the internal affairs of others. *Id.* Reflecting the more assertive stance of the thirty-plus Asian states that adopted the Declaration without a vote, the Declaration objects to the politicization of human rights, double standards in the application of rights, and the tendency among Western states to privilege civil and political rights over economic, social and cultural rights. Moreover, it rejects a confrontational approach to human rights issues in favor of cooperation based on equality and respect. The Bangkok Declaration, along with the statements of Asian Governments at the Vienna World Conference on Human Rights in 1993 and the Asia-Pacific Non-Governmental Organizations' response to the Bangkok Declaration, can be found in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION, *supra* note 7. After declaring the universal nature of human rights to be beyond question, the 1993 Vienna Declaration adopted by the General Assembly adds: "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." Thus, despite the difference in tone, both Declarations compromise universalism by emphasizing contextual factors. Nevertheless, the Bangkok Declaration was seen as a relativist attack on universalism whereas the Vienna Declaration has generally been portrayed as a victory for universalism. *See, e.g.*, Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cutural Contexts*, 16 HUM. RTS. Q. 740, 741-42 (1994); THE VIENNA DECLARATION (June 25, 1993), *available at* http://www.hri.ca/vienna+5/vdpa.shtml (last visited Nov. 5, 2003).

Asia or Africa. No one claims torture as part of their cultural heritage."[48] However, he then went on to point out that "the hard core of rights that is truly universal is perhaps smaller than we sometimes like to pretend."[49] Put differently, while there are areas of agreement about human rights, they represent non-issues. We hardly needed the human rights movement to confirm that murder is bad. No one in Asia or anywhere else in the world denies that. Indeed, if by murder one means wrongful killing, then it is by definition bad. As noted, there are many rights such as the right to be free from discrimination that people agree are good things when stated at very high level of abstraction. But agreement at this level of abstraction is not helpful in resolving most pressing social issues. As a result, there are many controversial human rights *issues* for which there is no universal agreement including what counts as discrimination. There is even considerable disagreement over what counts as murder as opposed to justified self-defense, euthanasia, or other excusable or morally less culpable killings. Whether capital punishment is permissible or itself a violation of human rights remains hotly contested.

Even within a relatively homogenous setting such as Europe, significant variations in the content, justification, interpretation, and implementation of rights forced the European Court of Human Rights (ECHR) to create the margin of appreciation doctrine.[50] Neither the legislative history of the European Convention on Human Rights nor the Convention itself mentions the margin of appreciation. Nevertheless, the ECHR needed the doctrine to accommodate national diversity and to obtain sufficient elbow-room to avoid having to strike down national laws and thus run the risk of incurring the wrath of member states and undermining support for the ECHR. The need for a margin of appreciation doctrine is all the more pressing once one moves beyond the borders of the relatively homogenous, wealthy, liberal-democratic Europe into the broader international arena characterized by greater cultural, religious, political, and economic diversity.[51]

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48. HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION, *supra* note 7, at 244.

49. *Id.*

50. *See* HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996). Although Council of Europe member states share a Judeo-Christian tradition, democracy, mixed-market economies and legal systems based on rule of law, the degree of homogeneity has decreased with the entrance of Central and Eastern European states in recent years. Whether this will lead to greater invocation of the margin of appreciation doctrine or to its curtailment as the ECHR seeks to reinforce the norms and standards of the original core members by imposing them on new members remains to be seen.

51. As discussed below, the margin of appreciation may be supported on moral/normative and/or pragmatic (strategic, realpolitik) grounds. Not everyone who accepts the practical necessity of the doctrine will believe that it is morally justified. One concern is that accepting a margin of appreciation doctrine might lead to a lowest common denominator approach and thus devalue rights. Even if a margin of appreciation approach is adopted, we should not expect the same degree of success in interpreting and implementing rights outside the E.U. context.

Such diversity undermines similar attempts to sidestep the universalism problem by arguing for a pragmatic consensus on human rights issues or by holding out hopes for the emergence of an overlapping consensus.[52] The pragmatic or overlapping consensus quickly breaks down once one moves beyond the feel-good discussions about the desirability of the broad wishlist of rights contained in human rights documents to the difficult issues of the justifications for such rights and how they are interpreted and implemented in practice.[53] Undeniably, there is greater acceptance of the general idea of human rights than in the past and even more agreement among more countries and people about particular human rights and how they are to be interpreted and implemented. There is also good reason to believe that the scope of agreement will increase over time. Nevertheless, there is still ample room for reasonable people to disagree over the *content*, *justification*, *interpretation*, and *implementation* of rights.

Ironically, the very success of the human rights movement has led to inconsistencies in human rights law, thereby undermining the pretense of universalism founded on a belief in uniform decisions across a variety of contexts. The ever-expanding corpus of rights law includes international treaties, customary international law, regional laws and domestic constitutions and laws. A single right may be covered in all of these different bodies of law, with each body of law defining the right in somewhat different ways or subjecting the right to different limitations. A growing number of entities are charged with interpreting and applying this ever-expanding corpus of human rights law, including international courts, treaty committees, special rapporteurs, regional courts and committees, domestic courts, human rights commissions and ombudsmen. The proliferation of disparate entities interpreting various types of law relating to human rights has resulted in diverse interpreta-

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Not only is the range of diversity much greater internationally than within Europe, but international human rights bodies lack the ECHR's mandate to impose legally binding decisions on states.

52. *See, e.g.*, Sumner Twiss, *A Constructive Framework for Discussing Confucianism and Human Rights*, *in* CONFUCIANISM AND HUMAN RIGHTS 27-53 (Wm. Theodore de Bary & Tu Weiming eds., 1998). The frequency with which rights advocates optimistically appeal to Rawls' notion of an overlapping consensus is somewhat bewildering given that it has not even proved possible to achieve on a wide range of rights issues in its place of origin, the United States.

53. Randall P. Peerenboom, *The Limits of Irony: Rorty and the China Challenge*, 50 PHIL. E. & W. 56 (2000). *See also* Charles Taylor, *Conditions of an Unforced Consensus on Human Rights*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 7, at 124. Taylor suggests that it might be possible to achieve at least some agreement on certain norms of conduct such as genocide, murder, torture and slavery. *Id.* However, he is less confident about reaching an overlapping consensus on the underlying values that justify such norms. *Id.* at 125. In any event, universalists who are moral realists will not be happy resting their claims for rights on the fact of universal consensus among states. After all, one of their arguments against the relativists is that even if all states at one time endorsed slavery or human sacrifices, such endorsement would not make the practices of slavery or human sacrifices right. Moral realist animal protectionists may believe we should all be vegetarians.

tions of the same right and differences in outcomes in cases with similar facts.[54]

The nature of international law and the international human rights regime further undermines universality. When ratifying treaties, states may limit their obligations to reflect local traditions and values by imposing reservations.[55] Moreover, in most instances, states are primarily responsible for the implementation of rights. Few treaties allow individuals to raise claims in an international forum, and when they do, they generally require that individuals exhaust their domestic remedies first.[56] Perhaps most importantly, the international human rights regime has limited enforcement powers. Treaties generally only authorize promotional activities, monitoring, and supervision through the review of country reports submitted periodically by the member states.[57] As a result, public censure or shaming is frequently the most serious

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54. THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH (Theordore S. Olin et al. eds., 2000). It should be noted that many of the pronouncements of these entities are non-binding. *See also* Douglass Lee Donoho, *Autonomy, Self-governance, and the Margin of Appreciation: Developing A Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 432-33 (2001) ("A poorly rationalized mixture of ill-defined mandates, circumscribed powers, cumbersome mechanisms, and often overlapping substantive norms generally clouds the potential role of these institutions in developing the meaning of rights. Unfortunately, the international human rights system is generally characterized by a multiplicity of non-authoritative interpretative sources.").

55. *See* Engle, *supra* note 8, at 294-302 (reviewing reservations of Islamic states with respect to the Convention on the Elimination of All Forms of Discrimination Against Women [hereinafter CEDAW], including Art. 2 (establishing a policy for eliminating discrimination – the reservation made is often in its entirety), Art. 13(a) (the right to family benefits and inheritance); Art. 15(4) (the rights of movement and domicile); Art. 16(a) (the right to enter marriage); Art. 16(c) (rights and obligations during marriage); Art. 16(f) (rights and obligations on dissolution of marriage); and 16(h) (the right to own property and to contract)).

56. The Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], the Optional Protocol to CEDAW, G.A. Res. 54/4, U.N. G.A. Res., 54th Sess., U.N. Doc A/54/49 (1999), 38 I.L.M. 763 (entered into force Dec. 22, 2000) and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. G.A. Res., 39th Sess., U.N. Doc. A/39/46 (1984), 1465 U.N.T.S. 85 (entered into force June 26, 1987) allow for individual complaints upon consent of the member states. In addition, the Inter-American and European regional systems allow for individual complaints.

57. In addition, human rights bodies often may issue general comments or interpretations. From time to time, committees such as the ICCPR's Human Rights Committee [hereinafter HRC] will try to bootstrap their claims to be able to issue binding interpretations. Thus the HRC has claimed the authority to declare certain reservations invalid such that the reserving party assumes all of the obligations of the treaty as if the reservations were not made. *See* General Comment No. 24, Hum. Rts. Comm., at 18, U.N. Doc. CCPR/C/21/Rev./Add.6 (1994). However many states do not consider the HRC position binding.

In any event, such international bodies face many of the same issues as domestic courts in deciding rights issues. Outcomes are determined by the judicial theories and interpretative methodologies of the decision-maker (e.g., original intent, plain meaning, purpose-oriented approaches). Decision-makers must also weigh the rights and interests of individuals against the rights and interests of other individuals or the interests of the public. In so doing,

sanction available.[58] In the final analysis, then, states have a

they must also consider jurisprudential issues such as the development of defensible standards and the legitimacy of the institution. *See* Donoho, *supra* note 54, at 441. Unlike domestic institutions, they are also more likely to encounter a wider diversity of values, beliefs and opinions. In addition, they must constantly keep in mind the fundamental difference that member states may withdraw from the treaty if the decisions are not to their liking.

58. This is not to deny that shaming may be effective in some circumstances. Clearly, the human rights regime has had some positive affect in some instances with respect to some issues even given its limited enforcement tools. Muntarbhorn summarizes several of the positive benefits of participating in the international human rights regime, despite its limited powers of enforcement:

> First, the standards expounded by these treaties help to promote law, policy and practical reforms by offering an international barometer to test national standards. Second, the country is obliged to prepare and send periodic national reports on how it is implementing the treaties to the various international treaty bodies charged with monitoring the implementation of these treaties at the national level. This helps to provide transparency and channels for eliciting international recommendations to help the local reform process. Third, the information and data gathered to prepare such national reports help to build a database system useful for planning and implementation. Fourth, the process of national report preparation may bring together both governmental and non-governmental actors to enhance cross-sectoral cooperation, which can assist in the implementation of the Rule of Law and human rights. Fifth, the opportunity of liaising between different sectors of the community to implement international standards at the national and local levels is an empowering process which may lead to the enhancement of cooperation through joint actions. In this context, there are avenues to share local experiences and wisdom which can provide value-added to the international perspective.

Vitit Muntarbhorn, *The Rule of Law and Aspects of Human Rights in Thailand: From Conceptualization to Implementation?*, *in* ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. (Randall Peerenboom ed., 2004).

In general, the human rights movement has altered public discourse and provided a moral foundation for criticisms of governments that abuse rights. A country's ratification of a human rights treaty generally strengthens the hand of domestic and international rights advocates. Thus, in the long term, the human rights situation may improve. Nevertheless, signing a treaty by no means ensures compliance. The reality is that despite the proliferation of human rights treaties, rights abuses remain widespread. A study of 178 countries from 1976 to 1993 found that signing the ICCPR or even the Optional Protocol allowing individuals to raise complaints had no impact on state's actual behavior after controlling for other factors known to affect human rights implementation. *See generally* Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999). Overall human rights protection among member states was no better than among non-member states, all else being equal. *Id.* Another quantitative study examining compliance with respect to torture, genocide, fair trials, civil liberties, and women's political equality in 166 countries found similar results. Although countries that ratify human rights treaties usually have somewhat better compliance ratings than countries that do not (without controlling for other factors), noncompliance is rampant. *See generally* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). Moreover, countries with the worst human rights records sometimes have higher ratification rates than countries with better human rights records. *See id.* at 1978. In some cases, treaty ratification is associated with worse human rights ratings, leading the author to conclude that the "relatively costless step of treaty ratification may thereby offset pressure for costly changes in policies." *See id.* at 1941.

large role in defining what rights mean within their jurisdictions and in translating often-abstract notions into concrete practices through implementation.

Indicative of the politicized nature of the first round of the debates, opponents of Asian values frequently refused to acknowledge a reasonable margin of appreciation and the many reasons for it. Part of the problem was the lack of a truly comparative framework. Both sides relied on overly simplistic constructs of "the West" and "Asia"/"the East."[59] While Asian-values opponents were quick to criticize defenders of Asian values for constructing a fictive Asia, they were no less guilty of constructing an overly unified and idealized "West." Opponents of Asian values oftentimes seemed unaware of the variation, even within Western states. They took at face value the long list of rights in international law documents or emphasized idealized accounts of rights or the lofty aspirational normative visions of philosophers, ignoring or downplaying the failure to implement such rights in practice or the many critiques of, and doubts about, rights in the West.[60] They also ignored the historical evolution of rights and how the United States and other Western countries only recently have begun to take many rights seriously.[61] Some

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Empirical studies have demonstrated that a number of substantive factors are more important for the protection of human rights than signing international treaties. One such study found that civil war exercised the most impact, followed by economic development, democracy, population size, international war, military control and the lack of British colonial influence. *See* Steven Poe et al., *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993*, 43 INT'L STUD. Q. 291, 310 (1999). The same study also found that leftist regimes were less likely to repress personal integrity than non-leftist regimes. *Id. See also* Conway Henderson, *Conditions Affecting Use of Political Repression*, 35 J. CONFLICT RES. 120 (1991) (democracy, inequality and economic growth were statistically significant predictors of political repression, though level of economic development was not); Neil J. Mitchell & James M. McCormick, *Economic and Political Explanations of Human Rights Violations*, 40 WORLD POL. 476, 497 (1988) (countries with higher levels of economic well-being have consistently albeit modestly better human rights records that those that do not); Frank B. Cross, *The Relevance of Law in Human Rights Protection*, 19 INT'L REV. LAW & ECON. 87, 93 (1999) (finding that judicial independence is significant with respect to the protection of political rights and search and seizure even after controlling for wealth and other factors, but finding that federalism and separation of powers were not significant and the presence of constitutional provisions regarding search and seizure seems to have no real-world significance).

59. As discussed *infra*, the issue is not that East and West are constructs, but that they have been overly simplistic and oftentimes misleading constructs.

60. *See* Kenneth Morris, *Western Defensiveness and the Defense of Rights: A Communitarian Alternative*, *in* NEGOTIATING CULTURE AND HUMAN RIGHTS, *supra* note 7 (pointing out that many of the arguments of advocates of Asian values have their Western counterparts).

61. As Richard Posner notes about the United States:

> There was surprisingly little actual enforcement of constitutional rights in the 1950s. A large proportion of criminal defendants who could not afford a lawyer had to defend themselves; the appointment of lawyers to represent indigent criminal defendants was not routine. Many state prisons and state insane asylums were hellholes, and to their inmates' complaints the courts turned a deaf ear. The right of free speech was narrowly interpreted, the better to crush the Communist

implicitly or explicitly relied on the frequently extreme practices of the United States as a benchmark. But the United States is an outlier even within Western liberal democracies on many rights issues from free speech to the rights of suspected criminals.[62] In short, the reality of Asian states frequently was compared to an idealized self-image of "the West," and in some cases, the United States.

Conversely, government spokespeople often stretched the margin of appreciation well past the breaking point. Guilty of widespread abuses of human rights not defensible under any standards, including forced labor, rape and murder by the military, Myanmar officials cynically invoked Asian values to ward off criticism at the Bangkok conference, arguing that "Asian countries with their own norms and standards of human rights, should not be dictated [to] by a group of other countries who are far distant geographically, politically, economically and socially."[63]

The debates could have been greatly sharpened by moving beyond grand statements, posturing polemics, and inflamed rhetoric to concrete issues bolstered by broad comparative, empirical, and historical studies of actual cases and events that demonstrate where exactly different countries draw the lines on human rights issues, the reasons (cultural, religious, political, economic, legal, and military) for the outcomes, and how the outcomes and rationales have changed over time as the context has changed.[64] Such an approach would clarify just how extensive the overlapping consensus actually is. It would also identify common ground and rationales that could be useful

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> Party U.S.A. and protect the reading public from Henry Miller. Police brutality was rampant, and tort remedies against it ineffectual. Criminal sentencing verged on randomness; in some parts of the country, capital punishment was imposed with an approach to casualness. In practice the Bill of Rights mostly protected only the respectable elements of society, who did not need its protection. . . . There were almost no effective legal protections of the environment. Every variety of invidious discrimination was common in employment, and there were virtually no legal remedies for it.

POSNER, *supra* note 36, at 197-98.

62. *See Discussion: Asian Values*, 41 KOREA J., Autumn 2001, at 246 (noting that "Western values" is often over-generalized, and suggesting that freedom and individualism are valued more highly in the United States than in Europe). Just as we need a more systematic empirical basis to support claims about Asian values, so do we with respect to "Western values."

63. CHRISTIE & ROY, *supra* note 8, at 100. As Christie wrote the chapters on Southeast Asia and Roy the chapters on Northeast Asia, I will specify the author accordingly, in part because Christie seems more hostile to the idea of Asian values and Roy more neutral in his presentation.

64. As rights are increasingly the medium through which different factions struggle for power, a focus on legal cases reveals much about who has power within a society. Because cases generally have legal opinions and often have minority dissents, one can also get a sense of the diversity of views within a society. However, because not all issues will necessarily be resolved through the formal legal system, any such empirical study would also need to expand its scope to include important social and political events that do not make it to court and other issues dealt with through informal mechanisms.

in expanding the overlapping consensus. And in some cases it would demonstrate that overlapping consensus is not likely, or at least not likely given the current circumstances.

As we have seen, some Asian governments argue that the hard core of universal rights is extremely limited. To be sure, there is little disagreement that some acts are bad, such as torture, disappearances, genocide and slavery. However, *little disagreement* does not mean *no disagreement*, even in these seemingly uncontroversial cases. Until recently, Israel permitted some forms of torture, justified on national defense grounds.[65] Philosophers love to debate the merits of torturing a terrorist who refuses to reveal the location of a deadly bomb that will wipe out the lives of thousands of innocent people. They even debate whether it would be permissible to torture or kill an innocent person if that were the only way to get the terrorist to reveal the location of the bomb.[66] While such arguments were easily dismissed in the past as the harmless musings of academics isolated in their ivory tower, the September 11 attacks on the United States and the ongoing retaliatory war on terrorism have given rise to public debates about the permissible use of torture in national emergencies.[67] But even before September 11, there were many disagreements about what exactly counts as torture, or its ex post cousin, cruel and unusual punishment. Does torture include mental suffering and degrading

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65. *See Public Committee against Torture, in* Israel v. Israel, HC 5100/94, Pub. Comm. Against Torture in Israel v. The State of Israel et al. (Sept. 6, 1999), *available at* http://www.derechos.org/human-rights/mena/doc/torture.html (last visited Nov. 5, 2003), *reprinted in* 38 I.L.M. 1471 (1999) (translating High Court of Justice's ruling that the Israeli Security Services could no longer use physical force in interrogations of suspected terrorists absent legal statutory provision granting GSS power to use such methods). The use of physical force included violent shaking which can lead to fainting, vomiting, intense head pain, urinating without control, and, at least in one case, death; the "Shabach position" where suspects are forced to sit in a low chair with their hands tied behind their back and head forced downward and covered in a hood while loud music is blasted inches from their ears; the frog crouch, where the suspect must crouch on tip-toes for five-minute intervals; and sleep deprivation. Jason Greenberg, Note, *Torture of Terrorists in Israel: The United Nations and the Supreme Court of Israel Pave the Way for Human Rights to Trump Communitarianism*, 7 ILSA J. INT'L & COMP. L. 539 (2001); Ardi Imseis, Comment, *'Moderate' Torture On Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of General Security Service Interrogation Methods*, 19 BERKELEY J. INT'L LAW 328 (2001). Even before the recent violent clashes in Israel, critics cautioned that the Supreme Court's decision was hardly a watershed for the human rights of Palestinians and other potential enemies of the state. *Id.* In its opinion, the Court invited Parliament to pass legislation overturning the decision, and also left open the possibility of use of such methods in certain circumstances where there was really a "ticking bomb." Deborah Sontag, *Israel Court Bans Most Use of Force in Interrogations*, N.Y. TIMES, Sept. 7, 1999, at A1. Lawyers also cited a list of ongoing problems, including lack of access to their clients held in custody and refusals to grant travel permits and family reunification requests on security grounds. *Id. See also* Dan Izenberg, *Ten-year Battle Against Brutality Ends in Victory*, JERUSALEM POST, Sept. 10, 1999, at 1B.

66. *See* Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1 (1981).

67. *See* ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002).

treatment? Is interrogation for six consecutive hours in a heavily air-conditioned room torture? How about twelve hours? Twenty-four hours? Forty-eight hours? Is caning, as allowed in Singapore and previously in Europe, but now prohibited by the ECHR, cruel and unusual punishment?[68] Is cutting off the hand of a thief cruel and unusual punishment? What about capital punishment? Is incarceration for long periods in prisons where convicts may be subject to rape or violence from other prisoners, as occurs in United States prisons, cruel and unusual?[69] Is it cruel and unusual to keep people waiting on death row for more than five years? Two years? One year? Does it matter if the reason for delay is that the legal representatives for the inmate keep appealing?[70] Of course, even assuming an overlapping consensus with respect to the meaning and reprehensibility of torture and cruel and unusual punishment (would anyone deny that being shocked with cattle prods or burnt with cigarettes is torture?), in practice torture and cruel and unusual punishments remain widespread and not just confined to Asian countries. Granted, states often deny the existence of torture or claim that it is not sanctioned by the state and that the state actors who commit torture are prosecuted and punished. However, in many cases, there is little enforcement, and few are subject to prosecution.[71]

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68. *See* Tyrer v. United Kingdom, 26 Eur. Ct. H.R., (ser. A), at 1 (1978).

69. For some truly harrowing accounts of sexual abuse of inmates by other prisoners *and guards*, see Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195 (1999); Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law–A Case Study of Women in the United States Prisons*, 13 HARV. HUM. RTS. J. 71 (2000). *See also* Carrigan v. State, 957 F. Supp. 1376, 1382 (D. Del. 1997) (holding against female inmate raped by guard because the existence of only a few prior incidents of misconduct was insufficient to show knowledge of substantial risk of serious harm).

70. For a discussion of case law on this point from a variety of countries as well as jurisprudence from UN human rights bodies, see Markus G. Schmidt, *The Death Row Phenomena: A Comparative Analysis*, *in* THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH, *supra* note 54, at 47-72. The study shows a wide range from countries that find capital punishment itself to be cruel and unusual to other states that do not find any length of stay on death row cruel and unusual.

71. Amnesty International, United States of America—Rights for All, 2-3 (1998), *available at* http://web.amnesty.org/library/Index/ENGAMR510361998!open&of=ENG-USA (last visited Nov. 5, 2003):

> There is widespread and persistent police brutality across the USA. Thousands of individual complaints about police abuse are reported each year. . . . Police officers have beaten and shot unresisting suspects; they have misused batons, chemical sprays and electro-shock weapons; they have injured or killed people by placing them in dangerous restraint holds. . . . Common forms of ill-treatment are repeated kicks, punches or blows with batons or other weapons, sometimes after a suspect has already been restrained or rendered helpless. There are also complaints involving various types of restraint holds, pepper (OC) spray, electro-shock weapons and firearms. . . . [V]ictims include not only criminal suspects but also bystanders and people who questioned police actions or were involved in minor disputes or confrontations.

Nevertheless, successful prosecutions of police for physical abuse are rare.

Other human rights issues are even more contentious. One of the main criticisms of Asian governments is that they invoke a cultural preference for stability over freedom to justify broad national security laws, extensive limitations of civil and political rights, and the derogation of criminal procedure and due process rights. There is no doubt that in some cases Asian governments do exaggerate the threat to national security and social order, and that many security laws are broadly drafted and kept on the books even after the threat for which they were created no longer exists. For instance, in Singapore, the Internal Security Act, inherited from the British and justified initially to prevent communist agitation, remains in effect, thereby allowing police to arrest and detain, without trial, anyone deemed to be "acting in a manner prejudicial to the security of Singapore."[72] Yet it is also true that many Asian states are less stable than mature Western liberal democracies. Moreover, while human rights may be destabilizing everywhere, they may be more destabilizing in Asia. In China, for instance, the ruling regime has yet to develop political institutions for adequately addressing human rights claims. Nor is there a reasonably coherent theoretical framework that incorporates rights and yet is consistent with the regime's norms.[73] It also appears the majority of citizens in different countries assign a different value to stability and order versus freedom.[74]

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72. CHRISTIE & ROY, *supra* note 8, at 60 (quoting Asia Week, June 15, 1985, at 20).

73. Whether out of traditional Confucian concerns for harmony and consensus or for more mundane political reasons, the Singaporean government has clearly tried to encourage disgruntled parties to seek compromise solutions through the political process rather than pressing potentially divisive rights claims in court. When an opposition party sought to set up a Malay rights group in 1997, a government spokesperson criticized the move as being unhelpful and dangerous to racial harmony, and suggested that it might lead to more vocal claims by other groups, such as the Chinese and Indian for special protections. The government argued that developing programs to tackle social problems like drug abuse and the rising divorce rate would be more constructive than "rights talk." The government also discouraged rights litigation when a controversy erupted over the wearing of *tudung* (Muslim headscarf) during a time when race relations were particularly delicate. As Singaporean constitutional law expert Thio Li-ann notes, the dispute raised important constitutional issues regarding the scope of religious freedom. However, the Prime Minister urged the parents of the schoolgirls be pragmatic and put their daughter's interests in receiving an education first by sending them back to school without the headscarves, which he argued were not religiously mandated. Despite the government's preference for a pragmatic approach based on dialogue rather than more adversarial litigation, it has indicated that it will be abide by a judicial ruling if the issue goes to court. Thio Li-ann, *Lex Rex or Lex Rex? Competing Conceptions of Rule of Law in Singapore*, *in* ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S., *supra* note 58.

74. *See* Susan Sim, *Human Rights: Bridging the Gulf*, STRAITS TIMES (Singapore), Oct. 21, 1995, at 32. A survey of academics, think tank experts, officials, businesspeople, journalists, and religious and cultural leaders found significant differences between Asians and Americans. *Id.* The former chose an orderly society, harmony, and accountability of public values, in descending order, as the three most important societal values. *Id.* In contrast, the Americans chose freedom of expression, personal freedom, and the rights of the individual. *See also* Bridget Welsh, *Attitudes Toward Democracy in Malaysia*, 36 ASIAN SURV. 882 (1996) (reporting that a survey of Malaysians in 1994 found that the majority were willing to limit

To be sure, Western governments have also enjoyed wide latitude in determining when a threat is sufficient to justify the derogation of criminal procedure and due process rights. In upholding the British government's derogation of due process rights as necessary to control civil strife in Northern Ireland, the ECHR stated:

> It falls in the first place to each Contracting State, with its responsibility for "the life of [its] nation," to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) [of the European Human Rights Convention] leaves those authorities a wide margin of appreciation.... It is certainly not the Court's function to substitute for the British Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism.[75]

The Court also noted that it must not base its decision on twenty-twenty hindsight, but must consider the government's decisions and actions in light of the circumstances at the time. A wide margin of appreciation does not mean unlimited discretion, of course. Furthermore, a state's derogation may not extend to certain rights, such as the right to life or freedom from slavery and discrimination.[76] Nevertheless, it is striking that the ECHR allowed dero

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democracy, particularly when social order was threatened, and that fears of instability and Asian values led to limited support for democracy; also noting that respondents were willing to sacrifice freedom of speech in the face of threats to social order). For several studies that show the high value assigned to order in China and limited demand for democracy, see RANDALL P. PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 53-56 (2002). Similarly, in Taiwan, while seventy-five percent of respondents in a 1999 study indicated that democracy was important to them in "their personal lives," a 1998 survey found that fifty-five percent of respondents believed developing the economy was more important than establishing democracy, with just over thirty percent giving the edge to democracy. *Id.* Some forty- percent of the sample initially indicated that the economy was more important than democracy and forty percent indicated that the two were equal. *Id.* When this last group was forced to choose, sixty-three percent opted for the economy. *Id. See* Sean Cooney, *The Application, and Non-application, of Rule of Law Principles in Taiwan, in* THE CONSTRUCTION AND DECONSTRUCTION OF RULE OF LAW IN ASIA: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S., *supra* note 58.

75. Ireland v. United Kingdom, 25 Eur. Ct. H.R., (ser. A), para. 207, 214 (1978).

76. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm (last visited Sept. 18, 2003) [hereinafter ICCPR]. Article 4 of the ICCPR provides that:

gation in all of the cases it has decided, with the exception of the *Greek Colonels* case where the entire government was suspended by a military takeover (it bears noting that Greece then proceeded to denounce the decision and withdraw from the Convention, demonstrating the practical limits of international human rights law). In the Ireland case, the Court upheld the detention of a member of the Irish Republican Army without trial for five months.[77]

It is much easier to be bold in calling for the protection of individual rights and opposing measures aimed at ensuring stability when it is someone else that will suffer the consequences. The United States and Western European countries are stable places and remain so even after the September 11 attacks. However, many Asian countries including China, Myanmar, Cambodia, Indonesia, Nepal, the Philippines, Thailand, and Malaysia are less stable. Some of these countries are torn by civil strife, racked by ethnic divisions, or actively engaged in long running battles with terrorists.[78] People in the United States and Western Europe have a comfortable life; many in Asia are living precariously on the edge and cannot afford social chaos. Amnesty International has claimed massive human rights violations in Nepal by both the military and Maoist guerrillas, including the killing and kidnap-

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> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Id However, derogation is not allowed with respect to articles 6 (right to life), 7 (torture, cruel and unusual punishment), 8 (slavery), 11 (no jail for failure to pay debt), 15 (nullem crime sine lege), 16 (recognition as person before law) and 18 (freedom of though, conscience and religion). *Id.*

77. *Compare* Brogan v. United Kingdom, A145-B Eur. Ct. H.R., (ser. A), at 117 (1988) (holding that detention of suspected terrorists for up to seven days without being charged violated the Art. 5(3) requirement that those arrested or detained be brought promptly before a judge or other judicial officer). The state argued that it needed more time given the difficulty of obtaining evidence, and that in thirty-nine of eighty-six such cases, the extra time led to a charge of terrorism. *Id.* The Court, noting that there was no state of emergency declared at the time, held that anything over four days was too long. *Id.* One judge dissented, observing that in a democratic country, presumably the people know best how to draw the proper balance between the rights of individuals and safety of others in society. *Id.* The United Kingdom then lodged a derogation for public emergency. *Id.* The Court upheld the derogation and detention for more than six days in Brannigan and McBride v. U.K, 258-B Eur. Ct. H.R., (ser. A) (1993), *available at* http://hudoc.echr.coe.int/Hudoc2doc/HEJUD/sift/404.txt (last visited Nov. 5, 2003).

78. For a list of conflicts in various Asian countries, see Richard Klein, *Cultural Relativism, Economic Development and International Human Rights in the Asian Context*, 9 TOURO INT'L L. REV. 1 (2001). In February 2003, one day after Secretary of State Colin L. Powell visited Beijing and a week before China's national legislature opened its annual session, two bombs exploded in cafeterias at two of China's leading universities, injuring nine people. *See* John Pomfret, *Explosions Rock China's Top 2 Universities*, WASH. POST FOREIGN SERV., Feb. 25, 2003.

ping of civilians, torture of prisoners, and destruction of property.[79] In defense of the government's suspension of constitutional freedoms and harsh actions, Nepal's Prime Minister declared: "You can't make an omelette without breaking eggs. We don't want human rights abuses but we are fighting terrorists and we have to be tough."[80] While the annual per capita income in the Nepal is less than $200, the government is spending *ten million dollars a week* on fighting the Maoists.[81] Furthermore, tourism revenues have all but disappeared and foreign investment and exports are down by ninety percent.[82]

When the United States was less stable, most notably during the war years in the 1920s and 1940s, the government's response was to curtail free speech and, during WWII, to lock up Americans of Japanese descent out of fear that they might be a threat to national security.[83] In fact, the United States has regularly reacted to domestic instability in ways inconsistent with international standards of rights,[84] including in its ongoing war on crime.[85]

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79. Daniel Lak, *Kingdom on the Brink of Catastrophe*, S. CHINA MORNING POST, May 12, 2002, at 7.

80. *Id.*

81. *Id.*

82. *Id.*

83. *See* David Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981); *Korematsu v. United States*, 323 U.S. 214 (1944).

84. *See* Diane Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 460 (2003) (noting that Lincoln suspended habeas corpus during Civil War, approved by Congress; 2200 people were prosecuted under Espionage and Sedition Acts, with more than 1000 convicted during WWI; the right of habeas corpus was suspended and martial law imposed in Hawaii after Pearl Harbor; during the McCarthy era, the Supreme Court in Am. Communications Ass'n. v. Douds, 339 U.S. 3832, 288-89 (1950) permitted regulations requiring labor unions to sign an oath swearing they were not members of Communist Party and did not believe in the overthrow of the United States, and in Dennis v. U.S., 341 U.S. 494, 501 (1951) rejected "any principle of government helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy"); William E. Lee, *"Security Review" and the First Amendment*, 25 HARV. J. L. & PUB. POL'Y 743 (2002) (noting that journalists who wanted to accompany American military personnel on U.S military cargo plans into Afghanistan to report on the "Operation Enduring Freedom" were required to accept certain conditions, including that they share their account with other media, not report the full names of military personnel, not report sensitive mission information such as altitude or route, and submit to a security of their report by military officials before publication); Richard Morin & Claudia Deane, *Belief Erodes in First Amendment*, WASH. POST,, Sept. 3, 2002, at A15 (poll shows that forty-nine percent of the public thinks the First Amendment goes too far, up from thirty-nine percent in 2001, twenty-two percent in 2000).

85. *See generally* Amnesty International, United States of America—Rights for All 2-3 (1998), *at* http://web.amnesty.org/library/index/ENGAMR510541998 (last visited Sept. 18, 2003), (finding that police officers, prison guards, immigration and other officials regularly breach domestic and international laws and that authorities have failed to punish and prevent abuses, and that while the United States has used international human rights standards as a yardstick to judge other countries, the United States government policies and practices frequently ignore or fall short of the minimal standards required by the international community). *See also* Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 71-72 (1998) (noting many ways in which United States is at odds with international legal standards, including continued reliance on death penalty, even for

Even today, the United States, France, and other countries have rushed to curtail civil liberties and to tighten criminal laws in the wake of the September 11 terrorist attacks.[86] In France, Parliament passed a law on public order without referring it to the Constitutional Council,[87] perhaps because it contains at least one provision expressly not in conformity with the Council's past jurisprudence. The new legislation gives the police broad powers to search vehicles to fight crime, even though the Constitutional Council nullified an identical provision in a 1997 decision.[88] The Council rejected the law on the ground that, by giving police virtually unlimited authority to search vehicles, the law failed to provide adequate controls on police activity and violated individual freedom.[89]

Meanwhile, the United States has passed a series of legislative acts and executive orders that greatly curtail civil liberties.[90] Just one week after the September 11 attacks, Congress hurriedly passed a bill authorizing the President to use all necessary force against any organization or state found to have been involved in the planning or execution of terrorist acts in the United States.[91] The bill also authorized the use of force against any state providing a safe haven to terrorist organizations that harm the United States. Other legislation expanded the government's authority to issue wiretaps and intercept and monitor written, oral, and electronic communication.[92] In a move much denounced by civil liberty groups, the Department of Justice

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juveniles and the mentally impaired; limits on double jeopardy in that criminal suspects may be tried on both state and federal charges for the same facts; juveniles may be tried whereas international human rights standards provide that criminal suspects get the benefit of a lighter sentence if changes in the law reduce punishments after the crime is committed but before sentencing, while in the United States they are subject to the heavier punishment; and the failure to require the separation of unconvicted detainees from convicted prisoners). *Cf.* JOHN RAYMOND COOK, ASPHALT JUSTICE: A CRITIQUE OF THE CRIMINAL JUSTICE SYSTEM IN AMERICA 14 (2001) (arguing that the current "get tough" on crime approach has failed miserably and calling for a comprehensive approach that puts more emphasis on rehabilitation by providing criminals an incentive to change their behavior while in prison and improve themselves).

86. *See generally* Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation–Part One: An Overview*, 11 J. TRANSNAT'L L. & POL'Y 183 (2001); Philip Heyman, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L. J. 1259 (2002).

87. Loi Relative À la Sécurité Quotidienne, Act n°2001-1062, Nov. 15, 2001, J.O. n°266, Nov. 16, 2001.

88. Laurent Pech, *The French Conception of Rule of Law*, *in* ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S., *supra* note 58.

89. *See id.*

90. *See* Zelman, *supra* note 86, at 185-90; Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001); Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677 (2002).

91. Military Force Authorization Bill, S. J. Res. 23, 10th Cong. (2001) (enacted).

92. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, S 201-225 (2001).

issued an order permitting the monitoring of attorney-client communications between inmates in its custody and their lawyers.[93] In one of the most controversial moves of all, President Bush signed an executive order that allows military tribunals to try non-citizens.[94] Human rights groups and legal scholars have complained that the accused would not have a right to appeal, the public would not learn about the case until after the suspects were convicted and sentenced, and suspects could be detained indefinitely without conviction.[95] The order appears to deprive the accused of the right of habeas corpus to challenge the decision to arrest in court, even though habeas corpus may be suspended only by Congress in times of invasion or rebellion. Moreover, the accused may be convicted and sentenced to life in prison or death if two-thirds of the panel agrees, even though military courts, under the Uniform Code of Military Justice, require unanimity in capital cases and provide for several stages of appellate review. Military courts also provide many due process rights, such as protection against double jeopardy and self-incrimination, not available to those hauled before the terrorist tribunals. Critics of these actions have noted that previously the United States imposed economic sanctions on Myanmar and criticized Egypt for holding trials by military tribunals, and complained about secret trials in China and Russia. In response to such criticisms, Vice President Cheney, sounding more like the conservative Chinese leader Li Peng than one of the leaders of the "Free World," stated: "These people are criminals illegally entering into the United States, killing our citizens. They do not deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."[96]

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93. Prevention of Acts of Violence and Terrorism, 28 C.F.R. § 501.3.

94. Robert A. Levy, *Don't Shred the Constitution to Fight Terror*, WALL ST. J., Nov. 20, 2001, at A18. Paust, *supra* note 81, at 677.

95. *See, e.g.*, Warren Richey, *How Long Can Guantanamo Prisoners Be Held?*, CHRISTIAN SCI. MONITOR, Apr. 9, 2002, 1, 4 (quoting U.S. Deputy Assistant Attorney General John Yoo: "Does it make sense to ever release them if you think they are going to continue to be dangerous even though you can't convict them of a crime?").

96. *See* "Ta Kung Pao Accuses US of Violating Human Rights with Proposed Military Tribunals," FBIS-CHI-2001-1126, Nov. 26, 2001. *See also* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1433-34 (2002) (citing justifications for military tribunals that are eerily similar to claims by PRC officials for limiting rights, including that (i) trials take too long and cost too much and are a nuisance or danger when fighting terrorism; (ii) civilian judges and witnesses would be at risk; (iii) there is no need to protect the rights of terrorists; (iv) normal rules do not fit the circumstances – soldiers in the field can hardly be expected to read Bin Laden his Miranda rights; it is not possible to maintain the chain of custody for evidence out in the field and state secrets are involved; and (v) witnesses will use public trials to grandstand for political purposes).

If there is anything universal, it would seem to be disregard for rights whenever there are real or perceived threats to stability and social order.[97] Even allowing that the threat of terrorism is real in the United States, it would not seem to rise to the level of a public emergency that threatens "the life of the nation," as literally required under Article 4 of the ICCPR to justify the derogation of civil and political rights.[98] Prior to September 11, the U.S. State Department and Western rights organizations often criticized Asian countries for cracking down on dissidents, insurgents, terrorists, and others who threaten social order on the ground that the life of the nation was not at stake. The restrictions were perceived as required to keep the ruling regime in power but not arising from a threat to the nation as such. Yet surely the threats faced by many Asian countries are more serious than the threats currently faced by the United States. After all, it stretches credulity to suggest that isolated acts of terrorism, deplorable as they may be, could bring the world's mightiest military power to its knees—though they may succeed in causing a major change in the "life of the nation" if the government's repressive policies to combat terrorism erode the very liberties they are supposed to protect. In contrast, many Asian states, weakened by ethnic strife, economic crisis, and insurgent movements whose express purpose is to bring down the government, do confront challenges that could result in the overthrow of the government and the collapse of the state.

Criminal law is another area where there is considerable variation both in the West and in Asia.[99] There is considerable variation with respect to the approval requirements for warrants and arrest, search and seizure rules, what constitutes arbitrary detention and interrogation issues such as access to a lawyer, the conducting of line-ups, the right to silence, and other issues such as the admissibility of tainted evidence. Indeed, half of the ECHR's caseload

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97. *See* David Klinger & Lt. Col. Dave Grossman, *Who Should Deal with Foreign Terrorists on U.S. Soil?: Socio-legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America*, 25 HARV. J.L. & PUB. POL'Y 815, 824 (2002) (arguing for the deployment of the United States military in domestic law enforcement actions and that "Foreign individuals or groups (and U.S. citizens aiding and abetting them) who commit acts of war on U.S. soil should not be viewed as people who need to be apprehended under the aegis of the Fourth Amendment of the Constitution, which properly requires substantial restraint on law enforcement officials seizing citizens. . ."; rather, such people should be treated as enemy soldiers under laws of war, whereby the military should have the right to make "informed decisions" that the people they are dealing with are foreign terrorists (or U.S. aiders) and attack using reasonable force, including tanks and missiles to blow planes out of the sky). *See also* Poe et al., *supra* note 51, at 296 (finding that civil war has a positive and statistically significant impact on political repression).

98. *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7 HUM. RTS. Q. 3, 1 (1985). Principle 39 of the Siracusa Principles interprets "threat to the life of the nation" to mean that a danger (i) is present or imminent; (ii) is exceptional; (iii) concerns the entire population, and (iv) constitutes a threat to the organized life of the community. *Id.*

99. *See, e.g.*, ERIKA FAIRCHILD & HARRY DAMMER, COMPARATIVE CRIMINAL JUSTICE SYSTEMS (2d ed. 2000).

consists of fair trial and length-of-proceeding issues.[100] While systematic empirical studies are lacking, it appears that most Asian nations seem to give police broader powers to arrest and detain than do the United States and Western Europe countries.

Systematic empirical studies would also help clarify the range of diversity with respect to other rights issues, such as free speech, freedom of association, and freedom of the press.[101] For instance, Thailand, one of the more tolerant countries in Asia in terms of freedom of speech and the press, prohibits the advocacy of communism, criticism of the government, and incitement of ethnic, racial, or religious tensions. Yet without an examination of actual cases and the specific context, it is not clear where the lines are drawn exactly, how onerous such restrictions are, what the penalties are, whether the laws are applied fairly or used to attack opposition party figures, and so on. Empirical studies would also shed light on sexuality/gender issues (same-sex marriage, homosexuality, pornography, prostitution, transexuality), obscenity laws, the public-private distinction and privacy issues (urine tests, mandatory treatment for drug addicts, identity cards, the right of employers to read employees' emails), the value of life (abortion, female infanticide, euthanasia, the right to die, eugenics, sale of body parts), paternalism and the limits of autonomy and consent (Can experienced business persons consent to unconscionable contract provisions? Can a woman consent to be beaten by her husband? Can dwarfs consent to dwarf-tossing contests where the participants compete in bars to see who can throw the dwarf the farthest? Can people consent to sadomasochistic acts that amount to criminal offenses in the case of non-consenting parties?[102] Can criminal defendants consent to trial without counsel?), family law issues (domestic violence, spousal rape, children's duty to support their parents, parents' duty to take care of children, the right to divorce, child custody, the division of property upon divorce, inheritance laws, surrogate motherhood), labor issues (the right to form a union and to strike, minimum wage, child labor), economic rights (the right to housing and medical care), cultural rights (the rights to the use of language, culturally important lands and waterways, freedom of religion), and collective

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100. YOUROW, *supra* note 50, at 67. For a discussion of administrative detention and criminal law in China in light of international standards and practices elsewhere, see Randall Peerenboom, *Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China,* NORTHWESTERN L. REV. (forthcoming 2004).

101. *See* CHRISTIE & ROY, *supra* note 8. Christie and Roy provide brief summaries of these issues. *Id. See also* Scott Goodroad, *The Challenge of Free Speech: Asian Values v. Unfettered Speech, An Analysis of Singapore and Malaysia in the New Global Order*, 9 IND. INT'L & COMP. L. REV. 259 (1998). Welsh, *supra* note 74, at 894 (noting that while eighty-six percent of Malaysian respondents supported free press, only forty percent thought the press should be free to discuss sensitive issues, while only fifty-two percent thought it should be free to criticize the government, with many of those favoring constructive criticism).

102. *See* Laskey v. United Kingdom, 29 Eur. Ct. H.R., (ser. A), at 120 (1997) (holding that British laws prohibiting adult, sexual sado-masochistic acts do not violate right to privacy).

rights (the right to self-determination and the right to a clean environment as reflected in environmental laws).

The Margin of Appreciation and the Benefits and Limits of Diversity

The margin of appreciation suggests that a certain amount of variation in how the aforementioned issues are handled is to be expected, and arguably justifiable, or at least acceptable, given the alternatives. Assuming persuasion does not work, the alternatives presumably would be to force others to accept ideas that they do not believe in by using increasingly coercive measures ranging from public censure to economic sanctions to military intervention. Some moral realists might believe there is a right answer to each of these questions, and some universalists (who may or may not be moral realists) might hold out hopes for a detailed overlapping consensus on all of these issues. But moral realism, as I shall argue below, does not get us very far in practice. Nor does an overlapping consensus seem likely, or even desirable. Diversity is a good thing. There is no reason for all countries to adopt the same conceptions of the good life or to resolve all issues in the same way. Diversity makes experimentation possible.[103] It also allows people with different interests and conceptions of the good life a greater chance of finding a suitable place to live.[104]

At the same time, there are limits to the benefits of diversity. At some point—a different point for different people that will vary depending on the issue—most people will protest against acts that violate their own sense of what is right and, if reasoned arguments or emotional appeals fail to persuade, they may in some cases be willing to escalate the degree of coercion required to bring the actions, if not the beliefs, of others into line with their own moral beliefs about what is right. Of course, a number of practical factors will—and should—enter into the calculus. There is little point advocating sanctions if they will not achieve the desired end, especially if they will lead to more human rights violations and greater suffering on the part of those whom the sanctions are supposed to benefit.[105] More controversially, states will also consider geopolitical factors and their own national interests when deciding what course of action to take. Humanitarian intervention is rare and occurs only when there is a consistent pattern of massive human rights violations.[106]

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103. In fact, many ECHR cases rely on such experimentation to support their positions. For example, in *Lustig-Prean and Becket v. U.K*, 29 E.H.R.R. 548 (2000), the court relied on information about gays in the military in other countries to strike down a United Kingdom law. The court argued that the experiences of other countries showed that such a restriction was not necessary for security purposes. *Cf.* Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (upholding ban on gays in U.S. military).

104. Obviously many people will not have the means (economic or psychological) to move to another country more to their liking, but at least some people will be able to take advantage of the opportunity.

105. *See infra* text accompanying notes 141.

106. *See supra* text accompanying note 143.

Even then, in many cases of widespread abuse of human rights, the Security Council fails to intervene.

As the proper response will and should depend on the nature and scope of rights violations, the first round of the debates could have profited from a more consistent recognition of the differences among Asian countries with respect to rights and an attempt to separate out the truly evil regimes from others that protected various rights to various degrees. Myanmar and North Korea are at one extreme, with citizens enjoying few if any rights and also suffering from a low level of economic development. Other countries, such as China, offer little protection when it comes to many civil and political rights, but do better with respect to other rights—or at least they are not significantly worse than other countries with respect to economic, social, and cultural rights. Singapore, Thailand, and the Philippines are generally protective of rights, though there are pockets of problems, often in the area of civil and political rights. Thailand and the Philippines are also dealing with poverty and a range of related socioeconomic problems. Japan, Hong Kong, South Korea, and Taiwan have relatively good records across the board (again, relative to other countries around the world). Of course, there are rights violations and areas of concern even in these countries. Japan, for instance, has problems with discrimination against women, Koreans, and other socially disadvantaged groups.[107] Western (or Asian) liberals still might object to where the line is drawn on some issues, such as free speech in Hong Kong or the rights of criminal defendants in Japan, preferring greater protection of the individual even if at the expense of group interests. However, Western liberals disagree with libertarians, communitarians, conservatives, and others in their own countries on these issues. In the West, however, liberals are in the majority and hence, by and large, able to get their own preferences enacted into law and upheld by the courts.[108]

The first round of debates also frequently suffered from the failure to distinguish between democracy and liberal rights. The lack of democracy does not necessarily mean the failure to protect rights. Hong Kong has

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107. *See* CHRISTIE & ROY, *supra* note 8, at 275.

108. Rights are often justified, particularly but not exclusively by liberals, by noting the need to protect individuals and the minority against the tyranny of the majority. Rights are an anti-majoritarian device to the extent that they remove certain issues from the legislative arena (and the majoritarian decision-making process) and trump the interests of the group and society as a whole. Even if rights in all societies serve an anti-majoritarian function, however, how they are conceived, justified, and interpreted will vary. Thus, while communitarians and liberals, for example, all believe, at least in certain circumstances, that the rights of the individual override the democratic majoritarian decision-making process, they will differ as to how often and for what reasons the rights of the individual should trump the will of the majority. Liberals tend to side with the individual more often, casting a broader and more impenetrable web of protective rights around the individual, than their fellow conservative or communitarian rights-based democrats. If they have majority control of the legislature and liberal judges dominate the courts, liberals will be able in most cases to have their views imposed on those who do not agree with them.

adequately protected rights, though not always interpreted as liberals do, even though it is not a democracy (and was not a democracy under the British).[109] Conversely, a state may become democratic (or at least hold elections) and yet not necessarily become liberal or adequately protect human rights. Indeed, it is easy to overstate the value of democracy for the protection of human rights, at least in the short term.

Despite the much-vaunted third wave of democratization in the 1980s and 1990s, regimes that combined meaningful democratic elections with authoritarian features outnumbered liberal democracies in developing countries during the 1990s.[110] These regimes have been described in a variety of ways: semi-democracies, electoral democracies, illiberal democracies, soft or semi-authoritarian states, semi-dictatorships or a form of electoral authoritarianism. A number of quantitative studies have found that the third wave has not led to a decrease in political repression, with some studies showing that political terror and violations of personal integrity rights actually increased in the 1980s.[111] Other studies have found that there are non-linear effects to democratization: transitional or illiberal democracies increase repressive action. Fein described this phenomenon as "more murder in the middle"—as political space opens, the ruling regime is subject to greater threats to its power and so resorts to violence.[112]

More recent studies have also concluded that the level of democracy matters: below a certain level democratic regimes oppress as much as non-democratic regimes.[113] Using the Polity IV Index consisting of five components—competitiveness of executive recruitment, competitiveness of participation, executive constraints, openness of executive recruitment and regulation of participation—one study found that political participation and limits

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109. *See U.S. State Department Human Rights Report 2000 Hong Kong*, U.S. Dep't of State, *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/eap/686.htm (released Feb. 23, 2001) (last visited Sept. 18, 2003).

110. Steven Levitsky and Lucan Way, *supra* note 23.

111. James A. McCann and Mark Gibney, *An Overview of Political Terror in the Developing World, 1980-1991*, in POLICY STUDIES AND DEVELOPING COUNTRIES, VOL. 4, 15, 23-24 (Stuart Nagel and David Louis Cingranelli, eds. 1996) (noting that political terror increased in the developing world in the 1980s and finding that democracy does not by itself ensure low levels of terror); *see also* Reilly, *supra* note 26 (finding no evidence that personal integrity rights are improving, and that over the period from 1976-1996, the number of countries with the best score actually decreased, countries with the worst score increased, while the mean remained about the same).

112. Helen Fein, *More Murder in the Middle: Life-Integrity Violations and Democracy in the World, 1987*, 17 HUM. RTS Q. 170 (1995).

113. Bruce Bueno de Mesquita et al, *Thinking Inside the Box: A Closer Look at Democracy and Human Rights* (2003), *available at* proceedings@apsanet.org. *See also* Christian Davenport and David Armstrong, *Democracy and Human Rights: A Statistical Analysis of the Third Wave* (2002), *available at* http://apsaproceedings.cup.org/index.htm. *But see* S.C. Zanger, *A Global Analysis of the Effect of Regime Changes on Life Integrity Violations, 1977-1993*, J. OF PEACE 33 (2000) (finding that democracy leads to improvement in human rights performance within the first year of holding elections).

on executive authority are more significant than other aspects, but that there is no human rights benefit at all until the very highest levels of political participation and executive constraints are achieved. However, these levels require moderate progress on each of the other subdimensions. In short, "there is no significant increase in human rights with an incremental increase in the level of democracy until we reach the point where executive constraints are greatest and where multiple parties compete regularly in elections and there has been at least one peaceful exchange of power between the parties... Put more starkly, human rights progress only reliably appears toward the end of the democratization process."[114]

The results in Asia are largely consistent with the findings of these multiple country studies. In Indonesia, there have been numerous human rights violations after the fall of Suharto, most notably with respect to ethnic violence, the tragedy in East Timor, and the violence that marred the 1999 elections. Similarly, Amnesty International reported in 1993 that the human rights situation had not substantially improved under the democratic regime in South Korea.[115] Even today, Kim Dae Jung has been unwilling or unable to do away with the strict National Security Law despite his campaign promises. Although Cambodia held elections in 1993 and 1998, the period was marked by battles between government armed forces and the Khmer Rouge, resulting in continued human rights violations including murder, rape, hostage-taking, and secret detention.[116] The government offered an amnesty to key leaders and supporters of the Khmer Rouge, much to the dismay of many rights advocates.[117] Nevertheless, stability remained an issue with a preemptive coup by Hun Sen in 1997 in which more than fifty people were killed, many of them shot in the back of the head after arrest.[118] In the Philippines, democracy

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114. De Mesquite el at., *supra* note 113.

115. AMNESTY INTERNATIONAL, REPORT (1993).

116. One can, of course, challenge whether Cambodia or Singapore or Malaysia are democracies in the relevant sense. A genuine democracy requires at minimum open, competitive elections, under universal franchise, of those in posts where actual policy decisions are made (the electoral dimension). It also requires sufficient freedom of association, assembly, speech, and press to ensure that candidates are able to make their views known and compete effectively in the elections, so that citizens are able to participate with reasonable effectiveness in the electoral process (the participatory process dimension). In addition, it requires the legal institutions to ensure that these freedoms are in fact realized and the election is carried out fairly (the rule of law dimension). Democracy therefore implies rule of law, but not vice versa.

117. David Chandler, *Will There Be a Trial for the Khmer Rouge?*, 14 ETHICS & INT'L AFF. 67 (2000). Thus far, no one from the Khmer Rouge has stood trial for war crimes. *Id.* Cambodia continues to say that it will have such trials, but after a February 2002 fallout between Cambodia and the United Nations, it remains unclear whether the United Nations will be involved. *Id.* Even without the United Nations, however, there may be an international presence via individual foreign governments (India, etc.) if a tribunal ever does take place in Pnomh Peng. *Id. See also Cambodia, U.N. in Khmer Rouge Talks*, CNN World, June 3, 2002, at http://europe.cnn.com (last visited Nov. 14, 2003) (search for Cambodia, U.N. in Khmer Rouge Talks, CNN World, June 3, 2002).

118. *Id.* at 79.

has not resolved pressing socioeconomic problems. At the end of the 1980s, seventy-five percent of the population lived below the poverty line. Under Ramos, the percentage was reduced by seven percent, but the gap between rich and poor grew.[119] There have also been numerous rights violations, including disappearances, extrajudicial killings, arbitrary arrests, and prolonged detention, as the government continues to struggle against insurgents.[120] Consistent with popular views in other countries threatened by terrorism and insurgents, most Filipino citizens apparently do not consider the government's tough treatment of terrorists as human rights violations. Preoccupied fighting terrorists, the government has been too weak to deal with corruption and violence, and democracy has been driven by cronyism, family networks in the countryside, and personalities, as in the ill-fated election of the actor Joseph Estrada. Thailand, for its part, has continued to struggle with prostitution and child labor, among other pressing socioeconomic issues. Poverty levels jumped from eight percent in 1996 to twenty percent in 1998 as a result of the financial crisis, eliminating much of the progress made in last twenty years. Some 800,000 school children and college students were forced to drop out of school; social problems such as alcoholism, depression and suicide increased; immigrants were no longer welcome; and trafficking in children and prostitution increased.[121]

The experiences of these countries suggest that there is something to the arguments of those who claim that stability and economic development are essential to the quality of life, that subsistence is the most important right, and that the biggest issue is poverty - and if developed Western countries really were concerned about human rights and the quality of life of Asian citizens, they would do more to help developing countries eliminate poverty rather than simply preach about violations of civil and political rights.[122] These arguments, framed in terms of the indivisibility of rights, the existence of a hierarchy of rights, the need to trade-off first generation civil and political liberties to ensure economic growth, and the need for strong authoritarian governments to ensure stability, constituted a second nexus of rights issues in the first round of debates.

2. *Conflicts among rights: hierarchies and trade-offs*

That the Bangkok and Vienna Declarations stressed the indivisibility of rights was hailed by rights advocates as a major success in the battle against Asian values. In my view, it was anything but that. Rather, it is a good example of what the Chinese call sleeping in the same bed but having different

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119. CHRISTIE & ROY, *supra* note 8, at 187.

120. *Id.* at 188, 191-92.

121. *Id.* at 166.

122. *See also supra* note 58 (multi-country empirical studies showing that the level of economic development is a statistically significant factor in respect to protection of human rights).

dreams (*tongchuang yimeng*) and of how an apparent consensus turns out to be chimerical once one probes beneath the surface. Opponents of Asian values wanted this language to counter the arguments of some Asian governments and advocates of Asian values that subsistence was the most fundamental right and that the need to ensure economic growth required a temporary trade-off of civil and political rights. Some Asian governments and Asian-values advocates, on the other hand, wanted it to obviate what they perceived to be the excessive emphasis of the Western-dominated international human rights community on civil and political rights. They wanted to ensure that they are given credit for improving the material standards of living in their countries (even if few Asian governments really want social, economic, and cultural rights to be taken so seriously as to actually obligate them to spend the resources necessary to satisfy such positive rights). Furthermore, they wanted to emphasize that poverty is the most pressing issue and, therefore, developed states should take the collective right to development seriously and help developing states develop.

Accepting the indivisibility of rights does not address the issues of whether there is or should be a hierarchy of rights or whether Asian governments are justified in restricting civil and political rights in some circumstances in the name of stability and economic growth. There is no conceptual reason why all good things must go together. In fact, the dominant view for years was that collective and group rights were not really human rights at all, because human rights attached only to individuals.[123] Fortunately this view is no longer so prevalent, and collective rights have become widely accepted. In any event, the notion that various types of rights are mutually supportive is compatible with a hierarchy among rights and the need to work out a ranking system to deal with conflicting rights. Given the proliferation in rights, conflicts among rights are inevitable. Does anyone seriously believe that all rights listed in human rights documents are equally important: that, for example, the right to holidays with pay is as important as the right to subsistence, or that the right to be brought before a judge promptly upon arrest is as important as the right not to be sold into slavery?[124] No system treats all rights as equal. In the United States, courts distinguish between fundamental rights, which require a compelling state interest and least restrictive means analysis, second-tier rights requiring intermediate scrutiny, and garden-variety

123. *See* DONNELLY, *supra* note 20, at 20.

124. Jeremy Waldron, *Liberal Rights: Two Sides of the Coin*, *in* LIBERAL RIGHTS, COLLECTED PAPERS 1981-1991 (1993). Waldron argues that economic and social rights must be taken seriously, even offering a defense of periodic holidays with pay. However, he also notes that rights do conflict and that it is imperative in a world characterized by conflict and scarcity to face up to the need to make trade-offs and to balance various rights claims. *Id.* In response to Henry Shue's well-known attempt to prioritize rights, Donnelly argues that one could have all of the basic rights mentioned by Shue and still live a degraded, shabby life. *See* DONNELLY, *supra* note 20, at 41-42; HENRY SHUE, BASIC RIGHTS PAGE? (1980). This is true, but it does not obviate the need to rank and trade off rights in the real world. *Id.*

rights that can be limited by showing only that the government has not acted irrationally or arbitrarily. International law distinguishes between *jus cogens* rights that do not require assent from member states and treaty rights that do require consent, with customary law forming an intermediate, rapidly expanding category where traditional indicia are increasingly less important.[125] International human rights treaties also distinguish between rights that are derogable and non-derogable.[126] Moreover, the rights documents themselves, in effect, discriminate against rights in that some are more binding than others.[127] An analysis of ECHR cases shows that in practice there are some inviolable core rights, such as the right against torture; some preferred, fundamental, or specially protected rights, including certain due process and personal freedom rights; and then other rights that may be derogated and receive less protection.[128]

Simply put, every legal system, whether international or domestic, must deal with conflicts of rights every day. The rights of some citizens to education and housing or to the use of their cultural land may require limitations on

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125. HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 224-36 (2000). Granted, jus cogens rights are controversial and in practice play little if any role in part because of the expansion of treaty and customary law. *Id.*

126. *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, *supra* note 98, at 7-10.

127. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), *available at* http://www1.umn.edu/humanrts/instree/b3ccpr.htm (last visited Sept. 18, 2003) [hereinafter ICCPR]. Compare, for example, the vague nature of the obligations of the International Covenant on Social, Economic and Culture Rights with the operative clauses of the International Covenant on Civil and Political Rights. *Id.*

Article 2 of the ICCPR states:

> 1. 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.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant *undertakes to take the necessary steps*, in accordance with its constitutional processes and with the provisions of the present Covenant, *to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

Id. (emphasis added).

Compare International Covenenant on Economic, Social, and Cultural Rights, *available at* http://shr.aaas.org/thesaurus/icescr.html (last visited Sept. 18, 2003). Article 2 of the ICSECR states:

> Each State Party to the present Covenant *undertakes to take steps*, individually and through international assistance and co-operation, especially economic and technical, *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.

Id. (emphasis added).

128. YOUROW, *supra* note 50, at 190.

the property rights of other citizens either in the form of higher taxes or the requisition of their land for public interest purposes.[129] The right of a group to maintain its culture may involve practices regarding marriage, divorce, and inheritance that are at odds with women's rights to equality and non-discrimination. The rights of Indian women to life and equality may require limitations on the practice of sati (widow burning) and thus, the practice of religion for (male) Hindus. The right to free speech may conflict with the rights of minorities not to be subject to discriminatory hate speech.

The real issues here are not whether there should be a hierarchy of rights, but (i) how to rank rights, or perhaps more accurately how to weigh rights against competing interests, including other rights claims, and (ii) whether civil and political rights really must be traded off to ensure stability and economic growth. The second issue often involves severe limitations on rights by authoritarian regimes, but it is not an issue that applies, at least anymore, to economically advanced Asian countries such as Japan, South Korea, and Taiwan. As it is related to the key economic issue of whether democracies or authoritarian regimes are more likely to achieve sustained economic growth, I will postpone discussion of it until later.

In contrast, the first issue is in some ways more fundamental and likely to endure in that it involves contentious line drawing exercises that pit liberals against communitarians, conservatives, and anyone else who does not privilege autonomy and the interests of the individual over other interests, including social order and the interests of the group. The excessive individualism of liberalism is a pressing concern in Korea, as it is in Taiwan, Japan, Hong Kong, and in Western countries as well.[130] This issue has often been construed as a battle between Asian communitarians and Western liberals. Opponents of Asian values, in addition to noting that there are Western communitarians and Asian liberals, question whether Asian governments are really interested in promoting communities.[131] They also deny that liberal democracies are antithetical to communities, and claim that in fact communities are more likely to flourish in liberal democracies than under authoritarian regimes. Communitarians counter that communities are not likely to flourish under either liberal or authoritarian regimes. What is needed is a non-liberal, communitarian form of democracy. Whatever the merits of these arguments, the issue is much broader than the debate between communitarians and liberals. It is a truly universal issue that everyone of whatever persuasion must face in that it involves drawing a balance between the individual and the group

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129. *See* Ghai, *supra* note 7, at 1128. Indicative of the importance of a country's history and particular circumstances, South Africa, given its history of apartheid that has resulted in an extreme imbalance in wealth, determines compensation in takings cases based on the history of the acquisition and use of the property as well as its current use and market value. *Id.*

130. See, for example, the essays on Asian values in the Korea Journal, volume 41..

131. *See, e.g.*, Xiaorong Li, *"Asian Values" and the Universality of Human Rights*, *in* DEALING WITH HUMAN RIGHTS: ASIAN AND WESTERN VIEWS ON THE VALUE OF HUMAN RIGHTS, *supra* note 7, at 37.

across a whole range of issues. It is certainly possible that the majority of Asians may prefer a different balance than the majority of Westerners, though again we need more detailed empirical studies to examine differences in practice across a wide range of specific issues.[132] The balancing issue is likely to endure because simply noting a majority preference one way or the other will not end the debates—those in the minority can continue to claim that they are right based on any number of reasons and theories from pragmatic considerations to moral realist arguments about what is *really* right, whatever that means other than that those making the claim are particularly committed to their position.

Of course, many issues do not turn on general conflicts between the individual and the collective or claims by individuals against the state but rather involve competing claims among different groups. Hindu women seeking to avoid widow-burning have different interests than Hindu men arguing for the free practice of religion. Poor citizens arguing for higher taxes have different interests than the rich. Muslims arguing for exceptions to generally applicable laws have different interests than non-Muslims. Deciding these issues requires consideration of context-specific factors. This context-sensitivity greatly qualifies, if not undermines, claims of universality. In most cases, such issues cannot be resolved by appeal to the broad rights stated in international human rights documents or based on some universal metric or matrix.

One of the interesting aspects of the first round of debates was that the focus was on the universality of *international* human rights. Few took notice that many of the same issues arise regularly in the course of domestic systems, including culture-specific challenges to the universality of rights;[133] the need to take into consideration historical, cultural, religious, and economic contingencies when interpreting and implementing rights; conflicts between rights and the need to balance certain rights against other rights and to create a hierarchy of rights; and disagreements over the extent to which prevailing moral values should be taken into consideration in determining the rights of individuals.[134] In the second round, a number of works have noted that while the international human rights regime differs in some important respects from domestic legal systems, many of the issues arise in both contexts.[135]

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132. *See, e.g.*, Cerna., *supra* note 47.

133. *See supra* note 54.

134. See *infra* text accompanying notes 203-205.

135. *See* Donoho, *supra* note 55, at 441-42 (noting similarities and suggesting that the jurisprudence of the ECHR and the United States may provide important insights for international human rights decision-making bodies); Michael Dowdle, *How a Liberal Jurist Defends the Bangkok Declaration, in* NEGOTIATING CULTURE AND HUMAN RIGHTS, *supra* note 7, at 125 (arguing that the Bangkok declaration's claims are consistent with a conception of how rights are understood and implemented in practice in the West especially with respect to the need to interpret rights in light of the existing context, to balance competing rights claims, and to give due consideration to cultural concerns and local values). For an earlier argument that much of what the Chinese government claims about rights is actually consistent with prevailing concep-

3. Sovereignty issues and sanctions

Many Asian government officials and citizens have complained vehemently that international human rights should not be an excuse for strong-arm politics and interference in the domestic affairs of a country. However, it is not only Asian governments that view international human rights as a threat to sovereignty.[136] The United States has refused to sign a number of human rights treaties, including a treaty to protect the rights of migrant workers and the first protocol to the International Convention on Civil and Political Rights (ICCPR) that would give individuals the right to lodge complaints based on the ICCPR. It has signed but failed to ratify a number of other treaties including the Convention on the Elimination of All Forms of Discrimination Against Women and the International Covenant on Economic, Social and Cultural Rights. The United States has also precluded the human rights treaties it has ratified from having any significant domestic effect through a series of reservations. Meanwhile, the United States has opposed the establishment of the International Criminal Court (ICC), and threatened to cut off military aid to any country that ratifies the treaty to establish the ICC and to use force if necessary to prevent U.S. citizens from having to appear before the ICC.[137]

Other non-Asian states have also argueg that foreign countries and international human rights bodies are permitted to intervene in another country's affairs only when there is a consistent and systematic practice of gross violations.[138] This position is not wholly without legal basis. Article 2 of the Charter of the United Nations declares that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." [139]

Nevertheless, broad sovereignty claims of the kind raised by China and some other Asian states are difficult to maintain nowadays, given the increasing reach of international law and the participation of all countries in the international legal order. China's claims, for instance, are undermined to a considerable extent by its membership in the United Nations, its accession to

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tions and, once one moves beyond overstated rhetoric, especially practices of rights in Western countries, see Randall P. Peerenboom, *What's Wrong with Chinese Rights? Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29 (1993).

136. A number of scholars have portrayed the rapid expansion of customary international human rights law as a threat to United States sovereignty. *See, e.g.*, Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT'L L. 327 (2000). Of course, others disagree. *See, e.g.*, Kenneth Roth, *The Charade of U.S. Ratification of International Human Rights Treaties*, 1 CHI. J. INT L. 347 (2000).

137. *See US Vote to Use Force Against UN Court*, S. CHINA MORNING POST, May 12, 2002, at 6.

138. *See* HENRY STEINER & PHILIP ALSTON, *supra* note 125, at 588-90.

139. U.N. CHARTER art. 2, para. 7.

various international human rights treaties, the increasing reach of general customary international law principles, and its own participation in the United Nation's imposition of sanctions on South Africa as well as its support of resolutions condemning human rights violations in Afghanistan and the Israeli Occupied Territories. It would be hypocritical for China to participate in the condemnation and sanctioning of other states for violating human rights and yet assert that the United Nations and other countries are interfering in China's domestic affairs when they condemn China or impose sanctions under similar circumstances.

On the other hand, allowing that China's sovereignty defenses fail in some circumstances does not mean that China's sovereignty concerns are never justified. Nor does it resolve all or even most of the more specific hotly contested issues such as what the response of the United Nations or individual states should be to ongoing rights violations in China or other countries.

There is a wide range of possible responses to human rights violations from persuasion to criticism and censure to the imposition of aid conditions or economic sanctions to military intervention. Some involve the United Nations or other international or regional rights bodies; others involve states either on a multilateral or bilateral basis; still others involve private parties from non-governmental organizations (NGOs) to academics to corporations or individuals. What is striking is the limited effectiveness of these measures. The United States and other Western countries tried to isolate Myanmar in the late 1980s and early 1990s, suspending aid and banning arms sales. In contrast, ASEAN states tried constructive engagement. Neither policy worked.[140] The United States eventually dropped its hard-line policies in favor of a "critical dialogue" approach. This also failed to lead to any significant change. Nor have foreign governments been very successful in influencing China's behavior. As Susan Shirk, the former Deputy Assistant Secretary for East Asian and Pacific Affairs at the United States State Department, acknowledged, the United States has tried a variety of approaches in dealing with China from linking human rights to trade to delinkage combined with dialogue to public shaming through speeches and resolutions at the United Nations. However, as she rightly points out, "basically, nothing has

140. *See* CHRISTIE & ROY, *supra* note 8, at 98-99, 102. The failure of sanctions to improve the human rights situation in Asia is consistent with the general evidence of the limited effect of sanctions. *See* Gary Hufbauer et al., ECONOMIC SANCTIONS RECONSIDERED (2d ed. 1970). *See also* LISA MARTIN, COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS (1992) (examining the conditions under which states cooperate rather than addressing directly the issue of whether sanctions work and finding that a key determinant of success is credibility and willingness of states seeking to impose sanctions to bear costs for doing so—something often lacking in the human rights context where states are reluctant to forego business opportunities, compromise geopolitical interest or risk the lives of their own citizens in peacekeeping missions for the sake of improving human rights in the target country).

worked."[141] On the contrary, external pressure has led to resentment, even among reformers in China.[142]

Countries rarely want to risk their own interests to protect the rights of citizens in other countries by imposing economic sanctions. The United Nations Security Council has been reluctant to impose sanctions for human rights violations and only does so in extreme situations such as South Africa, Kosovo, Rwanda or Iraq where there is a consistent pattern of massive human rights violations.[143] Aid conditions and sanctions may be useful in sending a message that human rights violations will not be tolerated and, in some cases, have produced some meager positive results, such as in China's periodic release and exiling of high profile prisoners. However, they often backfire and do more harm than good.[144] The debate about sanctions may be held hostage by domestic politicians or be opposed by the business community that fears lost opportunities. As a result, states may lack the fortitude to impose and maintain sanctions. This oscillation then sends the message that human rights issues may be traded off for short-term domestic economic and political benefits. The selective imposition of sanctions on a few countries, and not always the countries with the worst rights records, also gives rise to cries of a double standard and calls into question the fairness of the sanctions and the motives of the country imposing the sanctions. Moreover, whether such sanctions help or hurt the people within the target country is often unclear. Economic sanctions may worsen the living conditions for many people who are already living on the edge of subsistence. In recent years, sanctions have fallen out of favor among many in the human rights community.[145] To the extent that sanctions remain an option, the call is for "smart" sanctions that would minimize the adverse consequences experienced by innocent citizens

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141. *Remarks of Susan Shirk at the Asia Pacific Executive Forum*, ASIA COMMENT, Jan. 16-19, 2001.

142. *See Students' Attitudes Toward Human Rights Surveyed*, BBC SUMMARY OF WORLD BROADCASTS, May 4, 1999. In a survey of 547 students from thirteen universities in China, eighty-two percent claimed that for other countries to initiate anti-China motions before the U.N. Commission on Human Rights constituted interference in China's internal affairs; seventy-one percent believed that the true aim of the United States and other countries in censuring China was to use the human rights issue to attack China and impose sanctions on it, with sixty-nine percent maintaining that this constituted a form of power politics. *Id.*

143. For a list of Security Council sanctions, see http://www.un.org/News/ossg/sanction.htm (last modified July 2003) (last visited Sept. 18, 2003).

144. The 1993 Bangkok Declaration at the center of the Asian values controversy objects to "any attempt to use human rights as a conditionality for extending development assistance." *See* HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION, *supra* note 7, at 204.

145. *See* General Comment No. 8, Committee on Economic, Social and Cultural Rights, U.N. Doc. E/1998/22, Annex V (1977).

in the target state. Nevertheless, many critics question the wisdom and feasibility of even smart sanctions.[146]

4. The compatibility of human rights and indigenous traditions

One of the dominant themes of the first round was whether Confucianism, Islam, Buddhism, Hinduism, and other Asian traditions are compatible with, or can be reconciled with, democracy and contemporary human rights. Some universalist advocates of human rights argue that if indigenous traditions are at odds with human rights, then they must give way.[147] Their faith in the normative superiority of international human rights notwithstanding, any such claim raises many questions. How does one justify the superiority of contemporary rights over traditional values? Does it matter whether one is arguing from within the particular tradition or from outside of it? Is there some neutral or objective moral standard to which one may appeal? Does liberal tolerance require toleration of illiberal regimes?

While hardcore universalists would simply reject local traditions when in conflict, others have sought to reconcile rights with local traditions, a strategy that has been only partially successful.[148] One approach has focused on interpretive strategies. Passages that are seemingly antithetical to rights are limited to their historical context. One seeks to show how passages must be reinterpreted, given different conditions today, to achieve the intended purpose of the text as a whole, which itself may be reinterpreted in terms of today's circumstances and more general principles found in the text. Another typical approach has been to search traditional texts and practices for analogues to modern rights or indigenous values similar to the values that underwrite contemporary human rights, and then to argue that there were, or at least could be, Confucian rights, Buddhist rights, and so on.

I have discussed these strategies elsewhere and will not repeat those remarks here.[149] Rather, I will illustrate in Part II some of the methodological issues that arise in trying to render indigenous traditions compatible with the basic pillars of modernity, including human rights, by taking up the example of Confucianism. For now, it suffices to point out that rights-discourse need not crowd out other normative traditions and that rights need not play the same role in every society. One of the issues in the first round was the

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146. *See* Joy Gordon, *A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions*, 13 ETHICS & INT'L AFF. 123 (1999). *See also* Gary C. Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?*, 32 L. & POL. IN INT'L. BUS. 11 (2000) (noting that success rate of targeted sanctions is about twenty-five percent compared to a success rate of thirty-four percent for general economic sanctions).

147. Jack Donnelly, *Human Rights and Asian Values: A Defense of 'Western' Universalism*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 7, at 87.

148. For the limits of these kinds of approach, see Peerenboom, *supra* note 7.

149. Peerenboom, *supra* note 7; Randall P. Peerenboom, *Confucian Harmony and Freedom of Thought*, *in* CONFUCIANISM AND HUMAN RIGHTS, *supra* note 52, at 234.

centrality of rights within a political culture as opposed to other means of ordering society, such as reliance on religion or virtue-based character building. Joseph Chan, for instance, argued that Confucianism calls into question the prominence of rights as a means of ordering society relative to other more virtue-oriented approaches. In his view, rights will provide a fallback position, being invoked where virtues fail to obtain or personal relationships break down.[150] Farish Noor points out that Ghandi relied on Hindu principles of non-violence to affect social change. He also argues that Aung San Suu Kyi is not a liberal political activist in the Western sense. She has objected to the "unbridled freedom" and "selfish individualism" found in Western liberal democracies. While she believes in human rights and democracy, her views are grounded in the humanist principles of Buddhism and Burmese culture.[151] She has been successful in seizing the moral high ground from the ruling regime and gaining support from her fellow citizens in part because she has appealed to such principles.[152]

A discourse of rights may also complement and exist side by side with discourses of needs, capabilities and duties. However, in some cases there will be conflicts, and the various discourses may serve different functions or similar functions with varying degrees of effectiveness.[153] Thus, the compatibility issue cannot be avoided completely.

Economic Issues

1. Regime type and economic growth

The advantages and disadvantages of democracy were also much debated in the first round. That some Asian citizens would harbor doubts

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150. Joseph Chan, *A Confucian Perspective on Human Rights for Contemporary China*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 7, at 212-37. For a similar argument, see Peerenboom, *supra* note 135, at 29-58.

151. *See* BARR, *supra* note 6 at 19. Similarly, former Taiwanese President Lee Teng-hui and South Korean President Kim, both strong opponents of Asian values discourse, have objected to the excessive individualism and moral breakdown in Western countries. Kim has emphasized ethical education and spiritual values to stem the tide toward degeneracy associated with contemporary liberalism, while Lee has advocated Confucianism. *Id.* at 19-20.

152. Farish Noor, *Beyond Eurocentricism: The Need for a Multicultural Understanding of Human Rights*, *in* DEALING WITH HUMAN RIGHTS: ASIAN AND WESTERN VIEWS ON THE VALUE OF HUMAN RIGHTS, *supra* note 7, at 55. Noor notes that lower class Malaysians were among the first to embrace Islam as part of a struggle for power. He claims that importing liberal democracy failed in Eastern Europe and will fail in many Asian countries. Accordingly, he argues that Asians must look to their own traditions and cultural resources to solve contemporary problems.

153. *See* Peerenboom, *supra* note 7. While rights and virtue-based systems are complementary on the whole, they may come into conflict in particular circumstances. For a clear discussion of the similarities and differences of rights discourse and needs discourse, see Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, *in* LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 87 (Austin Sarat & Thomas R. Kearns eds., 1997).

about the most recent wave of democratization is understandable given the disappointing results of earlier experiments with democracy in Asia and the lackluster performance of many recently democratized states that has led to a reversion to authoritarianism in several. Indonesia tried democracy just after independence from the Dutch between 1950 and 1957. The experiment ended when Sukarno declared martial law. Thailand has gone through numerous cycles of democratic elections followed by military-led coups—since 1932, there have been some seventeen coups attempts.[154] South Korea held elections in the 1960s and early 1970s before returning to authoritarian rule, at which point economic growth took off. The less-than-successful experiments with democracy in the Philippines from 1935 led to the declaration of martial law by Marcos in 1972. As discussed previously, even more recent experiments with democracy in the 1990s have not necessarily meant better protection of many rights or the end of socioeconomic problems. Of course, there have also been some success stories, most notably Japan since World War II. In South Korea and Taiwan, two of the other reputed success stories, many citizens remain surprisingly ambivalent about democracy.[155]

Although opponents of Asian values argue that democracy is an intrinsic good,[156] much of the debate in Asia has turned on empirical issues rather than the inherent value of democracy. Interestingly, the rather poor empirical record of Asian democracy in the past was not central to the first round of debates.[157] Rather, the key issue was whether a democratic or authoritarian regime was more likely to achieve economic growth and ensure stability. A number of theories were advanced to support both sides of the argument.[158] There have also been numerous empirical studies. It is now common to claim that the results of such studies have been inconclusive.[159] Nevertheless, although the studies did not show a definite winner with respect to regime

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154. *See* CHRISTIE & ROY, *supra* note 8, at 161. Christie observes that despite the coup attempts there has been relative stability, particularly between 1978 and the present. He describes the system as a semi-democratic, power-sharing scheme between the military and bureaucratic elite.

155. *See* Yun-han Chu, Larry Diamond & Doh Chull Shin, *Halting Progress in Korea and Taiwan*, 12 J. DEMOCRACY 122 (2001) (finding that "support for democracy lags well behind the levels detected in other emerging and established democracies. And on some dimensions of belief, the two publics exhibit a residual preference for authoritarian or nondemocratic principles, akin to the portrait of traditional or 'Asian values.'").

156. Amartya Sen, *Human Rights and Economic Achievements*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 8, at 88-99.

157. *But see* Kausikan, *supra* note 7, at 230 (observing that claims that democracy and civil and political rights are basic to survival do not correspond with the historical experiences of Asian states).

158. For a discussion, see PEERENBOOM, *supra* note 74, ch. 10.

159. *See, e.g.*, SEN, *supra* note 7, at 11. This claim is frequently supported by reference to Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, 7 J. ECON. PERSP. 51 (1993) (noting that of twenty-one studies, eight found in favor of democracy, eight in favor of authoritarianism; and the rest were inconclusive). However, Przeworskin and Limongi do proceed to draw conclusions with respect to more particular issues. *Id.*

type in general, the studies do allow conclusions to be drawn with respect to a number of other more specific questions (subject to the usual limitations of such studies).

It is now clear, for example, that when it comes to economic development, regime type is not as important as the stability of the regime and variations within regimes.[160] In particular, regimes that are market-oriented, dominated by technocrats, and relatively free from corruption are more likely to be successful. Second, and a corollary of the first, although some authoritarian regimes have been successful at promoting economic growth, not all have. Conversely, although some democracies have been successful at promoting economic growth, not all have. Third, all else being equal, authoritarian regimes tend to outperform democratic regimes at relatively low levels of economic development.[161] Thus, promoting democracy in very poor countries may be putting the cart before the horse. Fourth, some Asian countries, including China, may not yet have reached the level of development that makes it likely that there will be a transition to democracy, and even if there were, that democracy would be sustainable.[162] Fifth, when the conditions for a durable or stable democracy are not present, the transition to democracy often impedes economic development, at least in the short term. Sixth, economic development is not sufficient for political reform and the emergence of democracy. Countries may develop economically and not become liberal democracies, at least for a considerable period. Hong Kong and Singapore are good examples.[163] Seventh, higher levels of prosperity and economic development are likely to lead to a growing demand for democracy—Taiwan, South Korea, Thailand and Indonesia are good examples. Whether or not economic development is the cause of democratization, in the long term, economically advanced countries are likely to be and to remain democracies. However, while democracy proponents often claim that authoritarian regimes are particularly vulnerable to economic downturns,[164] so are democracies, at least at relatively low levels of growth.[165]

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160. *See* Przeworski & Limongi, *supra* note 159, at 51.

161. Robert Barro, *Democracy: A Recipe for Growth?*, *in* CURRENT ISSUES IN ECONOMIC DEVELOPMENT: AN ASIAN PERSPECTIVE 67-106 (M.G. Quibria & J. Malcolm Dowling eds., 1996).

162. *See* PEERENBOOM, *supra* note 74. Some countries may be able to sustain democracy at lower levels of development than others. However, China is not a likely candidate given the many obstacles to democracy. *Id.*

163. *See also* Welsh, *supra* note 74 (finding in Malaysian survey little support for the thesis that economic development and the rise of a middle class will lead to calls for democracy). As in China, many of the wealthy and middle class oppose democracy, either because they fear it will lead to disorder or because it could lead to reforms that would undermine the relationships on which their economic success has depended. *Id.* *See* PEERENBOOM, *supra* note 74.

164. CHRISTIE & ROY, *supra* note 8, at 130.

165. Adam Prezowski & Fernando Limongi, *Modernization: Theories and Facts*, 49 WORLD POL. 155 (1997).

2. Trade-off arguments

Central to the first round of debates were two trade-off arguments. The *liberty trade-off* refers to the argument that civil and political freedoms must take a back seat to economic development. The *equity trade-off* is the argument that economic growth will not benefit all equally, and may, in the short-term, actually increase inequality and make some of the least well-off even worse-off; nevertheless, growth should still be pursued because the immediate task is to make the pie bigger, with redistribution of the pieces to come later.

Arguments on both sides of these issues tended to collapse into claims about whether authoritarian or democratic regimes are more likely to lead to growth or to be over-generalized in other ways. It was either all or nothing: either economic growth and stability justified any and all restrictions on civil and political liberties, or it justified none. However, in most cases, carrying on the discussion at this level is not sufficient. Many people believe, for instance, that democracy is not appropriate for China at this stage and that given the potential for instability, the government is justified in limiting certain civil and political rights in the name of social order (and, because social chaos would undermine economic growth, in the name of development). Yet, they also believe that the government unduly restricts civil and political rights. We need to move beyond these general arguments and consider specific instances of restrictions. As Bauer and Bell helpfully point out, Asian governments typically "present narrower justifications for curbing *particular* rights in *particular* contexts for *particular* economic or political purposes;" thus, "trade-off arguments for rights violations cannot be refuted solely by appealing to general principles."[166] Critics of repressive government policies must examine each case in detail to determine whether the social crisis is real and the government is employing the least restrictive or at least a proportional means to overcome it.[167] As we have seen, such issues are complex and have led to controversial judgments in Europe; the same can be expected in Asia.

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166. THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 7, at 8.

167. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A1810 (1948). The standards under international law, particularly in the jurisprudence of the ECHR, are whether the restriction is (i) prescribed by law; (ii) for a legitimate purpose, specifically to protect public safety, order, health or morals, or the fundamental rights and freedoms of others; and (iii) necessary or at least proportional for the purposes prescribed. *Id.* Article 29 of the Universal Declaration of Human Rights contains a common restriction clause:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Id.

As for the equity trade-off, critics of Asian values note that high growth in authoritarian regimes frequently goes hand in hand with sharp disparities between rich and poor. Christie cites as examples Indonesia, Vietnam, Myanmar, and Thailand.[168] On the other hand, some non-democratic regimes have done better in spreading the wealth, including Hong Kong, Singapore, and China, although the gap is growing at alarming rates in China.[169] Moreover, democracy does not necessarily mean an egalitarian distribution. One need only consider the Philippines, India, or for that matter, the United States to appreciate that unfortunate fact.[170] In any event, while it is true that economic growth is consistent with poverty, lower income, and more economic hardship for some people and an increasing gap between the rich and poor, it is also true that for poverty reduction to be sustainable, economic growth is necessary. Hence, the equity trade-off may in some cases be an issue of the timeframe. As Bauer and Bell again insightfully observe, "Social and economic rights seem particularly vulnerable as societies move toward integration in a global marketplace, whereas this same transformation may contribute to greater protection for civil and political rights in the long run."[171]

3. Confucianism and economic development

A third economic issue in the first round was the role of Confucianism in economic growth in Asia, especially in East Asia. Views ranged from it was/is very important to it wasn't/isn't important at all.[172] It is striking that Confucianism, once blamed for retarding capitalism and economic growth in Asia, could suddenly become a main cause of such growth. Given that Confucianism didn't change, it would seem that other factors were at play. If anything, modernity and capitalism may have changed the culture and

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168. CHRISTIE & ROY, *supra* note 8, at 16.

169. *See* Carl Riskin et al., *Introduction to The Retreat from Equality, in* CHINA'S RETREAT FROM EQUALITY 3 (2001) (the Gini coefficient of inequality in household income rose by seven percentage points, to eighteen percent, between 1988 and 1995; "Seldom has the world witnessed so sharp and fast a rise in inequality as has occurred in China.").

170. *See* John Gledhill, *Liberalism, Socio-Economic Rights and the Politics of Identity: From Moral Economy to Indigenous Rights, in* HUMAN RIGHTS, CULTURE AND CONTEXT 70, 72-73 (Richard Wilson ed., 1997). GNP reached a historic high in the United States in 1990, having grown over 25% in a decade. At the same time, child poverty increased by 21% so that one in five American children lived in poverty. *Id.* The United States "ranked" fourteenth in the world in terms of life expectancy and twentieth in terms of infant mortality. Almost 30% of the poor had no medical insurance in 1991. *Id.* Somewhere between five and ten million Americans experienced homelessness in the late 1980s. While the United States is not ranked very highly in these economic indicators, it is second only to Russia in incarceration rates. THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAW IN THE UNITED STATES 12 (1998).

171. THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 7, at 19.

172. *Compare* EZRA VOGEL, JAPAN AS NUMBER ONE (1979) (arguing that Confucian values were critical to the success of the four Mini-Dragons), *with* Phillip Wonhyuk Lim, *East Asian Economic Development*, 41 KOREA J. Summer 2001.

Confucianism. Jun Sang-in has observed that Koreans began to value punctuality and diligence in the 1960s when the nation was incorporated into the capitalist world economy. Accordingly, he claims Korea did not achieve capitalist development because Koreans were, from the start, diligent and hard-working, but rather capitalist development made Koreans hard-working and diligent.[173] More generally, the basic problem is that it is difficult to control for "Confucianism," operationalize its role, and separate out the effects of different variables on economic growth.

ROUND 2

Despite several nuanced and insightful works, the first round on the whole was heavily politicized, with government leaders and spokespersons often driving the debates and setting the tone. Ad hominem arguments were common, with participants accusing others of bad faith and attacking their motives rather than examining the substance of their arguments. Anyone who defended Asian values was accused of being an apologist for dictators. Conversely, within Asia, those who were critical of Asian values ran the risk of being dismissed as a "self-demeaning 'Westophile,' a blind follower of neo-liberalism, or an idealistic citizen of the world."[174]

Noting the irony in the fact that liberals were threatened and upset by a more pluralist approach to rights, as advocated by some in Asia, Singapore official Bilhari Kausikan suggested that the vitriolic attack on Asian values in the West has been overblown, disproportionate, and reflective of the West's parochialism and fears arising from a crisis of confidence in the economy and social order.[175] Conversely, others accused Asian governments of an equally hysterical reaction to the rapid changes taking place in Asia. In this view, traditional Asian values are being eroded as Asian countries modernize. As a 1991 Singapore government report observed, "[t]raditional Asian ideas of morality, duty and society, which have sustained and guided us in the past, are giving way to a more Westernised, individualistic and self-centered outlook on life."[176] Critics then portray the discourse of Asian values as a

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173. Jun Sang-in, *Commentary on "Social Capital in Korea,"* 41 KOREA J., Autumn 2001, at 235. Phillip Wonhyuk Lim notes that many of the values and attributes that were supposed to have contributed to growth are hardly unique to Confucianism: an emphasis on education, hard-work, meritrocratic opportunities for advancement, respect for authority, and so on. *Discussion: Asian Values*, *supra* note 62, at 282, 284. Of course, that they are not unique to Confucianism does not mean they are still not Confucian. Some traditions will have some or all of these values, others may not. Confucianism may be one of them. Confucianism may also assign a higher priority to them than other systems.

174. Lee Seung-Hwan, *"Asian Values" and Confucian Discourse*, 41 KOREA J., Autumn 2001, at 210.

175. Kausikan, *supra* note 7, at 263.

176. CHRISTIE & ROY, *supra* note 8, at 20 (quoting Leonard R. Sussman, "The Essential Role of Human Right," *in* THE WORLD AND I 41 (1993)).

desperate, conservative, and hopelessly nostalgic attempt to delay the inevitable and impede progress.

There were enough bad arguments on both sides to provide professors of first year logic courses with a lifetime of examples. As we have seen, many arguments were over-generalized. The debates were often overly abstract and theoretical and lacked an empirical basis or a comparative framework.[177] There were numerous sweeping claims, many of them insufficiently articulated to be falsifiable. Proponents of Asian values argued that because the West has its own problems, it should not criticize others. There is perhaps something to this argument. A priest who gambles, drinks, and visits prostitutes is less credible when he preaches to the flock about the need to avoid such evils. Perhaps countries do lose some of their moral standing when they criticize others because of their own rights problems. On the other hand, two wrongs do not make a right. The proper response should be for both sides to improve.[178]

Opponents of Asian values had their fair share of weak arguments. Many tried to portray the concerns about universalism as an anything-goes relativism, which clearly was not the case.[179] Asian leaders such as Lee Kuan Yew have very definite ideas about what is right for Singapore. Lee even believes that the United States and others may be able to learn something from Singapore. But he doesn't see Singapore as a perfect state or a model for everyone, and he is willing to accept that others may prefer to solve complex social problems in different ways.[180]

Other opponents of Asian values mistakenly equated the mandate of heaven or Mencian notions of righteous government and the need to take

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177. *See* Lee Seung-Hwan, *supra* note 174, at 249 (calling for an end to abstract discussions of Confucian capitalism and Asian values and arguing that discussions need to be based on concrete, tangible research). A number of the commentators in the Korea Journal debates made similar points. *Id. See also Discussion: Asian Values*, *supra* note 62, at 253 (Hahm Chaibong calling for a realistic experiential approach-lest Asian values become nothing more than a superficial, meaningless, rallying cry). Kang Jung-in observes that social and political scientists have emphasized the discourse of Asian values as a whole, but attempts to outline or concretely support their views are seriously lacking: "[w]hile opposing the holistic character of the Western-centric discourse, Asian values, which have not been fully elaborated and differentiated yet, tended to be idealized as a whole." *Id.* at 246-47.

178. Roger Cohen, *America the Roughneck*, N.Y. TIMES, May 7, 2001, at A10. Tired of American preaching, China supported the ousting of the United States from the Human Rights Commission in 2001, claiming that it was time the United States enter into a dialogue with other countries on an equal footing and stop using human rights issues as a tool to pursue its power politics and hegemony. *Id.*

179. Islam and Buddhism are, themselves, universalist in their claims. Thus, in some cases, the criticism of human rights as hegemonic, imperialistic constructs is not so much that they claim to be universal; rather, the claim is simply that they are not universal either as a matter of fact or as norms.

180. *See* Lee Kuan Yew, *Culture is Destiny*, *in* DEALING WITH HUMAN RIGHTS: ASIAN AND WESTERN VIEWS ON THE VALUE OF HUMAN RIGHTS, *supra* note 7, at 75, 79.

people as the basis (*minben*) with democracy.[181] But the right to rebel does not give citizens the right to choose their leaders. Nor did Mencius advocate choosing government officials by elections or public participation in the government. Similarly, critics often claimed that there was too much diversity within Asia to speak of Asian values, but then they turned around and called for "Asian democracy" or referred to Asia as a whole when making comparisons to "the West."[182] In arguing for the universality of liberal values, many seemed to take it for granted that the views of liberal NGOs reflected the majority view in Asian countries, notwithstanding polling evidence that clearly shows liberals are a tiny minority in many Asian countries.[183] Thus, the response of some opponents of Asian values to the Bangkok Declaration's attack on the universality of human rights was to point to the statement of Asian NGOs strongly endorsing, albeit more by proclamation than sustained reasoned argument, the universalism of human rights. Liberal opponents also tried to take the wind out of the sails of communitarians by demonstrating that in fact Asian governments often did not promote communities, and that when government officials invoked duties to the community, they really meant duties to the state.[184] However, many communitarian supporters of Asian values also take issue with governments that conflate the interests of the community with the interests of the state and object to the lack of support for communities.

Round 2: Less politicized arguments and more nuanced views about culture

In contrast to the first round, the second round has been much less politicized and the arguments more sophisticated and balanced. Most participants in the debate are now more sensitive to the need to avoid reifying, essentializing, and nationalizing culture (how could they not be, given how often this rather obvious point has been made?). They are aware that there is a diversity of cultures within any country, and that cultures can and do change.

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181. *See, e.g.*, Kim Dae-Jung, *Is Culture Destiny?*, *in* DEALING WITH HUMAN RIGHTS: ASIAN AND WESTERN VIEWS ON THE VALUE OF HUMAN RIGHTS, *supra* note 7, at 98.

182. *Id.* at 102.

183. *See* Dinah PoKempner, *Asia's Activists and the Future of Human Rights*, 66 FORDHAM L. REV. 677, 679-80 (citing favorably the Asian NGO response to the Bangkok declaration). To cite just one of countless examples, Dinah PoKempner, the Deputy General Counsel of Human Rights Watch, makes the rather incredible assertion that the "most powerful rebuttal" of the arguments of advocates of Asian values, who espouse an Asian conception of rights, "comes from thousands of Asians themselves, who reject the idea that their culture requires a diminished set of individual freedoms." *Id.* But what of the millions of Asians who are willing to trade off civil and political rights for economic growth or who do think liberal rights excessively privilege the interests of individuals over the community? For polling evidence from China, see PEERENBOOM, *supra* note 74. *See also* SUSAN OGDEN, INKLINGS OF DEMOCRACY (2002).

184. *See* Xiaorong Li, *supra* note 131, at 42.

They are also wary about over-emphasizing culture as a causal factor. For instance, cultural values may play some role in the prevalence of torture. The emphasis on confession in Confucianism may lead to the excessive use of force. The dominance of utilitarian and consequentialist rather than deontological theories may also tip the balance away from protection of the rights of individual criminal defendants in favor of the interests of society.[185] However, cultural factors are only part of the story, and perhaps not the most important part. As in the case of Nepal, the stability of a regime and the existence of terrorists and others bent on overthrowing the government increase the likelihood of torture. In China, the lack of modern forensic tools and the technology to tap phones, track down criminals, or conduct DNA tests also increases the importance of confessions and hence, the likelihood of torture. The rise of crime, which often accompanies modernization, may lead to hostility toward criminals. Worried about the rapid increase in crime, particularly violent crime, that has accompanied economic reforms, most Chinese citizens support the government's campaign to "strike hard" at crime.[186] Few seem to care much about the fate of criminal suspects. Notwithstanding objections from international human rights agencies to China's unprecedented use of capital punishment, the overwhelming majority of Chinese citizens strongly support the death penalty.[187] In a 1995 survey of 5006 citizens, less than one percent believed that the death penalty should be abolished, while more than twenty-two percent believed that there were too few death sentences.[188]

The rise of rational choice theories and institutional explanations of behavior have, in some cases, pushed cultural factors to the margins if not completely out of the picture. Nonetheless, it would be a mistake in the opposite direction to totally discount cultural factors and values. At the end of the day, values do matter, though how much, when, which ones, and why all require detailed context-specific studies.[189] Unfortunately, there are still

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185. Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT'L L. 359-86 (1995).

186. *See* Peerenboom, *supra* note 100.

187. Amnesty International, *The Death Penalty in China: Breaking Records, Breaking Rules* (Aug. 1, 1997), *at* http://www.web.amnesty.org/ai.nsf/Index/ASA170381997 (last visited Nov. 14, 2003). Amnesty International reported more than 6,100 death sentences and 4,367 confirmed executions in 1996 alone and noted that these numbers are based on public reports and are likely to fall far short of the actual numbers. *Id.*

188. Hu Yunteng, *Application of Death Penalty in Chinese Judicial Practice*, *in* IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 247, 255 (Jianfu Chen et al. eds., 2002). Granted, many citizens probably do not have a good sense of how many death sentences there are. *Id.* However, even if they had, whether it would matter is doubtful. *Id.*

189. Culture is invoked in a variety of ways. One way is where rights are rejected across the board as antithetical to a particular culture. Nowadays, few if any states reject rights in such a comprehensive way. *But see* Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000) (suggesting that in Fiji, indigenous Fijians portrayed rights as antithetical to underlying values of indigenous social and political organizations). Much more common is to invoke culture to reject, limit or

examples of excessively politicized polemics, as in the continued biased reporting of rights issues in some countries, ongoing strong-armed rights politics, and the premature celebration of many opponents of Asian values over the alleged demise of Asian values.

One striking characteristic of the first round was that there was not much of an attempt to link up the discussion of Asian values to the Western literature on multiculturalism, identity politics, and critical theory. There was little reference to the critical legal studies, law and society, or law and cultural studies literatures. One of the reasons for this is that politicians played a large role in the first round, not legal scholars, particularly Western legal scholars of a critical persuasion. The politicians may simply have had different backgrounds and interests. Moreover, the leadership even in some of the more authoritarian states in Asia is hostile to the quasi-Marxist, leftist politics of many critical theorists and law and society scholars. The agenda within these schools is generally the critique of modernity, including capitalism and the rule of law. This postmodern agenda, useful in the context of late modernity capitalism in the West, is at odds with the efforts of Asian governments to modernize, and thus, is likely to find little support among Asian-values advocates, be they academics or government officials. Similarly, critical scholars often oppose globalization in favor of local solutions. While this position would seem to be consistent with arguments against universalism and in favor of Asian values, some Asian governments see globalization as part of their efforts to modernize and useful in bolstering their legitimacy. Contemporary culture studies, including studies of culture and law, often take as their target the notion of a unified culture and nation-state, exposing the ways culture reifies power relationships and masks ideology. This agenda is at odds with that of those Asian governments seeking to invoke Asian values to strengthen the state. As leaders of multi-ethnic states, in many cases, they are also likely to be deeply concerned about the divisive effects of identity politics.

To be sure, multiculturalism, identity politics, and critical theories were not wholly absent from the first round, and they seem increasingly prevalent

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localize particular rights. Culture is often directly relevant to a number of rights issues, as evidenced in the debates about multiculturalism, ethnic identities, the adoption of multiple official languages, bi- or multilingual educational programs, and the legality of cultural defenses and exemptions for particular groups from generally applicable laws. It is also more indirectly related to a number of other issues such as choice of institutions and outcomes with respect to many social issues. As we have seen, some societies may for cultural reasons assign a higher order to stability and social order and therefore limit the rights of criminal defendants more than other societies. In his laudable analysis of the relationship between culture and rights in designing constitutions in India, Canada, Fiji, and South Africa, Ghai tends to focus primarily on direct invocations of culture rather than the more indirect way culture matters in constructing, interpreting, and implementing a legal system. As a result, he tends to downplay the importance of culture in favor of explanations that highlight the balance of power and competitions for resources. *Id.* at 1099.

in the second round.[190] As elsewhere, their appearance frequently signals a politicizing of the discussion, suggesting that the trend toward less politicization may not last.[191] Consider the debates over Orientalism and reverse Orientalism. It is true that some of the arguments on both sides have had an Orientalist cast to them. It is also true that Orientalism can come in different forms, some of which at first may seem diametrically opposed. In some cases, Orientalism takes the form of denying out-of-hand that Asian countries could implement "Western" institutions such as capitalism, democracy, rule of law, or human rights: we in Western countries have it, and they in Asian countries do not have it and never will.[192] Alternatively, it may take the form of an imposition of a particular conception of capitalism, democracy, rule of law, or human rights on Asian countries. Despite the difference in form, the root problem is the same: the initial assumption of an excessively narrow conception of the institutions of modernity, one defined in terms of the contingent values and institutional arrangements of contemporary Western liberal democracies.

Notwithstanding the merits of exposing Orientalisms in some cases, debates about Orientalism are often too polemical. Lee, for example, dismisses explanations by Westerners of the recent economic crisis that emphasize favoritism, cronyism, familism, and authoritarianism as metaphysical rhetoric to justify "their" economic domination over Asia. However, it is not only Westerners who have raised such arguments.[193] Further, it is not clear who is seeking economic domination, although Lee does mention Western scholars. It is doubtful, however, that Western scholars see themselves as a direct participant in or beneficiary from the economic development of Asia. Nor do I believe that many Western scholars would deny that corruption

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190. *See* Shih Chih-yu, *Human Rights as Identities: Difference and Discrimination in Taiwan's China Policy*, *in* DEBATING HUMAN RIGHTS, *supra* note 8, at 144-63 (an insightful study of the interplay between human rights and identity politics in Taiwan).

191. Thomas Hylland Eriksen, *Multiculturalism, Individualism and Human Rights: Romanticism, the Enlightenment and Lessons from Mauritius*, *in* HUMAN RIGHTS, CULTURE AND CONTEXT, *supra* note 170, at 49-69. Eriksen sees great dangers in appeals to multiculturalism: "If . . . institutionalised differences form the core of multiculturalist practices, it is liable to regress into nihilism, apartheid and/or the enforced ascription of cultural identities." *Id.* at 53. Multiculturalism may (i) contribute to freezing ethnic distinctions and thereby heighten the risk of ethnic conflict; (ii) make members of minorities more vulnerable and less able to choose their own path; (iii) strengthen internal power discrepancies within minorities; (iv) direct public attention away from more pressing economic issues; and (v) contribute to a general moral and political disqualification of minorities in society–since they are not accorded the same rights and duties as everyone else, there is no reason why they should be respected as equals either. Accordingly, Eriksen would limit multiculturalism to where it is compatible with individual rights. *Id.*

192. Lee Seung-Hwan, *supra* note 174, at 238. In reverse Orientalism, Asians themselves argue that Asian values are so different that Asian countries could not possibly implement such institutions. As Lee Seung-Hwan points out, the use of stylized Oriental characteristics and Asian values to oppose Western imperialism can slip into ultra-nationalism. *Id.*

193. *Id.* at 204.

existed and still exists in Western countries or claim that the negative values present in some contemporary Asian societies are permanent cultural traits, immutable to change.

Beyond the universalism versus relativism debate

Another feature of the second round has been the attempt to move beyond debates about universalism versus relativism,[194] even though such philosophical debates continue to rage elsewhere.[195] Numerous first round articles addressed issues related to the topic of universalism or relativism although without relying on the technical philosophical terminology of moral realism, metaethical relativism and the like. For instance, some commentators distinguished between the origins of rights, the importance of local circumstances for the implementation of rights, and moral arguments about whether rights were universal.[196] Opponents of Asian values are surely correct that the fact that the modern conception of human rights originated in the West does not by itself necessarily render them any less attractive as normative principles for people from non-Western states, any more than the fact that airplanes or aspirin were invented in the West makes them less useful or desirable for those living in Asia. However, origins are important for psychological, political, and practical reasons. Given the history of exploitation by colonial Western countries, some Asian leaders and citizens may feel the need to resist the appearance of capitulating to the ideology of their former repressors.

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194. *See id.* at 210; Manisha Desai, *From Vienna to Beijing: Women's Human Rights Activisim and Human Rights Community*, *in* DEBATING HUMAN RIGHTS, *supra* note 8, at 184-96; Ghai, *supra* note 189, at 1096 (noting that the universal versus relativism has already proved sterile and unproductive and may be damaging); Donoho, *supra* note 54 (arguing that the political rhetoric surrounding the tired debate over cultural relativism has obscured the deeper issues that global diversity presents for the international human rights system and suggesting that more attention be paid to just how much diversity, pluralism, self-governance, and autonomy will be allowed); Richard Wilson, *Introduction* to HUMAN RIGHTS, CULTURE AND CONTEXT, *supra* note 170, at 3. *See also* HUMAN RIGHTS, CULTURE AND CONTEXT, *supra* note 170; Engle, *supra* note 8, at 323 (claiming "the debate over the Bangkok Declaration seems almost outdated. The argument for context has prevailed.") Lynda Bell, Andrew Nathan, and Ilan Peleg note in their introduction to a conference volume on Asian values that the participants were uncomfortable with the rigid dichotomy embedded in the first round of the debates between an arrogant universalism that seemed to force its values on others and a morally vacuous relativism that seemed to flee from hard judgments and to justify non-democratic practices. Lynda Bell, *Introduction* to NEGOTIATING CULTURE AND HUMAN RIGHTS, *supra* note 7, at 3-19.

195. *See* Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305 (1999). As noted above, in the Western philosophical literature, the debate is often couched in terms of moral realism and objectivity. *See, e.g.*, POSNER, *supra* note 36; Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996); Brian Leiter, *Objectivity, Morality and Adjudication*, *in* OBJECTIVITY AND MORALS 66-98 (responding to Dworkin).

196. *See* Xiaorong Li, *supra* note 131.

Moreover, local circumstances, including cultural beliefs, philosophical and religious traditions, the level of economic development, and the nature and level of development of political and legal institutions are clearly relevant with respect to the implementation of human rights.[197] Rights advocates have learned that implementation is easier and more effective when supported by local traditions, as confirmed by the experience of women's rights groups in Malaysia and Indonesia that have made considerable progress in their daily battles by working within their religious and cultural traditions.[198]

In general, laws that are not in accord with the values of a particular society will be difficult to enforce.[199] Thus, if only for purely strategic or instrumental reasons, culture, traditions, and values do matter.[200]

Apart from strategic considerations, the implementation of rights is relative to local conditions in the legal sense that a country's obligations are in some cases tied to the level of economic development. The International Covenant on Economic, Social, and Cultural Rights requires states to use all *appropriate* means (which are not defined) to *the maximum of available resources* (which will depend on how each country prioritizes its needs and apportions spending on national defense and the military as opposed to social services and other normal government expenses) *with a view to progressively achieving* its obligations (over some undefined time period).[201] More generally, all rights may be restricted in some circumstances. Thus, all rights will depend on local conditions.[202] International human rights bodies, regional courts such as the ECHR, and domestic courts have a number of doctrinal and interpretive tools at their disposal to accommodate diversity in local circumstances. Such tools include vague phrases in limitation clauses such as "*necessary* in a democratic society" and the doctrines of *proportionality, appropriateness, reasonableness,* and *legitimate government aim* that are used in interpreting such clauses.

Universalists, of course, allow that the implementation of rights depends on circumstances, but would claim that the same set of circumstances should

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197. *See* Cross, *supra* note 58.

198. *See* Peerenboom, *supra* note 7.

199. For yet one more example, see Susan Dicklitch, *Failed Democratic Transition in Cameroon: A Human Rights Explanation*, 24 HUM. RTS. Q. 152, 153 (2002) (noting that once stable, relatively economically developed countries such as Cote d'Ivoire, Zimbabwe, and Cameroon quickly degenerated into authoritarian and human-rights-abusive regimes due to the lack of a rights-respective society and culture; also arguing that when the mechanisms of democracy are grafted onto a political and social system that does not respect rights, competition breeds chaos and violence, not democratic progress).

200. *See* HENRY STEINER & PHILIP ALSTON, *supra* note 125. It is interesting to note that different U.N. rights bodies have adopted different approaches. *Id.* The Human Rights Committee in charge of overseeing the ICCPR tends to be more legalistic and confrontational than the Committee in charge of overseeing CEDAW. *Id.*

201. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at Art. 2, U.N. Doc. A/6316 (1966).

202. See *supra* note 167, for examples of limitation clauses.

lead to the same result, regardless of whether the state seeking to limit the rights is in the West or Asia. Differences in normative views from place to place are not considered a relevant circumstance. Thus, some universalists (especially moral realist universalists) object to the margin of appreciation doctrine, whether applied within Europe or more broadly. In this view, why should it matter whether three countries, five countries, all but one country or even all countries in Europe (or the rest of the world) prohibit same-sex marriage or allow capital punishment? What is morally right does not depend on the views of the majority.

However, allowing that circumstances matter when it comes to implementation of rights greatly reduces the distance between universalists and advocates of Asian values. After all, that is what the Asian-values advocates have been claiming all along. The disagreement then is narrowed to which circumstances are relevant. The more circumstances deemed relevant, the more the decision becomes context-specific and limited to a particular place and time, thus undermining universalism at least in implementation.

A second issue is why local values and norms should not be considered relevant. Even assuming local values should not be considered relevant to the question what is *morally* right, most people would allow that what is morally right is not necessarily the same thing as what is *legally* right. Even Ronald Dworkin, who continues to believe in a single right answer to legal questions, allows that the single right legal answer will not always be the morally right answer.[203] Dworkinian judges, in making the law the best that it can be, must balance what is morally right with what fits with precedent and the constitution. For Jurgen Habermas, law also resides between facts and norms. Law is a combination of morals (which are universal), ethics (which are grounded in particular communities), and non-generalizable interests that reflect the particular interests of individuals and groups.[204] Thus, at least some legal decisions will turn on local values (though Habermas is none too clear on where or how the lines between morals, ethics and interests get drawn and his examples are unpersuasive). For positivists such as H.L.A. Hart, law and morality are clearly distinguishable in theory.[205] However, they will overlap in practice, because many laws will reflect local values. When the judges reach decisions based on such law, they will be reflecting local values. In hard cases, when the law runs out, judges may decide cases based on various factors, one of which may be local values. Similarly, Legal Realists such as Cardozo and Holmes also allow judges to consider local norms and values

203. RONALD M. DWORKIN, LAW'S EMPIRE (1986); Dworkin, *supra* note 195.

204. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

205. H.L.A. HART, THE CONCEPT OF LAW (1961).

when reaching decisions, although they may differ over how much importance to attach to communal values.[206]

The debate over moral relativism does not get one very far when it comes to practical legal issues of how rights are to be interpreted and implemented. Rights, after all, are not just moral concepts. They are also legal instruments. Given the weak enforcement mechanisms of international human rights regimes, parties seeking to invoke human rights must often rely on domestic legal systems. However, domestic judges will need to interpret such rights in light of their constitution, domestic laws and other legal practices, including judicial practices. Local values will be reflected in the constitution, domestic laws and case precedents and will influence judges in deciding cases.

Philosophical discussions have been most successful in showing *the limits* of realism and antirealism, universalism, and relativism.[207] They have also succeeded in clarifying variants that, in the process of qualification, become harder to distinguish in terms of practical consequences, despite the differences in labels and rhetorical packaging.[208] Weak moral realism of the kind advanced by Thomas Nagel "need not (and . . . should not) have any metaphysical content whatever. It need only hold that there are answers to moral questions and that they are not reducible to anything else."[209] As Posner notes, however, this kind of weak moral realism converges with his pragmatic, non-dogmatic moral skepticism. In practice, there is little difference because there are no *convincing* answers to *contested* moral questions unless they are reducible to ones of fact or errors of logic.[210]

For what it is worth, I am agnostic on the issue of moral realism. There are interesting and plausible arguments that can be made in its defense, but there are roughly equally interesting and plausible arguments that can be made against it. The same is true for various forms of normative and metaethical relativism and conventionalism. The basic point, however, and the reason I prefer agnosticism on the issue of moral realism, is that these kinds of

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206. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); OLIVER WENDELL HOLMES, THE COMMON LAW (1881).

207. *See supra* text accompanying notes 195-97.

208. *See* DONNELLY, *supra* note 20, at 110. In the end, even Donnelly accepts a weak cultural relativism. *Id.*

209. POSNER, *supra* note 36, at 10.

210. *Id.* Leiter seems correct in claiming that Dworkin's arguments against external skepticism show not that external skepticism is unintelligible, but that it is irrelevant. Leiter, *supra* note 195, at 84. He also objects to "non-naturalist" accounts of ethics (i.e. accounts that reject natural science as the standard for objectivity in ethics) on the grounds that it leads to a weak notion of objectivity that reduces, if not eliminates, the distance between cognitivists and noncognitivists. *Id. See also* Jeremy Waldron, *The Irrelevance of Moral Objectivity*, *in* LAW AND DISAGREEMENT 186 (1999).

philosophical debates are not useful in solving issues that arise in practice.[211] That is why such debates have not played an important role in the Asian-values discussion so far and will not in the future. Even if moral facts exist, there is no way of proving them to others in contested legal cases. As we have seen, hopes for an overlapping consensus are chimerical because there is not enough common ground to reach consensus on most human rights issues.[212] Any such "facts" are too few or too abstract to do us much good when deciding the many controversial issues that arise every day. As Jeremy Waldron puts it, moral facts do not constrain the decision-making of judges or anyone else in a way that is important: "facts do not reach out like little gods and grab the decision-maker, preventing him from deciding capriciously or dictating themselves to him in any unavoidable way."[213]

An intellectually honest moral realist would still have to say "*I think* slavery is evil" or "*I think* the cutting off of a hand is cruel and unusual punishment." A non-realist would do the same. Neither moral relativism nor antirealism (or even skepticism or emotivism) precludes giving reasons for one's beliefs or to justify one's decisions. As a practical matter, decisions have to be made, and they can be made on the basis of arguments and reasons. The antirealist cannot claim some ontological foundation for her view; nor is she likely to pound the table and claim that her view is "really right" or "true." Yet, she need not allow that anything is as good as anything else. In some cases, she might be able to persuade someone who holds a contrary view to change his position. She might be able to do this by showing how his view rests on mistakes of fact. For example, he might think that the maximum length for detention without charge should be four days, because if a suspect is beaten the bruises will clear up within that period. If it were the case that bruises generally take ten days to heal, then he might be persuaded to change his mind. Similarly, she might show that his beliefs about a certain issue are inconsistent with other beliefs that he holds or simply not likely to achieve the desired result and thus faulty on instrumental, means-ends grounds.[214]

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211. They may be useful for other purposes, including the enjoyment of philosophers who like to ponder and debate such issues. Giving up on realism may also have other practical consequences, such as encouraging people who hold moral views that are at odds with the majority's view to be less defensive about them, although that assumes they are defensive about them now or that there would not continue to be practical reasons that lead them to be defensive about their views.

212. Even if there was enough common ground to reach reasoned agreement, parties may not argue in good faith because of political factors and self-interest. But even if they do argue in good faith, limits on their reasoning power and time to sort out all of the related issues may prevent them from reaching agreement.

213. Waldron, *supra* note 210, at 186.

214. On the other hand, I think philosophers tend to overestimate the importance of consistency to most people. In my experience, people may come to appreciate that some of their views are inconsistent, and yet still hold on to them. In some cases, they may feel that ultimately there is some way of reconciling them, but they just have not figured it out yet. But in other cases, they simply accept the inconsistency. Rather than give up their views, they sacrifice consistency.

Clearly, some people seem to have a greater faith in their moral barometers than others. I am continually struck by how confident people can be about the proper solution to contested moral issues, particularly given sophisticated and seemingly persuasive arguments on both sides. In most cases, it does seem that their views are more firmly held because they believe the logical force of reasons in support of their positions is compelling. More often it seems their views are simply based on unshakeable intuitions about what is right and wrong. Having made up their minds—or rather their hearts —they then seek out philosophical arguments to support their intuitions. If anything, one would think a high level of philosophical sophistication would undermine such confidence *in an open-minded person* given the strong arguments that can be mustered for the opposing view in most cases of contested moral issues. Similarly, one would think that exposure to other people with radically different but equally firmly entrenched intuitions and immersion in other cultures with different comprehensive worldviews would at least give one pause. Unfortunately, that does not seem to be the case. On the whole, it seems that moral realists and universalists tend to be people with firm intuitions that do not easily give way to doubts caused by philosophical arguments or encounters with others who hold opposing intuitions.

Nevertheless, even antirealists, moral relativists, pragmatists, and for that matter, most skeptics and emotivists will find some actions so offensive or abhorrent that they will protest.[215] They will then have to decide what to do about it, particularly if persuasion fails to change the other side's beliefs or behavior. This is the pressing moral issue in practice, and one for which abstract discussions about universalism versus relativism and realism versus anti-realism provide no constructive guidance. It may be the case that moral realists and universalists are more likely to employ more coercive measures across a wider range of issues when persuasion fails than antirealists and moral relativists, but it need not be so. For most people the decision will turn on a variety of factors, including the particular issue, how strongly one feels about it, estimates about how much and what kind of coercion will be needed, the likelihood of success of the measures, and the possibility of adverse collateral consequences. Having reached a decision, the realist may dress up the conclusion in the language of objectivity and moral fact. However, if someone disagrees with the realist's decision, the realist packaging will add nothing to the weight of the arguments and reasons for the particular decision and in many cases will simply frustrate and alienate the other side. One of the advantages of focusing on actual disputes and cases rather than abstract theories is that universalists and relativists may find common ground. When

215. Justice Oliver Wendell Holmes used the term "the puke test" to describe the process when United States judges upheld a constitutional right and struck down legislation passed by democratically elected legislatures; in contrast, Justice Frankfurter preferred the more genteel "shocks the conscience" test. Others would set a lower standard.

they do not, the differences in their views will be clearer, more focused, and anchored in real problems rather than "counter-examples" that are not really contested.

The attempt to move beyond universalism and relativism may coincide with a shift at a philosophical level from moral realism to a more pragmatic approach, either because of the growing number of advocates of philosophical pragmatism, particularly in the United States, or simply because of the limits of moral realism when it comes to what to do about contested moral issues in practice. Since it seems that few people read the philosophical literature and even fewer are likely to change their beliefs based on philosophical arguments alone, I would wager the latter is a more likely explanation. In any event, the growing consensus for the need to move beyond universalism versus relativism has highlighted the importance of law, politics, sociology, and anthropology.

Although human rights are part of an international legal framework, the first round of debates made little reference to international law, other than superficial appeals to the Universal Declaration of Human Rights and other treaties for broad statements of human rights principles. There were few concrete studies of international human rights jurisprudence or case law, of how international human rights bodies have sought to achieve their objectives in promoting human rights, of how Asian countries have worked with and in some cases resisted international human rights bodies, or of how the international human rights regime interacts with domestic legal regimes. Nor were there many comparative, empirical, or historical legal studies of rights issues. In contrast, recent articles and books have addressed such issues as the rights of indigenous peoples under international law, developments in the area of women rights at the 1993 Conference in Vienna and the 1995 World Conference on Women and their implications for international law, China's efforts to resist being censured in Geneva, and Japan's use of aid to promote democratization and human rights.[216] Many of these studies emphasize the limits of international law to solve human rights issues and the important role of politics.[217] In some cases, political scientists have appealed to the political science and international relations literature to shed light on governments' rights policies and actions in terms of more generally applicable theories of

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216. Benedict Kingsbury, *The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 7, at 336-77; ANN KENT, CHINA, THE UNITED NATIONS AND HUMAN RIGHTS (1999); Radhika Coomaraswamy, *Reinventing International Law: Women's Rights as Human Rights in the International Community*, *in* DEBATING HUMAN RIGHTS, *supra* note 12, at 184-96; Manisha Desai, *supra* note 194; Hoshino Eiichi, *Human Rights and Development Aid: Japan After the ODA Charter*, *in* DEBATING HUMAN RIGHTS, *supra* note 12, at 199-221.

217. *See* Kingsbury, *supra* note 216. *See also* Lucinda Joy Peach, *Are Women Human? The Promise and Perils of "Women's Rights as Human Rights,"* *in* NEGOTIATING CULTURE AND HUMAN RIGHTS, *supra* note 7, at 153-96 (noting that Thai women are themselves not sympathetic to legalistic, rights-based approaches to their problems).

realism, constructivism and liberalism (as the last term is used in international relations theory, i.e., to refer to the impact of domestic politics and constituencies on a state's international policies).[218]

The recognition that rights are imminent in and constitutive of social relations has led to a greater role for sociology and anthropology in recent debates. Early on, Geertz observed that law is a way of social imagining, a system of meanings.[219] Law defines and creates social realities as well as reflects them. However, law is not only a form of thought and a system of signs; it is also a means of exercising power in that law sanctions and legitimates state violence. Human rights arose in part as a response to the modern state and the need to protect the individual given the development of highly individualist capitalist economies and the emergence of more powerful states, together with the breakdown of traditional social networks. Sociological studies remind us that human rights are not founded in the eternal moral categories of social philosophy, but are the result of concrete social struggles. By focusing on how rights-based discourses are produced, translated, and utilized in various contexts, they shed light on how international rights and cultures combine in particular contexts to create social meaning and channel competing forces seeking to advance their own interests and gain power.[220]

In this era of globalization, rights discourse is everywhere, or almost everywhere. However, the discourse of international rights interacts with national law, local law, and customs in different ways. As Sally Engle Merry observes, in mobilizing law in local contests for power, locals reinterpret and transform Western law.[221] Sometimes global legal discourses infiltrate and influence local laws and norms, but sometimes they are resisted. In some cases, local practices and understandings may become incorporated into international law. Sociological studies allow us to better understand how human rights law shapes local normative orders, how and when domestic movements use or resist international law, and how domestic courts incorporate or curtail the reach of international law.

Beyond Asian values?

Writing in 1999, before many of the Asian countries had recovered from the financial crisis, Frances Fukuyama declared that the Asian values debate was over: "Since few people today seem to be interested in making the case

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218. See Helfer, *supra* note 1, for an interesting article in this vein though outside the Asian region.

219. CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective, in* LOCAL KNOWLEDGE 167-234 (1983).

220. HUMAN RIGHTS, CULTURE AND CONTEXT, *supra* note 170.

221. Sally Engle Merry, *Legal Pluralism and Transnational Culture: The Ka Ho'Okolokolonui Kanaka Maoli Tribunal, Hawai'i, 1993, in* HUMAN RIGHTS, CULTURE AND CONTEXT, *supra* note 170, at 28-48.

for Asian values as the basis for distinctive political or economic institutions, criticizing the concept may seem a bit like beating a dead horse."[222] As the active second round debates show, Fukuyama once again seems to have been a bit too quick to declare a winner in the historical sweepstakes. Key questions for consideration are whether "Asian values" is a useful analytical concept; whether we have exhausted this line of inquiry or whether there is more to be gained from pursuing it further; and if there is still something to be gained, what issues need to be examined and how.

Before rushing to get rid of "Asian values," it is helpful to consider the reasons it has been and continues to be invoked. Indeed, even if one thinks that the term is vacuous, misleading, analytically barren, and likely to cause confusion, it may not be possible to do away with it any more than one can do away with other contested terms such as "democracy" or "rule of law".

Invoked to counter the universalism of the human rights movement, "Asian values" was a natural outgrowth of the growing importance of the movement. As the international human rights regime grew in power and started to have some real bite, it was inevitable that it would give rise to a reaction by those bitten. Asian countries began to feel the bite in the late 1980s and early 1990s, when they increasingly became subject to growing public censure. China in particular needed to defend itself after the crackdown in Tiananmen. Its 1991 Human Rights "White Paper" included many of the main points that would come to define the first round: the claim that although some rights are universal, their interpretation and implementation depends on local circumstances, including the level of economic development, cultural practices and fundamental values that are not the same in all countries; the argument that subsistence is the main right and the main problem is poverty, which Western developed countries should do more to address; the complaint of the Western bias of the international human rights movement and its excessive emphasis on civil and political rights and the individual at the expense of the community and collective; the criticism of the hypocrisy of Western imperialists who were guilty of human rights violations in Asia and continue to have their problems at home today; the defense of the importance of sovereignty and the need to avoid strong-arm rights politics; and the plea to discuss human rights based on a principle of mutual respect.[223]

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222. Fukuyama, *supra* note 8, at 151.

223. *Human Rights in China*, 34 BEIJING REV., Nov. 4-10, 1991 [hereinafter White Paper]. Lee Kuan Yew popularized the term "Asian Values" at an academic seminar in 1977. Although he has contrasted Asian values with Western values, he has at other times rejected the more expansive "Asian values" in favor of Confucian values, while allowing that even among Confucians there are many differences. The other great champion of Asian Values has been Mahathir. Lee and Mahathir share a preference for communitarianism, emphasize the family, value democracy but a nonliberal version of it, lament the corrupting influence of excessive individualism associated with liberalism and stress the (Confucian) values of hard work. Both also maintain that a strong state is necessary for economic development. Mahathir, however, has placed greater weight on the right to development and played up in the particular the neo-

Lee Kuan Yew, for his part, emphasized the need for a strong government to ensure economic growth and social order. Moreover, whereas China did not couch its arguments in terms of Asian values, Lee expanded (perhaps over-expanded) his claims beyond Singapore to Asia more broadly. As the leader of a small city-state, Lee may have needed to cast his arguments as part of a broad-based movement to be taken seriously. Thus, his sometimes overstated arguments may have been a calculated strategy to drum up regional support against Western liberal democracy and the increasing role of largely Western-dominated international human rights and financial institutions.

Many of the arguments against the human rights movement need not be framed in terms of Asian values. As we have seen, the United States and other Western countries have also begun to worry about the movement's encroachment on their sovereignty.[224] But as the dominant power, the United States is better able to resist encroachment. Indeed, international law scholars continue to debate whether the International Criminal Court can succeed without the support of the United States.[225] In contrast, Asian countries may have needed to ban together to have any political clout within the Western-dominated international rights movement. In that sense, Asian values may have served and may continue to serve a useful purpose for some, depending on their political preferences.

Asian values may also be a response to globalization. Globalization appears to be increasing sensitivity to differences. The more similar we become, the more we focus on what makes us unique or special.[226] As a result, ethnicity, gender, and religious identities take on more significance. Ethnic conflicts in Bosnia, the rise of Islamic fundamentalism, the Israeli conflict with the Palestinians may all be contributing to a global trend toward heightened awareness of identity politics and multiculturalism. Such concerns are likely to continue to fuel the search for non-Western identities, particularly given that many Asians are not all that happy with liberalism. Having modernized, many Asians are now discovering that a market economy, democracy, rule of law, and human rights do not solve all their problems.

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colonialist theme of Western exploitation of the developing world. *See* BARR, *supra* note 6, at 39. While the PRC leadership did not expressly make Asian values the centerpiece of their post Tiananmen response to the international community, many of the themes announced in the White Paper draw on or fit nicely with some of the Asian values arguments of Lee and Mahathir. Moreover, it was China's political power that allowed advocates of Asian values to force the issue onto the international human rights agenda, leading ultimately to the Bangkok Declaration and Vienna Declaration in 1993.

224. *See supra* notes 137-146.

225. Jack Goldsmith, *Should International Human Rights Trump U.S. Domestic Law?*, 1 CHI. J. INT'L L. 327, 336-37 (2000).

226. In Mauritius, as Africans and Indians have become increasingly culturally similar in terms of language, a way of life and general outlook, they have increasingly emphasized differences in part because their cultures are threatened. They are also coming into closer contact and competing for scarce resources. Eriksen, *supra* note 191. *See also* Hahm Chaibong, *Why Asian Values?*, 41 KOREA J., Summer 2001, at 270.

With modernity comes unequal incomes, apathy, alienation, prostitution, crime, and disenchantment. As Choi Won-shik comments, "The crisis of Western capitalism reveals that the Western Way has lost its role as the guiding light of the twenty-first century. The Asian values debate came about in the process of trying to find a new model to save the Western Way from impending collapse."[227]

While some opponents have portrayed Asian values as a defensive, conservative reaction to the modernization of Asia and the usual sort of problems that accompany modernity, Hahm Chaibong puts a more positive spin on it. Hahm notes that many Asians were never comfortable with Western values. They always saw their own civilization as superior. However, during the Cold War, one was either a communist or capitalist. There was no time to reflect on traditional civilization. Once the Cold War ended, Asians could reflect on other issues, including their differences with Western capitalist states.[228] The economic rise of some Asian countries gave them the confidence to stand up for their own traditions and to argue that they succeeded by combining Western institutions and indigenous (East) Asian values.[229]

Notwithstanding these explanations of why it is unlikely that the Asian values debate will go away, many think that it should. The argument against Asian values can be summed up in Daniel Bell's remark– "not Asia, not values."[230] The first part calls into question the analytical utility of Asian values as a concept. As has often been noted, Asia is a big place, with tremendous diversity–too much, critics suggest, to speak about a singular set of Asian values. As many have also pointed out, there is sometimes a tendency to reduce Asian values to Confucianism, which is clearly a mistake given the importance of Islam, Buddhism, Daoism, and many other belief systems in Asia.[231]

However, a pluralism of Asian values is still Asian values.[232] There is nothing wrong with noting a diversity of values and still claiming that they are Asian. Furthermore, not every country within Asia needs to share every single feature. There may still be dominant patterns within Asia. Nor does it matter that "Asian values" is a construct, as Bell notes.[233] Of course it is. So is "the

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227. *Discussion: Asian Values*, *supra* note 62, at 288.

228. *Id.* at 267.

229. Chaibong, *supra* note 226, at 270. To be sure, the positive sense of pride may in some cases turn into a narrow-minded nationalism that can be manipulated by the state to deflect attention away from pressing social problems. China for instance has appealed to nationalist sentiments to shore up its legitimacy.

230. Daniel A. Bell, *Beyond Asian Values*, 41 KOREA J., Winter 2001, at 163.

231. *See, e.g.*, Fukuyama, *supra* note 8.

232. *See* Welsh, *supra* note 74, at 896 (noting that seventy-six percent of the respondents in Kuala Lumpur and fifty-six percent of those in rural areas believed there were distinctive Asian values, though they differed over what they were).

233. *See* Bell, *supra* note 230, at 163.

West," or "liberalism."[234] Both encompass a tremendous diversity of views. Nevertheless, there are still dominant trends in Western thought. Liberalism clearly has a stronger hold than communitarianism in the West, for example, whereas the opposite seems to be true in Asia, although perhaps collectivism is a more apt description than communitarianism.

Bell notes that not all Asian countries face the same issues. That is true. Nevertheless, there are considerable family resemblances across a variety of issues. For instance, in addition to communitarianism or collectivism, one could point to a higher priority assigned to order, stability and economic growth relative to individual freedoms and autonomy; the importance of social networks; a different and greater role for the family than in modern Western liberal democracies; differences across a range of gender issues; differences with respect to the treatment of criminals; resentment toward the human rights policies of Western powers; and preference for a perfectionist or paternalistic state in which the state actively sets the moral agenda for society rather than the liberal neutrality which has been challenged with increasing frequency in the West as well. There are also a number of issues that affect many, though not all, countries in Asia. All but Thailand experienced periods of colonialism. As developing countries, a number of Asian countries also share the belief that developed countries should do more to eradicate poverty. In any event, even if the "only" issue was a difference with respect to individualism versus the collective, that might be a sufficiently major difference with such important consequences in so many areas whether economic, social, political or legal that it alone might be enough to justify the continued reference to Asian values.

Bell and others note that many of these issues are not unique to Asia.[235] There are, for example, communitarians in the West as well.[236] However, that does not make these issues any less Asian, especially when you consider a cluster of issues and the ranking of the various values within the overall value scheme. For instance, family and gender may be treated somewhat differently in Asia than elsewhere, even allowing for some variation within Asian countries and some overlap with other countries. Fukuyama argues that modernization has had a very different impact on family structure in Asia than it has in Europe and North America. Fukuyama also sees gender relations as an example of Asian exceptionalism, although he thinks over time there is likely to be convergence even with respect to the family and gender.[237] He is probably correct. Globalization has produced convergence in many areas

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234. *Id.* Any comparative project must begin by constructing categories that highlight certain features and simplify to some extent. However, the first round suffered from overly simple constructs that lacked a firm empirical foundation.

235. Bell, *supra* note 230, at 162.

236. However, communitarians in the West on the whole may be more liberal than their Asian counterparts.

237. Fukuyama, *supra* note 8.

including the family.[238] However, convergence is a matter of degree. Generally, one can find evidence of both convergence and continued divergence with respect to forms of capitalism, democracy, rule of law, and human rights. The pace and path of change is also likely to reflect the different starting points.

In the final analysis, the question is whether Asian countries share enough common ground for the term to be useful. To some extent, that will depend on what one's project is. There may be more common ground in certain areas than in others. In general, I tend to agree with Bell that in most cases "Asian" is too broad a qualifier to capture the significant differences for most comparative purposes. However, at this stage, we need more detailed empirical studies across a range of issues in a number of Asian and Western countries before we can conclude that there is not enough in common among Asian countries and difference from Western countries to render the term Asian values useless, at least with respect to the "Asian" part. Opponents of Asian values sometimes seem to suggest or assume that if we can only do away with references to "Asian values" all of our problems will be solved. To that end, one common suggestion is to replace "Asian values" with "values in Asia." However, eliminating references to "Asian values" and replacing it with "values in Asia" will not put an end to substantive debates about the universality of rights or shed any light whatsoever on how rights are to be interpreted or implemented in particular contexts in Asia. Success in eliminating reference to "Asian values" certainly does not mean that all Asian countries will become liberal. Appealing to "values in Asia" merely shifts the focus to a less grand level, whether that be country by country, area of law by area of law, or issue by issue.[239]

As for the values part, Bell and others are surely right to point out that many of the issues have not been about values or culture, at least initially or primarily. As we have seen, some of the most contested issues were economic in nature, such as what regime type would be most likely to achieve sustained economic growth. This is ultimately an empirical issue, as is the relationship between Confucianism and economic growth, and whether civil and political rights must be traded off to ensure growth or social stability. But these are not *only* empirical issues; they are also heavily value-laden issues. Empirical studies may be able to demonstrate that Confucianism or authoritarianism

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238. The theme of issue 41:4 of the Korea Journal was "Remaking of the Modern Family in Korea." The essays demonstrate unequivocally that there has been convergence. At the same time, they also show some significant differences that (at least for the time being) continue to persist, for better or for worse.

239. *See* Jiangyu Wang, *China and the Universal Human Rights Standards*, 29 SYRACUSE J. INT'L L. & COM. 135, 136, n.9 (2001) (noting PRC government appealed to Chinese values in response to criticisms in U.S. human rights report on China). The PRC government has referred to "Chinese values" to support some of its actions. But the diversity of views within China leads to many of the same objections against Asian values.

facilitates economic growth. However, empirical studies cannot answer the normative question whether higher growth under a Confucian or authoritarian regime is preferable to lower growth under a non-Confucian, democratic regime. Similarly, empirical studies might show that broad free speech laws may lead to more obscenity, less civility and even less social stability, but one would still have to decide whether the benefits of free speech outweigh such costs.

Fukuyama claims that "Asian values" is misleading in that the debate was about institutions rather than values: "values almost never have a direct impact on behavior; they must be mediated through a variety of institutions to make themselves manifest."[240] This is true, but as Fukuyama himself notes, values may influence the choice of institutions, their structures, and how they operate. That we must consider institutions does not mean we can ignore values. Similarly, Bell notes that debates about the economy and the role of social networks in the economy do not turn on efficiency considerations alone. They also depend on value judgments about what kind of society one would like to live in. In fact, Bell acknowledges that values are deeply held and may re-emerge even after years of government campaigns to change them. He cites as an example the strength of "filial piety" after the Cultural Revolution.[241] He also notes how a model of corporate governance that emphasizes quick returns for shareholders may be difficult to sustain or implement in Japan.[242]

Cultural variables and values are often difficult to operationalize, and their effects are hard to determine in a rigorous way. However, that does not mean we can simply throw our hands up in the air and dismiss them. They are too important to be dismissed. We will simply have to make do as best we can with various methodologies from in-depth case studies to empirical surveys to comparative and historical studies of cases and the rationales given for the outcomes.

Bell also argues that "Asian values" is not a useful concept because it has been too politicized and tainted by its origins and association with Lee Kuan Yew.[243] Perhaps so, but similar arguments are often made by Asian-values proponents about human rights – they are tainted by their origins in the West. As noted, the proper response seems to be to focus on the substance of the arguments rather than the origin. Rights are either beneficial or they are not. "Asian values" is either useful or it is not.

Given the many reasons for invoking "Asian values", references to "Asian values," are likely to continue despite academic concerns about the term's analytical limitations. Empirical studies are needed to determine just how much common ground there is and on what issues. In the meantime,

240. Fukuyama, *supra* note 8, at 152.
241. Bell, *supra* note 230, at 164.
242. *Id.* at 164-65.
243. *Id.* at 170.

there is perhaps a middle ground between simply rejecting Asian values and endorsing the term without qualification. In discussing Asian variants of modernity, it is probably more useful in most cases to rely on more specific, substantive labels. To the extent that the nature of the project does require broad comparisons, the label "Asian" should be used with caution and, like other potentially dangerous items, come with warning labels and disclaimers attached. Moreover, in many instances, it may be possible to substitute the more pluralistic "values in Asia" for the more contentious "Asian values." While this would not end the debate about universalism versus localism, it would signal the desire to move away from the over-politicized first round debates to the more critical and nuanced views that have dominated the second round.

Asian variants of modernity

The "Asian values" debates arose in response to and owe their resilience in part to the feeling that liberalism is a failure and Asians must come up with their own normatively attractive variant(s) of modernism. It is important to distinguish between radical and moderate challenges to modernity in Asia. With Marxism having lost its appeal, Islamic fundamentalism is the main contender for a radical alternative. However, modernity has made inroads even in that sphere, perhaps weakening support for Islamic fundamentalism and forcing some degree of accommodation with modern institutions, including human rights.[244]

Apart from Islam, there are few credible *radical* challenges to the main pillars of modernity within Asia or elsewhere. There is widespread support for some form of a market economy, though Myanmar is only recently moving in that direction, marketization in Vietnam has been hindered by the lingering influences of socialism, and North Korea remains an economic basketcase stuck in the past. Of course there are many critiques of market capitalism and arguments for particular Asian or local variants. However, they do not add up to a radical challenge to market capitalism.

Although a number of states are still not democratic, and democracy seems a distant prospect in China, Vietnam, Myanmar, and North Korea, the long-term trend seems to be clear. Again, there may be varieties of democracy, but none of the current non-democratic regimes seems to offer a credible long-term alternative.

Rule of law is increasingly accepted in theory, if not always implemented in practice. Some commentators argue that Myanmar, North Korea,

244. While support for Islamic fundamentalism may or may not have been weakened by its association with the September 11 terrorist attacks, the bombings in Bali and other more recent attacks in the region, the United States' wars against Afghanistan and Iraq are likely to increase radicalism.

Vietnam, China, and perhaps even Singapore and Malaysia are better understood as rule by law.[245] Rule by law may capture the theory of law in North Korea and Myanmar and the practice in some of the other states. However, the other states all accept the basic rule of law principles that law is to be supreme and binding on government actors as well as citizens. All too often critics simply assume a liberal democratic rule of law as the benchmark and then dismiss Asian legal systems that do not comply with that standard as instrumental rule by law systems. However, the choice is not confined to either liberal democratic rule of law or rule by law. There are alternative conceptions of rule of law in Asia that nonetheless merit the label rule of law.[246]

Finally, the totalizing Marxist critique of rights as a tool of the bourgeoisie useful in inducing false consciousness in the proletariat is no longer credible. The more radical critiques argue that rights are not enough and that focusing on rights diverts attention from the need for fundamental change in the structures and institutions of society. Rights have not been sufficient to address the fundamental economic inequities that have accompanied capitalism even in the richest states, to overcome the imbalance of wealth between nations, or to do away with discrimination and ethnic hatred and strife. Thus, some critics advocates discourses of needs, capabilities or duties to complement rights talk. Others argue for a broader based conception of rights, not founded on secular liberalism, which builds on a more inclusive spiritual and moral worldview drawn from the world's great religions.[247] However, even these critiques do not reject rights outright.

Moderate challenges to modernity in Asia accept the basic pillars of modernity, but try to construct local variants that avoid some of the excesses and shortcomings associated with Western liberalism. Just as libertarians, classical liberals, welfare liberals, conservatives, civic republicans, and communitarians differ over many issues in the West, so do Asians of various stripes. Given the diversity within Asia and within particular countries, a variety of alternative conceptions are possible. I have for example distinguished between four conceptions of rule of law in China: Statist socialist, neo-authoritarian, communitarian, and liberal democratic.[248] One might also develop Islamic or Buddhist alternatives. One could also make increasingly finer specifications of the various forms. For example, there are no doubt many varieties of communitarianism or collectivism, much as there are many

245. Christie asserts: "[T]he notion of socialist authoritarianism is still concerned with the illiberal doctrine of rule by law rather than the liberal democratic perspective of the rule of law. This is typical of what states that promulgated the Asian values thesis attempted." CHRISTIE & ROY, *supra* note 8, at 118.

246. *See* Peerenboom, *supra* note 7.

247. Chandra Muzaffar, *From Human Rights to Human Dignity*, *in* DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA, *supra* note 12, at 25-31.

248. Peerenboom, *supra* note 7.

varieties of liberalism. Similarly, one could develop a number of different ways of characterizing market capitalism, democracy, and human rights.

In fact, many of the debates in the second round have been about more specific issues that tend to define local variants. With respect to the economy, the role of the state in Asian countries continues to be a major concern. Interestingly, although regulatory failure was one of the causes of financial crisis, several Asian states responded to the Asian crisis by setting up non-elected, elite, technocratic bodies to get their economies back on track. Other issues include the role of social networks, *guanxi*, corporatism, and clientelism. The issue is *not* whether informal social networks can substitute for rule of law and a formal legal system and still achieve sustainable economic growth. They cannot.[249] Nor is it whether rule of law requires the complete dismantling of informal mechanisms for resolving disputes and the elimination of social networks. Informal mechanisms and social networks are a part of legal systems everywhere. There are many reasons that they exist, from institutional failure to cultural factors to their ability to serve people's needs in a cheaper, more efficient way. The question is how to maximize the benefits and limit the costs of such networks.[250] A number of corporate governance issues have been debated including whether short-term profits for shareholders should be emphasized over employee interests, to what extent the impact of businesses on local communities should be considered, and whether there should be a stronger role for the government in coordinating research and making the results publicly available so as to increase the effectiveness of coordination among firms.[251] Labor issues include, in some countries, the right to strike, and in other countries, issues such as lifetime employment and the promotion of the family through the adoption of workplace rules and government supported childcare programs. The pros and cons of different types of welfare systems have also been discussed.[252] Other topics include the need for greater attention to an egalitarian distribution of wealth, corruption and good governance, and the affects of globalization.

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249. *See id.*

250. The issue of social networks was much discussed in previous issues of the Korea Journal. See especially issue 41:3. It was also the focus of a recent conference on civil society and social networks in Asia, held in Hong Kong in April 2002. I discuss these issues at greater length in, *Social Networks, Civil Society, Democracy and Rule of Law: A New Conceptual Framework*, in THE POLITICS OF RELATIONALITY: CIVIL SOCIETY, ECONOMICS, AND LAW IN EAST ASIA, (Hahm Chaihark, Daniel Bell & Hahm Chaibong, eds., forthcoming 2004).

251. Ha-sung Jang, *Corporate Governance and Economic Development: The Korean Experience*, *in* DEMOCRACY, MARKET ECONOMICS & DEVELOPMENT, *supra* note 7, at 73-93.

252. *See* Kim Yeon-Myung, *Welfare State or Social Safety Nets?*, 41 KOREA J., Summer 2001, at 169. Kim argues that the welfare reforms of the Kim Dae-jung administration cannot be described as liberal, neo-liberal, corporatist or in terms of the Japanese model (sometimes referred to as the East Asian model) but rather is a hybrid reflecting characteristics of various regimes without consistent principles.

The second round has also emphasized the need to look beyond democratic elections to public participation (both in terms of quantity and quality) and to increased transparency. There has been greater concern with mechanisms for holding governments accountable and for dealing with corruption and the diversion of state assets to private parties. The shortcomings of top-down Fordist or Weberian regulatory mechanisms have led to calls to localize and proposals for greater deregulation, bottom-up participatory mechanisms, negotiated rule-making, and the contracting out of regulatory functions.[253] One issue has been the applicability of these "postmodern" responses to modern bureaucracies to countries that are still in the process of establishing the basic institutional infrastructure of modernity.[254] Other topics receiving attention have been perfectionism versus liberal neutrality, the nature and role of civil society, freedom of the press, and the limits of free speech in relation to judicial independence.

Human rights were the primary focus of the first round, albeit at a high level of abstraction. As noted, in some cases such as North Korea and Myanmar, there seems to be little to say other than the regime has taken the wrong path and must mend its ways, as Myanmar is showing signs of doing. However, given the poverty in much of Asia, the most urgent issues in many cases have been economic. The second round has added little to the well-developed theoretical arguments and extensive (if on some issues inconclusive) empirical record about the relationship between regime type and economic growth. Furthermore, the second round has not had much impact on the more specific rights issues faced by authoritarian and democratic regimes alike. Such issues require extensive local knowledge and context-specific judgments. For instance, Hong Kong police refused to allow protestors of the Tiananmen anniversary to protest in front of the Central Government Offices, restricting them to the West Gate. The government argued that the decision was made on security grounds based on a threatened assessment of events involving recent protests over the controversial right-of-abode cases.[255] The reasonableness of such restrictions is difficult to assess from Geneva or Washington. In economically advanced, relatively stable democratic regimes like Japan, South Korea, and Taiwan, many issues reflect "normal" politics and turn on differences of opinion over contested, difficult issues that involve the balancing of individual interests against other interests. Meaningful conclusions can only be drawn by looking at a range of such cases.

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253. Michael Dowdle, *Heretical Laments: China and the Fallacies of 'Rule of Law*,' 11 CULTURAL DYNAMICS 285 (1999).

254. *See* Peerenboom, *supra* note 7.

255. May Sin-mi Hon, *Rally Rights Curbed, Say Groups*, S. CHINA MORNING POST, May 12, 2002, at 2.

Confucianism

A main focus of the second round has been to develop a "Confucian" alternative to liberalism. However, perhaps we ought to pause and consider how important Confucianism is today. The empirical basis for the claim that Confucianism is still important in contemporary societies seems rather weak. One might point to countries such as South Korea, Taiwan, and even Singapore as examples of modern states *influenced* by Confucianism. Yet, are these countries really Confucian in any meaningful sense? They are basically modern states that have not fully endorsed liberalism. But that does not make them Confucian.

It is often difficult to empirically verify the link between Confucianism and contemporary institutions or practices. Frequently, Confucianism is simply assumed to be doing the explanatory work when other alternatives seem just as likely. For example, Yi Tae-jin claims that a Confucian subconscious awareness led Korean presidents after the Third Republic to emphasize economic growth as the commanding objective.[256] That may be, but how would one go about showing it? Many governments emphasize economic growth. How do we know that Korean presidents emphasized economic growth because of (subconscious) Confucian beliefs? Similarly, contemporary Confucian advocates are aware that many Asians have little understanding of Confucianism and cannot articulate its main beliefs. Nevertheless, many claim that these people still are Confucian because their actions are consistent with Confucian ideas and a Confucian worldview. Their Confucianism is revealed in their "habits of the heart." *Perhaps* so. Many people in the West are influenced by Christianity in ways that they may not be able to articulate and may not even be aware of. However, the situation becomes more problematic when there are multiple possible explanations for actions and multiple sources for particular beliefs. It may be true that some Chinese care for their parents out of a Confucian sense of filial piety. However, many may believe they owe their parents care and respect for other reasons. In fact, they may explicitly reject the idea that their actions are based on Confucian concerns about filial piety. More generally, some people may have expressly rejected Confucianism because of its anti-democratic character, emphasis on hierarchical relations, and tendency to lead to discrimination against women. Regardless of whether they are right about these points, it seems odd to describe them as Confucians because they may have been influenced in some ways by Confucian ideas.[257] As someone who grew up in the West, I have no doubt been influenced by Christianity in some

256. *Discussion: Asian Values*, *supra* note 62, at 286 (showing comments of Yi Tae-ji).

257. Bell and Hahm refuse to describe anyone as a Confucian who explicitly rejects Confucianism. *INTRODUCTION*, in CONFUCIANISM FOR THE MODERN WORLD (Daniel A. Bell & Hahm Chaibong eds., 2003).

general ways and most likely even in some specific ways. However, it would be odd to describe me as a Christian if I expressly deny the existence of God and Jesus Christ, declare myself to be against Christianity, and claim to have converted to Buddhism.[258]

Choi Won-shik points out that for the debates to take a proper direction, the various aspects of Confucianism in Asia should be clearly understood and the various elements scrutinized.[259] Yet, this is no easy task. A difficult threshold question is what is "Confucianism?" There is no accepted definition of Confucianism, and it is understandable why there is not. Confucianism is a vague term that covers two millennia of diverse ideas and practices. Identifying the key or core values or elements of Confucianism is problematic, to say the least. Yet in the absence of any attempt to state the key elements or to delineate the outer parameters of Confucianism, advocates of New Confucianism are left to their own devices. Thus, many scholars have scanned the tradition for values or practices that seem, at least on the surface, similar to values and practices associated with modernity while ignoring the context in which these ideas were embedded and all of the related values and practices that are inimical to modernity. When undesirable features are noted, they are quickly dismissed, generally by fiat, although in some cases interpretive strategies are employed to rehabilitate the texts. However, a tradition is more than just the sum of its parts. Traditions consist of integrally related clusters of concepts, ideas and values. What defines a tradition is the particular combination of concepts, ideas, and values.[260]

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258. Confucianism is arguably more compatible with other belief systems than Christianity in that one can be a Confucian and many other things simultaneously. But the general point still remains that one could reject Confucianism, even a rehabilitated Confucianism, put in its most favorable light.

259. *Discussion: Asian Values*, *supra* note 62, at 287.

260. *See* ASIAN FREEDOMS: THE IDEA OF FREEDOM IN EAST AND SOUTHEAST ASIA (David Kelly & Anthony Reid eds., 1998) [hereinafter ASIAN FREEDOMS]. With the issue of rights and democracy seemingly exhausted, some scholars have sought to shift the focus to related but distinct issues such as freedom. However, because the concept of freedom in its politically salient form is part of the cluster of concepts that defines modernity, the discussion then tracks the rights debates, with the same moves being made by the participants. The first move is to undermine the belief in the universality of freedom and the naturalness of freedom as an intrinsic value on both a theoretical and historical level. Theoretically, the argument begins by demonstrating that there are many different conceptions of freedom. The subject of freedom may be the individual, group or state (i.e. sovereignty and freedom of states from interference by other states). In contrast, freedom of individuals and groups may mean freedom *from* the state. At the same time, group freedom need not go hand in hand with freedom of individuals and indeed may be an obstacle to individual freedom. One could also distinguish between negative and positive freedom (*freedom from* interference by the state and other individuals or groups versus *freedom to* do something, which may entail positive obligations on the part of the state or others to provide resources or opportunities). When singing the praises of freedom today, much of the emphasis is on a specific kind of freedom–a liberal understanding of individual freedom, manifest in particular Enlightenment political institutions and social practices such as democracy, rule of law, civil society and individual rights (let us call it "liberal

freedom," notwithstanding the awkward translation that this will give rise to in Chinese, in which both liberty/liberal and freedom are translated as *ziyou*).

Historians then point out the obvious, that freedom so understood is not universal. Rather, freedom as a "widely held vision of life" has emerged only recently as part of the Enlightenment. Comparative philosophers and area specialists jump in and show how this particular conception of freedom is at odds with religious and philosophical traditions in Asia. If not straightforwardly incompatible with such traditions, at minimum it is safe to say that freedom never played a central role in such traditions and did not become the subject of much theorizing. Moreover, social and political practices were not meant to foster freedom; indeed, quite the opposite–freedom was restricted in the name of other values such as stability and social order. *See, e.g.*, Ian Mabbet, *Buddhism and Freedom, in* ASIAN FREEDOMS, at 19, 20 (demonstrating how the liberal conception of freedom does not fit well with traditional concerns of Buddhism, and concluding that "Buddhism contributed to freedom in some ways and limited it in others; in yet others it belongs to a different universe of thought."); W.J.F. Jenner, *China and Freedom, in* ASIAN FREEDOMS, at 65, 87 (documenting the ways freedom was limited and concluding that "[c]oncepts of freedom have had very little to do with China until the last hundred years" and even now encounter resistance).

The response of liberals and universalists is then to search the tradition for similar ideas or practices that seem supportive of freedom. However, they must first challenge the narrow modern conception of freedom, just as those looking for rights in Asian traditions have sought to move beyond the narrow understanding of rights as (deontic) anti-majoritarian legal entitlements enjoyed by individuals to a broader understanding of rights as moral rights. In some cases, they have emphasized certain functions of rights, thus making it possible to discuss rites (*li*) as rights, despite the fundamental differences in these concepts. *Cf.* Peerenboom, *Confucian Harmony and Freedom of Thought, supra* note 137, at 247-52 (arguing that rites are *not* rights and eliding them merely produces conceptual confusion in the name of an ahistorical, anachronistic misreading). Thus, Kelly takes exception to Jenner's argument that freedom was not historically a prominent concern in China by objecting to his "severely defined" view of freedom, opting instead for a "looser and more multidimensional notion of freedom. . . ." *See* David Kelly, *The Chinese Search for Freedom as a Universal Value, in* ASIAN FREEDOMS, at 94-98 (emphasis added). He then surveys the tradition for "a range of values and visions of life which can stand as precursors to freedom" citing Daoism and Buddhist notions of liberation, as well as the tradition of heroic rebels of *All Men Are Brothers* folklore. The title of Kelly's essay is revealing both of where his normative preferences lie and of the difficulty of making his case.

This move results in cries of bait and switch. These may be examples of freedom, but they are not freedom in the relevant sense in that they do not and did not lead to modern liberal conceptions of individual freedom, rights against the state, democracy, civil society, and so on. Rather they are embedded in a very different context and served different ends. Daoist hermits may have been free, but their freedom was apolitical.

At this stage, universalists may opt for the strategy typical of the second round—that is, rather than arguing about *whether* freedom in the relevant sense is part of the tradition or compatible with certain belief systems, they simply stipulate that freedom is an essential part of modernity and traditions must adapt accordingly. Kelly, at 94 ("Notions of civilisation, modernity and development have proven both irresistible and almost impossible to decouple from the liberal ideology of political freedom they are said to entail."). To overcome the suggestion that it might not be possible to adapt Asian traditions to the demands of modernity, universalists note how some Asian countries such as South Korea, Taiwan, and Japan have become democratic and endorsed a variety of rights. Thus, they conclude, freedom is consistent with "Asian values" (it bears noting that this strategy reinforces the notion that freedom is part of a cluster of concepts, values and institutions peculiar to modernity). The preferred liberal/universalist strategy for dealing with those countries that have resisted democracy and liberal rights, such as China and Singapore, is to pick out a few liberals and emphasize their views,

New Confucians suggest that Confucianism can be adapted to modern times and that to claim otherwise is to essentialize Confucianism in an inappropriate way. In one extreme articulation of this view, Roger Ames claims that even to ask the allegedly "Western analytical" question "what is Confucianism?" essentializes Confucianism by "treating it as a specific ideology that can be denoted with varying degrees and accuracy."[261] He suggests that "this assumption is likely to add confusion."[262] In his view, "*what* is an interrogative perhaps appropriate for attempts at systematic philosophy, from Plato to Freud, but it is not appropriate in reading a fundamentally aesthetic tradition which takes as its basic premise the uniqueness of each and every situation."[263] Rather, we need to ask *how* Confucianism functions. We should view Confucianism as a continuing cultural narrative rather than as (a set of) isolatable doctrines and ideologies. Thus, claims Ames, "*any particular doctrinal commitment or set of values* that we might associate with Confucianism needs to be qualified by its resolutely porous nature, absorbing into itself, especially in periods of disunity, *whatever it needs* to thrive within its particular historical moment."[264] Why call whatever results "Confucianism," you might wonder—"because any narrative must have a proper name."[265]

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notwithstanding that liberals may be a distinct minority in these countries. Kelly, at 108-14.

When forced to admit that liberalism is but a minority view, the response is to shift to normative ground and argue that freedom is a universal value. Even allowing that historically Asian traditions did not endorse liberal freedom and that liberals are in the minority, liberal freedom *should* prevail. *Id.* at 114. The responses to this move track the rights debate. One response is to question the normative value of freedom. In many cases, critics can draw on critiques from those in Western countries who point out the limits of freedom and the shortcomings of Western societies—freedom cannot be so wonderful if it results in the chaos of American cities and the isolated monadic lifestyle of suburbia, where busy parents commute from home to office in their air-conditioned, environmentally degrading boxes on wheels. In other cases, the critiques may proceed from the perspective of indigenous traditions by challenging the values and assumptions of the liberal worldview in which the modern discourse of freedom is embedded. Critiques may be radical or partial. Rather than rejecting freedom outright, the argument may be about degrees of freedom and how freedom is to be implemented given existing institutions and circumstances.

As in the rights debate, the next step is to move beyond grand, universal claims about freedom to context-specific discussions that bring out more clearly issues of power and whose freedom is being pursued at whose expense. *See, e.g.*, Vera Mackie, *Freedom and the Family: Gendering Meiji Political Thought*, *in* ASIAN FREEDOMS, *supra*, at 121-40 (discussing Confucian and liberal discourses and their relation to the struggle of women for freedom); Anthony Reid, *Merdeka: The Concept of Freedom in Indonesia*, *in* ASIAN FREEDOMS, *supra*, at 141-56 (noting charged emotional appeals to merdeka or freedom in colonial struggle for independence). The wonder of the second round is that the entire cycle can be completed within a single volume.

261. Roger Ames, *New Confucianism: A Native Response to Western Philosophy*, *in* CHINESE POLITICAL CULTURE, 1989-2000, 71 (Shiping Hua ed., 2001).

262. *Id.*

263. *Id.*

264. *Id.* at 80 (emphasis added).

265. *Id.* at 73.

Ames' view confuses form with content. There is nothing inherently illogical or nonsensical in asking "what" questions of narratives. We often ask someone what a book or movie is about. What would seem nonsensical (though it could still be aesthetically pleasing or fun) is a "story" or rather non-representational art that had no plot, no content—nothing that could be said in response to the question "what is it about?" Indeed, the very notion of a narrative implies some connection between what came first and what comes after. Noting that the story may have different parts or sequels–like *Rocky I, II, III* or *IV*–does not render the "what" question moot. One would still expect that someone walking out of a *Rocky* marathon could answer with a summary of the contents of each movie (assuming, that is, anyone could still be coherent after four movies, particularly mind-numbingly banal jingoistic *Rocky* movies). One would also expect that the respondent could have something intelligible to say about the series as a whole. Of course, one might expect some lesser degree of coherence, given that the movies were made over several years and perhaps written, produced, and directed by different people.[266]

Perhaps even more problematic is the idea that Confucianism is so porous because of its narrative nature that it could transform itself into Rawlsian liberalism or Nazi Fascism depending on the time. It would seem that Ames is willing to allow any and all elements of Confucianism to change over time into anything whatsoever. Setting aside for the moment the difficulty of defining with precision the core elements of Confucianism, let us assume for the sake of argument that, as Ames has argued, *he* (harmony), *ren* (benevolence), *yi* (righteousness), and *li* (rites) are important aspects of classical Confucianism (which shows that we can ask and answer "what" questions about Confucianism, at least for a particular period or author/text).[267] Presumably, given Ames' view, even if under the pressure of modernity New Confucians rejected each of these and adopted the opposite view of non-*he,* non-*ren*, non-*yi*, non-*li*, we would still be entitled to call this doctrine Confucianism. I see little point in calling any such doctrine Confucianism. *Confusionism*, perhaps, but *Confucianism*, no. The only seeming purpose

266. This is also true of any multi-author tradition based on systematic first principles such as Kantianism or liberalism. We recognize differences between Kant and Rawls, or between Rawls and Dworkin, for example. But we describe them as (neo-)Kantians, or as liberals, because of certain identifiable shared beliefs. The only difference seems to be that it is easier to identify the commonality and differences in their views because these philosophers set out their assumptions and arguments in a more explicit way than did early Confucians and even most New Confucians today. However, there is nothing to prevent New Confucians today from systematically defining the contents and scope of New Confucianism just as Rawls has done for his version of liberalism. In fact, philosophers such as Joseph Chan are trying to do just that.

267. These are the standard, admittedly not very felicitous, translations of these terms. Ames has his own preferred translations of these terms and his own views about *what* they mean. *See* DAVID HALL & ROGER AMES, THINKING THROUGH CONFUCIUS (1987).

would be to take advantage in bad faith of whatever normative authority comes from invoking Confucianism.

To be sure, in practice it is not possible that Confucianism could or would actually transmute into just anything. Certain changes would simply not be seen as attractive or feasible given the mindset and dispositions of those within the tradition. Perhaps then we should not push Ames' comments to their extreme logical conclusion. Rather, his comments should be read as making a rhetorical point that emphasizes how Confucianism, like other discourses, traditions, and—isms, is capable of evolution and change. This makes the narrative less "porous," but still allows for considerable change. It also allows Confucians to rule out certain objectionable paths such as Fascism. It *may* also render moot or diminish the importance of stating in advance the defining elements of Confucianism or laying out all of the possible outer parameters of Confucianism. Rather than dreaming up unrealistic hypotheticals, we need only consider on a case-by-case basis actual possibilities in particular historical circumstances. However, this still leaves open the key issues of *this* era—whether Confucianism is consistent with modernity, including democracy, human rights, and rule of law; whether there is a coherent Confucian variant of modernity that can serve as a morally attractive alternative to liberalism; and if so, what that is.

Rather than arguing for the infinite elasticity of Confucianism on theoretical grounds having to do with the (essential?) nature of Confucianism as a narrative, some scholars, such as Bell and Hahm, respond to the compatibility issue by taking a more historical tack, showing the various ways in which Confucianism has changed in response to the times.[268] Thus, they argue that Confucianism was able to survive the transition to a centralized state in the Han by reinventing itself under the guidance of Dong Zhongshu as a bureaucratic ideology prepared to serve the interest of the empire by incorporating elements of yin-yang five phases ideology. They also argue that Song Neo-Confucians were able to reinvent the tradition that eventually became the "orthodoxy" for most parts of East Asia, by constructively engaging Buddhist and Taoist philosophy. More specifically, the new schools of Confucianism incorporated "everything from Buddhist epistemology and Taoist cosmology to philosophical diagrams and methods of contemplation."[269]

That Confucianism could assimilate certain elements of certain traditions does not mean that it is compatible with contemporary conceptions of democracy, rule of law, and human rights. Moreover, the fact that scholars felt the need to come up with a new label for Neo-Confucians suggests that there were sufficient differences to distinguish between the views of Confucius and Mencius and their Song dynasty counterparts. It may be the case that there is still enough common ground to continue using Confucianism for these

268. Bell & Hahm, *supra* note 257.
269. *Id.*

various thinkers. However, at some point, perhaps when Confucianism embraces Rawls' two principles of justice, the usefulness of referring to the new doctrine as Confucianism (setting aside for the moment the internal coherence of any such system) will be outweighed by the tendency to create confusion.[270]

Another approach has been to point out that Christianity was once opposed to democracy and human rights, but that it later came to support them, thus implying that Confucianism could do the same.[271] However, this will not suffice without further argument. At minimum, we need a careful analysis of how Christianity was opposed to democracy in theory and practice and then a careful historical study of how it came to be supportive. We would then need a similar effort for Confucianism. Finally, we would need to compare the results of the two studies to see if the factors involved in the transformation of Christianity from obstacle to facilitator also apply in the case of Confucianism. Just because one tradition can change does not mean another can do the same. Christianity may have been more compatible with democracy and human rights to start with than Confucianism.

Confucianism is a living tradition and traditions change. However, that does not mean that one is free to attribute anything one wants to Confucianism or that Confucianism can assimilate any and all ideas from other traditions and still be considered Confucianism in any meaningful or useful sense. It may be possible to reject by fiat some ideas–such as the subjugation of women--in favor of other ideas. However, can one reject the notion of a paternalistic government or the inegalitarianism inherent in the *li*/rites, assuming one would want to? Moreover, can one simply substitute democracy and elections as the basis for legitimacy rather than the traditional moral cultivation of the leaders and the mandate of heaven? Although New Confucians suggest that Confucianism can be adapted to modern times and that to claim otherwise is to essentialize Confucianism in an inappropriate way, there are many thorny methodological issues that arise in the process of rendering Confucianism compatible with modernity.

While it seems necessary for Confucianism or any other tradition to come to grips with modernity and be adapted accordingly or simply perish as a viable political system, it may be that there can be Confucian variants of capitalism, democracy, rule of law, and rights. We may no longer be dealing

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270. Bell argues there are very good reasons why Confucians would not embrace Rawls' principles. Most importantly, Confucians would be reluctant to give "lexical priority" to the first principle that secures civil and political rights in cases of conflict with the second principle that secures (the functional equivalent) of social and economic rights. As he points out, one of the earliest and most influential Confucian political values is that the first obligation of the state is to secure people's basic material well being. *See* CONFUCIANISM FOR THE MODERN WORLD, *supra* note 257.

271. *Discussion: Asian Values*, *supra* note 62, at 244 (showing comments of Kang Jung In).

with *Confucianism* per se, but rather with *Confucian-inspired* or *-influenced variants* of contemporary institutions. The new system might have enough Confucian elements to differentiate itself from liberalism as practiced elsewhere, but be too different from and too much at odds with core elements of what has historically been known as Confucianism to merit that label. Indeed, what remains of Confucianism today seems less like a coherent system and more like isolated values, often hardly unique to Confucianism, that serve as a communitarian corrective on liberal extremism.[272] If that is true, it might be that Confucianism will only affect the institutions of modernity at the margins and in a piecemeal, ad hoc fashion that does not add up to a coherent Confucian alternative to liberalism.[273]

As there may not be much gained by hanging on to the label of Confucianism at this point, perhaps the focus should shift to developing communitarian or collective alternatives to, or variants of, liberalism without worrying so much about the link to Confucianism. However, even if there is some explanatory power in Confucian communitarianism, Confucian democracy, Confucian rule of law, Confucian human rights or even a Confucian liberalism, much more work needs to be done to develop these ideas into coherent concepts and to spell out in sufficient detail the implications of these alternative forms of modernity in terms of institutions, norms, legal rules, social practices, and outcomes. Assuming Confucianism is compatible with democracy or that we are simply going to stipulate that democracy is unavoidable and turn our attention to developing a form of Confucian democracy, what will that be? How does it differ from liberal democracy? What are its distinctive institutions, practices and values? Will it have a divided legislature with one chamber controlled by elites?[274] If so, what exactly will the division of power be? On what issues will the elites have ultimate authority? Similarly, what are the defining characteristics of a Confucian rule of law? Will the purposes of the law and legal system be to limit or strengthen the state, to protect individual rights or, more likely, some balance between the two, and if so, what balance? Will there be a role for rule of virtue (*de zhi*) as well as rule of law–as advocated by that born-again New Confucian Jiang Zemin—and how will the two relate and be reconciled? Will there be any distinctive institutions–such as the censorate from the Imperial era to check government

272. There may be many elements of Confucianism that inform the Chinese worldview that are not relevant to social and political philosophy or are too abstract to have much bearing on practical issues (such as the nature of Confucian cosmogony, a pragmatic based epistemology that emphasized know-how rather than knowing—that or arguably even the conception of self as a social being).

273. Presumably, Confucian liberalism would be what you would get if you accepted Rawls's criteria of justice, but introduced various Confucian elements at the margin to give the system a particular Confucian flavor. However, that is not Confucianism, but rather a Confucian-tinged variant of liberalism.

274. DANIEL A. BELL, EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA (2000).

power? A letter and petition system whereby citizens can beseech government leaders for help? An ombudsmen system? Will there also be the usual modern institutions: administrative reconsideration bodies, a constitutional review entity, and an independent judiciary capable of conducting judicial review of government acts? If so, will they operate on different principles? How independent will the judiciary be, and on what issues? Will the courts be responsible for deciding cases in terms of a normative agenda—a particular conception of the good—decided by moral elites? What will be the role of the legal profession? Will lawyers have greater duties to society as opposed to their individual clients? What will the Confucian conception of rights entail? Will there be a different conception of or importance attached to autonomy? What are the justifications for and limitations on free speech and other civil and political rights? How will gender issues be handled? What is "the" New Confucian position on same-sex marriage, equal pay, the inheritance rights of women, and inheritance rights more generally?

CONCLUSION: ROUND THREE AND BEYOND

The first round should be seen as a necessary stage in an ongoing debate or discussion. Despite the excessively politicized nature of much of the discussion, the lack of an empirical foundation for many claims and a number of bad arguments, the first round did lay the foundation for future discussion and result in considerable progress on many issues. At least many of the issues were clarified to the extent possible given the subject matter. The available evidence was collected and brought to bear on a few key economic issues. In some cases, the need for more or different kinds of evidence became clear while in other cases it became clear that no amount of empirical evidence would resolve all of the disputes and that reasonable people are likely to continue to disagree.

The next round is likely to continue the trend of the second round to move beyond universalism and relativism by focusing on particular legal issues, politics, and sociological studies. In light of the heavily politicized nature of the first round, many have called for greater attention to discourse contexts and the different purposes and agendas of the participants.[275] It may be any discussion of Asian values will be politicized to some extent, but some contexts are much more politicized than others. Cultural and values claims may also play a greater role in some contexts than others. The next round could benefit from a closer look at the use of Asian values, and cultural arguments more generally, in different contexts. How do international courts treat cultural claims and arguments? What role do cultural claims and arguments play in bilateral and multilateral relationships? Does the role vary depending on the issue? What role do they play in regional legal and political regimes

275. Lee Seung-Hwan, *supra* note 174, at 210.

and in domestic affairs? What is the role of culture and values when domestic courts interpret and implement international human rights? How, where, when, and why do INGOs and NGOs invoke culture?

The debate over Confucianism is likely to continue; perhaps some of the empirical, methodological, and theoretical issues mentioned above will be addressed. However, we must also move beyond Confucianism to consider the role of Daoism, Islam, Hinduism, and Buddhism in developing local variants of modernity. There also should be greater efforts to develop communitarian or collective alternatives to liberalism that need not be based directly on existing religious traditions. These projects will require both empirical and theoretical work.

Posner has argued that academic moral theory is useless.[276] Moral theory is too abstract to resolve most real issues. As Posner notes, there are generally good arguments on all sides of broad philosophical issues, and the lack of any agreed means of demonstrating which side is "really" right means that people will be able to maintain their initial positions. Even some of Rawls' biggest supporters among law professors question whether Rawls' views have had any impact on American law or influenced the outcome of specific cases.[277] "When Rawls . . . descends from the abstractions of political philosophy to concrete issues of law and public policy, he becomes a superficial dispenser of the current 'liberal' dogmas concerning abortion, campaign financing, income distribution," and so on.[278] This is not to deny that philosophers may make a valuable contribution to the debates. They may spot bad arguments, clarify issues, and point out errors in logic or reasoning.[279] However, for the most part, what is needed is more factual information about the consequences of different options rather than abstract moral theories.

I both agree and disagree with Posner's views. In general, I do not think people are persuaded by rational arguments as much as they are driven by their intuitions and emotions. I also side with Posner, Richard Rorty, and others who argue that a good story and appeals to emotions and sentiments are more likely to lead people to change their views and behavior than philosophical arguments.[280] Certainly they have a greater capacity to motivate than rational arguments. After all, believing something is right and doing it are very different things. Based on my own encounters, I doubt moral philosophers are more moral in their actions or show more consistency between belief and action than non-philosophers. To that extent, prophets or

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276. POSNER, *supra* note 36.

277. *Id.* at 82.

278. *Id.* at 58.

279. *See* Laura Carrier, *Making Moral Theory Work for Law*, 99 COLUM. L. REV. 1018, 1019 (1999) (explaining that while moral theory may not be able to resolve many disputes, it serves a useful purpose in articulating the problems and ensuring that all relevant arguments have been heard).

280. *See* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989).

moral entrepreneurs (to use Posner's phrase) are more likely to have a significant social impact than philosophers–think Lee Kuan Yew, Mao Zedong or even Deng Xiaoping.

On the other hand, the debates over Asian values, Confucianism, and communitarian alternatives to liberalism have suffered from the lack of a systematic, coherent theory (or theories). It may be that moral philosophers generally dress up in academic language the prevailing views of their times or their set.[281] In that sense, Rawls' main contribution was to systematize the way many Americans felt. However, that is not an insignificant contribution. Moreover, while many judges and citizens may not have read Rawls, others have. There is a general sense that liberalism has some proper intellectual foundations. Of course, there are many who would disagree, and there are significant points of contention among liberals. Nevertheless, there is still some sense that at least a powerful theory exists. This sense trickles down to others in academia, then into the media, and then into the general public sometimes via moral entrepreneurs who "popularize" Rawls.

In contrast, communitarianism, whether in the West or in Asia, always seems less reputable, less solid, because of the lack of a systematic theoretical exposition. It seems more like a marginal critique of liberalism than a credible, full-fledged alternative able to stand on its own. The same is true of Asian (Confucian) (communitarian/collectivist) alternatives to liberalism. They have yet to be properly developed into a coherent, systematic theory. We are still waiting for an Asian (Chinese, Korean, Thai, Buddhist, Confucian, Islamic, sectarian communitarian) Rawls to synthesize the intuitions, values, beliefs, practices, and institutions that reflect a normatively attractive systematic alternative to liberalism. We are still waiting for some new theory that is compatible with modernity, but sufficiently different to be more than just a variant of liberalism. To date, the attempts to articulate a Confucian alternative to liberalism generally have been either too abstract, proceeding without any reference to institutions or concrete issues,[282] or too piecemeal, discussing specific institutions that at best seem marginal to a functioning legal or political system while ignoring much more basic and central issues about democracy, rule of law, and human rights.[283]

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281. POSNER, *supra* note 36, at 81.

282. For an attempt to develop a Deweyean-Confucian alternative to liberalism, see DAVID L. HALL & ROGER T. AMES, THE DEMOCRACY OF THE DEAD: DEWEY, CONFUCIUS AND THE HOPE FOR DEMOCRACY IN CHINA (1999). WM. THEODORE DE BARY, *supra* note 6, argues for a more liberal form of Confucian communitarianism. While admirable preliminary attempts to sketch a philosophical theory of Confucian communitarianism exist, neither account addresses in any detail the issue of rule of law nor provides details regarding political or legal institutions, legal rules or outcomes with respect to particular controversial issues. Bell's *East Meets West* is an exception in that it contains both a theoretical discussion of nonliberal democracy and consideration of institutions and specific issues. Nevertheless, it is more of a sketch than a detailed presentation, with many crucial issues left open.

283. *See, e.g.*, CONFUCIANISM FOR THE MODERN WORLD, *supra* note 257.

What is needed as a first step is a broader empirical, institutional and comparative framework. For example, several of us are now engaged in a project on rule of law that will examine legal system development and rule of law in Asia, using the legal systems of the United States (a common law country) and France (a civil law country) as comparison points.[284] Given the great diversity among legal systems, the purpose is to understand how rule of law is conceived and implemented, and the role of law in economic development, political reform, the protection of human rights and geopolitical stability. We will look at a series of concrete issues in different areas of law including constitutional and administrative law, criminal law, environmental law, and family law and also examine issues such as the relation between law and morality. The project may generate a menu of options with respect to institutions, rules, norms, practices and outcomes on particular issues that can be used by theorists to develop a more credible theoretical alternative to liberalism. Similar studies are needed with respect to varieties of democracy and capitalism.

However, empirical studies by themselves are not sufficient. There is still a need for bold and creative thinking. One of the problems has been the dominance of the liberal democratic paradigm. Today, many of the leading Asian academics are trained in the West. Even those who have not studied abroad are often as well versed in the Western political, economic, and legal literatures as they are in the literatures of their own countries.[285] It is important to understand Western systems in detail, to go beyond a superficial, usually excessively rosy account, to the realities of Western countries. At the same time, Asian theorists must also be firmly situated in their own context, with a solid grasp of institutional issues, and be willing to shake off liberal dogma and follow their own intuitions. In fostering critical reflection on Asian values, the second round of debates has increased the likelihood of the emergence of this kind of a bold, new theory. Perhaps we will see it come to fruition, if not in the third round, then in later rounds of what will no doubt be a never-ending attempt to come to grips with both our commonalities and our differences.

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284. For an overview of the project, see the preface to ASIAN DISCOURSES OF RULE OF LAW, *supra* note 59.

285. Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUM. RTS. Q. 130, 149, 171 (2003) (noting how many delegates to the U.N. from developing countries "adopt a positively hostile attitude towards culture and traditions of their own people" and end up supporting "policies at the state and international level which provide important support for international human rights but which, in various ways, betray and undermine the cultural values of the people they purportedly represent.").

ETHICAL REVIEW OF RESEARCH INVOLVING HUMAN SUBJECTS IN NIGERIA: LEGAL AND POLICY ISSUES

Remigius N. Nwabueze*

INTRODUCTION

In 1999, the United States National Bioethics Advisory Commission (NBAC) commissioned an empirical study to analyze the impact of U.S. regulations on the conduct of United States biomedical research sponsored in Nigeria.[1] The study, conducted by Patricia Marshall, was part of the NBAC's larger project on the ethical and policy issues involved in clinical trials in developing countries. On April 30, 2001,[2] NBAC produced its recommendations in two volumes; volume one contained analyses and recommendations,[3] and volume two contained the reports on commissioned studies. Marshall's case study of genetic epidemiology research in Nigeria highlighted the various problems confronting researchers and ethics review committees in Nigeria. Specifically, the study focused on the implications of cultural relativism on the implementation of United States rules of informed consent in Nigeria.[4] Though Marshall was not concerned with broader issues, such as the general regulation of research involving human participants in Nigeria, the analysis provides a useful forum for beginning such an important discussion.

Some problematic ethical issues in the conduct of biomedical research have gained notoriety in the wake of globalization of biomedical research. These issues have attracted much attention in recent years, warranting copious

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1. *See* Patricia A. Marshall, *The Relevance of Culture for Informed Consent in U.S.-Funded International Health Research in Ethical and Policy Issues in International Research, in* II CLINICAL TRIALS IN DEVELOPING COUNTRIES, COMMISSIONED PAPERS AND STAFF ANALYSIS (NBAC 2001).

2. Presidential Bioethics Commission Issues Report on Clinical Trials Research in Developing Countries, National Bioethics Advisory Commission (Apr. 30, 2001), *available at* http:www.bioethics.gov (last visited Nov. 11, 2003).

3. National Bioethics Advisory Commission, ETHICAL ISSUES IN INTERNATIONAL RESEARCH: CLINICAL TRIALS IN DEVELOPING COUNTRIES: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION (2001) [hereinafter NBAC].

4. *See* O.O. Ajayi., *Taboos and Clinical Research in West Africa*, 6 J. MED. ETHICS 61, 63 (1980) (discussing the impact of custom, tradition, and worldview on the conduct of biomedical research). *See also* C.B. Ijsselmuiden & R.R. Faden, *Sounding Board: Research and Informed Consent in Africa–Another Look*, 326 NEW ENG. J. MED. 830, 831 (1992).

recommendations by the NBAC[5] and the Nuffield Council on Bioethics.[6] The conduct of biomedical research and clinical trials in developing countries[7] could be motivated by altruistic concerns to help developing countries confront particular health care problems, thereby reducing the inequality in global health research expenditures.[8] However, this conduct (i.e. biomedical research) could also exploit and take advantage of the abundant research subjects, poverty and disease, low level of regulation, and comparatively cheaper cost of clinical trials in developing countries.[9] For instance, a developed country's pharmaceutical corporation may undertake clinical trials in a developing country simply out of convenience and to quickly generate clinical data that would support drug registration application in the developed country.[10]

A myriad of factors contribute to recent public sensitivity to trials in developing countries. This includes the placebo-controlled trials that took

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5. NBAC, *supra* note 3.

6. *See* NUFFIELD COUNCIL ON BIOETHICS, THE ETHICS OF RESEARCH RELATED TO HEALTHCARE IN DEVELOPING COUNTRIES (2002).

7. The expressions "developing" and "developed" countries have contested meanings and are not used here in any technical sense. The term "developing" is used to describe non-industrialized countries in South Africa that are still caught in the throes of poverty and economic underdevelopment. Similarly, "developed" is used to describe industrialized and wealthy countries in North Africa.

8. *See* Ad Hoc Committee on Health Research Relating to Future Intervention Options, *Investing in Health Research and Development: Report of the Ad Hoc Committee on Health Research Relating to Future Intervention Options* (World Health Organization) (1996). The World Health Organization estimated that 90% of health care research money in the world is applied to diseases representing less than 10% of the global burden of disease. *See id.* In other words, only 10% of the global health research budget is devoted to diseases afflicting about 90% of the world's population; these are mainly people in the developing countries. *See id. See also* Commission on Health Research for Development, *Health Research: Essential Link to Equity in Development* (Oxford University Press 1990); Global Forum for Health Research, *The 10/90 Report on Health Research* (Global Forum for Health Research 1999).

9. Rebecca A. Finkenbinder, *New Recommendations on International Human Research: Can Minimum Standards Prevent the Exploitation of Vulnerable Human Subjects in Developing Countries*, 21 PENN ST. INT'L L. REV 363, 364 (2003).

10. This was part of the motivation for the proposal sent in 2001 to the U.S. Food and Drug Administration by a Pennsylvania biotechnology company to conduct clinical trials of a drug for the treatment of infant's lung disease in Latin America. The trial used a placebo-arm (inert) considered unethical in the United States because of the availability of established surfactant drugs. Similar trials proposed in Europe would not use a placebo. *See* Mary Pat Flaherty & Joe Stephens, *Pa. Firm Asks FDA To Back Experiment Forbidden in U.S.*, WASH. POST, Feb. 23, 2001, at A3. The president of the Pennsylvania company estimated that the trial could shave eighteen months off of the development of the experimental drug. *See id.* The NBAC considers this proposed study to be unethical:

> In studies of this kind–in which the disease is life threatening, an established effective treatment is available, patients in developed countries will be the primary beneficiaries of the results of the clinical trial, and it is not clear that the clinical trial is responsive to the health needs of the host country–a placebo control would not be permissible under the rules recommended in this report.

NBAC, *supra* note 3, at 25.

place in various developing countries[11] that tested the efficacy of a short course zidovudine (AZT) in the reduction of perinatal transmission of HIV/AIDS. These trials raised the ethical issue of whether ethically unacceptable research in a developed country (for instance, the United States) could be ethically appropriate in a developing country; in other words, whether the standard of care in research is universal or dependent on local circumstances.[12] Another factor that drew public attention to international clinical trials concerned the ethical propriety of Pfizer's 1996 clinical trial in Nigeria that tested the efficacy of trovan in the treatment of epidemic meningitis.[13]

The aforementioned context demands that developing countries rethink the availability and extent of protection accorded research participants in their territories. Accordingly, this paper explores the legal, policy and ethical frameworks for the regulation of biomedical research in Nigeria. Part I traces the history of biomedical research in Nigeria from the colonial period to contemporary times and observes that there is no formal regulation of biomedical research involving human participants in Nigeria. Part II examines some of the international biomedical research scandals and presents them as a context

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11. The countries included in the trials were: Cote d'Ivoire (Ivory Coast), Burkina Faso, Ethiopia, Kenya, Malawi, South Africa, Tanzania, Uganda, and Zimbabwe.

12. Other than to illuminate public sentiment on research in developing countries, this paper is not concerned with the ethical controversy over the AZT trials in some developing countries. The trial was halted in 1998 when sufficient evidence in Thailand made its continuation unnecessary. *See* Sheryl Gay Stolberg, *Placebo Use Is Suspended in Overseas AIDS Trials*, N.Y. TIMES, Feb. 19, 1998, at A16. For more information about the AZT trials and ethical debates, see generally P. Fidler, *"Geographical Morality" Revisited: International Relations, International Law, and the Controversy Over Placebo-Controlled HIV Clinical Trials in Developing Countries*, 42 HARV. INT'L L.J. 299 (2001); Leonard H. Glantz, *et al.*, *Research in Developing Countries: Taking 'Benefit' Seriously*, Hastings Center Rep., at 38 (Nov.-Dec. 1998); Jonathan Todres, *Can Research Subjects of Clinical Trials in Developing Countries Sue Physician-Investigators for Human Rights Violations?*, 16 N.Y.L. SCH. J. HUM. RTS. 737 (2000); Ronald Bayer, *The Debate Over Maternal-Fetal HIV Transmission Prevention Trials in Africa, Asia, and the Caribbean: Racist Exploitation or Exploitation of Racism?* 88 AM. J. Pub. Health 567 (1998); David Orentlicher, *Universality and its Limits: When Research Ethics Can Reflect Local Circumstances*, 30 J.L. MED. & ETHICS 403 (2002); Eldryd Parry, *The Ethics of Clinical Research in Developing Countries*, 34 J. ROYAL C. PHYSICIANS LON. 328 (2000); Joanne Roman, *U.S. Medical Research in the Developing World: Ignoring Nuremberg*, 11 CORNELL J.L. & PUB. POL'Y 441 (2002); Robert Levine, *International Codes of Research Ethics: Current Controversies and the Future*, 35 IND. L. REV. 557 (2002); Harold Varmus & David Satcher, *Ethical Complexities of Conducting Research in Developing Countries*, 337 NEW ENG. J. MED. 1003 (Oct. 2, 1997); Peter Lurie & Sidney M. Wolfe, *Unethical Trials of Interventions to Reduce Perinatal Transmission of the Human Immunodeficiency Virus in Developing Countries*, 337 NEW ENG. J. MED. 853 (Sept. 18, 1997); Marcia Angell, *The Ethics of Clinical Research in the Third World*, 337 NEW ENG. J. MED. 847 (Sept. 18, 1997); George Annas and Michael Grodin, *Human Rights and Maternal-Fetal HIV Transmission Prevention Trials in Africa*, 88 AM. J. PUB. HEALTH 560 (1998); Robert A. Crouch and John D. Arras, *AZT Trials and Tribulations*, Hastings Center Rep., at 26 (Nov.–Dec. 1998); Carol Levine, *Placebos and HIV: Lessons Learned*, Hastings Center Rep., at 43 (Nov.–Dec. 1998).

13. Joe Stephens, *Doctors Say Drug Trial's Approval Was Backdated*, WASH. POST, Jan. 16, 2001, at A1; Sonia Shah, *Globalizing Clinical Research: Big Pharma Tries Out First World Drugs On Unsuspecting Third World Patients*, THE NATION, July 1, 2002, at 23.

for the controversial drug trials in Nigeria in 1996. Part III reviews Pfizer's controversial drug trial in Nigeria and highlights its problematic aspects. Part IV discusses the concept and nature of ethical review of biomedical research. Specifically, Part IV examines recent CIOMS guidelines, particularly the provisions regarding ethical review of research sponsored in a host country by a foreign country or organization. This part laments the lack of a functional and credible system of ethics review in Nigeria and that many Nigerian research institutions lack a firmly established, competent, independent, and functional ethics review board. Part V suggests that urgent steps should be taken in Nigeria to promulgate a formal guideline for conducting research involving human subjects, and that international and regional institutions should help Nigeria in building capacity for ethical review.[14] Here, it is also suggested that the few ethics committees in Nigeria, financially and administratively hampered in the discharge of their duties, should seriously consider the option of charging fees in a way that does not affect their independence.

This paper is not concerned with specific ethical problems that arise in the planning and conduct of biomedical research such as informed consent, selection of subjects, compensation, availability of research result in the host country, randomization, and the ethics of placebo-controlled studies.[15] The focus on the general regulatory structure in Nigeria is not intended to underestimate the value of specific issues, which legitimately deserve future attention. Moreover, a formal and comprehensive research guideline, promulgated as suggested in this paper, would likely set out the bases for resolving the specific ethical issues in ways that respond to cultural and national circumstances.[16]

1. History of Biomedical Research in Nigeria.

As a political entity, Nigeria attained statehood on October 1, 1960. However, biomedical research started in the colonial era, long before Nigeria gained its political independence from Great Britain. In 1920, the Rockefeller Foundation initiated a colonial research enterprise in the west coast of Africa

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14. For instance, the Swiss Commission for Research Partnership with Developing Countries (KFPE) has a guideline that purports to ensure that collaborative projects lead to capacity building in developing countries. *See* KFPE, *Guidelines for Research in Partnership with Developing Countries*, Principle 10 (1998), *available at* http://www.kfpe.ch/download/guidelines_e.pdf (last visited Sept. 15, 2003).

15. These issues were considered in the report of the NBAC, *supra* note 3. *See also* NUFFIELD COUNCIL ON BIOETHICS, *supra* note 6. *See generally* Dawn Joyce Miller, *Research and Accountability: The Need for Uniform Regulation of International Pharmaceutical Drug Testing*, 13 PACE INT'L L. REV. 197 (2001).

16. For instance, it was suggested that the imposition of western bioethical values on non-western peoples and cultures amount to ethical imperialism. *See* M. Angell, *Ethical Imperialism? Ethics in International Collaborative Clinical Research*, 319 NEW ENG. J. MED. 1081 (Oct. 20, 1988).

known as the "Rockefeller Foundation Yellow Fever Commission to the West Coast of Africa."[17] In 1925, the Yellow Fever Commission, as it was generally called, built a Research Unit in Yaba, Lagos.[18] Few details are known about any clinical trial or other activities by the Yellow Fever Commission, but, considering that ethics review was developed in the 1960s,[19] yellow fever research would probably raise only issues of informed consent.

In 1954, the British colonial government established the West African Council for Medical Research for its West African territories of Nigeria, Ghana, Gambia, and Sierra Leone.[20] The main function of the Council was to arrange for the conduct of medical research in those West African territories and to provide medical research information concerning West Africa to the British government.[21] Legislation establishing the Council was not specific on the type of medical research to be conducted or sponsored by the Council, nor did it contain any provision relating to the ethics review of research protocols conducted under the auspices of the Council.

In 1952, the Nigerian colonial government established the University College Hospital, Ibadan (UCH).[22] UCH was established as a teaching hospital of the University of Ibadan (then University College, Ibadan). Part of the mandate of the UCH was to carry out clinical research or other medical experimentation,[23] though no research guideline was specifically mentioned.[24] Following the UCH research mandate, subsequent teaching hospitals established in Nigeria were given the same clinical research jurisdiction.[25]

In 1972, the then Nigerian Military government established the Medical Research Council of Nigeria (MRC).[26] The federal agency was responsible for the conduct of medical research in Nigeria. However, in 1977, the National Science and Technology Development Agency[27] (NSTDA) was statutorily

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17. *See* The National Institute of Medical Research, Yaba Lagos, Nigeria, *available at* http:www.nimr-ng.org./NIMR-nav.htm (last visited Nov. 11, 2003).

18. *Id.*

19. The first ethical review committee was established in the United Kingdom in 1966. *See* P. Ferguson, *Do Researchers Feel an LREC Hinders Research?*, 165 BULL. OF MED. ETHICS 17, 19 (2001). In the United States the policy that made it mandatory for a review of federal-funded research by an Institutional Review Board began in 1966. *See id.;* Roman, *supra* note 12, at 455.

20. *West African Council for Medical Research Ordinance, Laws of the Federation of Nigeria and Lagos, Cap. 215* (1958).

21. *Id.* § 3.

22. *University College Hospital Act, Laws of the Federation of Nigeria and Lagos, Cap 205, § 3* (1958).

23. *Id.* § 12(1).

24. At that period the main international medical research guideline was the Nuremberg Code, which I shall discuss later.

25. Such as the University of Nigerian Teaching Hospital; University of Lagos Teaching Hospital; University of Benin Teaching Hospital, and Obafemi Awolowo University Teaching Hospital.

26. Decree No. 1, *Medical Research Council of Nigeria* (1972).

27. Decree No. 5, *National Science and Technology Development Agency Decree* (1977).

established in Nigeria to advise the federal government on matters relating to scientific research and development. The NSTDA Decree repealed the Medical Research Council of Nigeria Decree 1972.[28] Pursuant to the NSTDA Decree, the Research Institute's Order of 1977[29] established the National Institute of Medical Research in Yaba Lagos (NIMR). The assets and rights of the MRC were transferred to the NIMR.[30] The NIMR is authorized to conduct medical research related to health problems in Nigeria and to cooperate with Nigerian medical schools and universities to provide the necessary facilities for training medical researchers in Nigeria. Though the NIMR is a major Nigerian institute concerned with human medicine and research in Nigeria, it has not promulgated any formal guideline for the conduct of research involving human subjects.

2. International Context of Biomedical Research: Research Scandals.

Recent research scandals in Nigeria have raised ethical anxieties that are better understood in a historical perspective. This involves the clinical trial of trovan for the treatment of epidemic meningitis. Also important are questions of the ethical appropriateness of placebo-controlled studies in some African countries used to determine the effect of a short-course zidovudine in reducing prenatal transmission of HIV.[31] Institutional or ethics review of biomedical research[32] has some interesting international historical background.

In the nineteenth century, gonorrhea and syphilis studies were undertaken by medical scientists who were characterized by Vikenty Veressayev as "bizarre disciples of science," and "zealots of science," in Germany, France, Russia, Ireland, and the United States of America.[33] The gonorrhea study involved the inoculation of gonorrhea-free (healthy) patients without their consents with pure cultures of gonococcus to prove that it was the agent responsible for gonorrhea.[34] Similar inoculations were undertaken with respect to syphilis to demonstrate that it was contagious in its secondary stage.[35] The syphilis study was so outrageous that even after Ricord, the greatest opponent of the hypothesis that secondary syphilis was contagious, had accepted his error, unethical and unconsented inoculations with the disease were still

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28. *Id.* § 11, Schedule 3.

29. Research Institutes (Establishment, etc.) Order 1977, Annual Volume of the Laws of the Federal Republic of Nigeria (1977).

30. *Id.* § 8(c).

31. For African countries involved in the trial and the literature on the debate, see *supra* notes 11-12.

32. Known in Canada as a Research Ethics Board (REB) and in the United States as the Institutional Review Board (IRB).

33. VIKENTY VERESSAYEV, THE MEMOIRS OF A PHYSICIAN 332-66 (Alfred A. Knopf ed., & Simeon Linden trans., 1916).

34. *Id.*

35. *Id.*

carried out by some investigators, despite the abundant scientific proof contrary to their hypothesis, thus rendering more victims to science.[36]

A. The Tuskegee Syphilis Study.

Between 1930 and 1973, the U.S. Department of Public Health Services (USPHS) conducted research on the natural progression of syphilis in Tuskegee, Macon County, Alabama.[37] The research subjects in the Tuskegee study were mainly poor African- Americans, many of whom suffered from syphilis but were denied treatment as part of the study design despite the availability of penicillin in the 1950s as an effective treatment for the treatment of the disease.[38] Even before penicillin became standard care for syphilis, arsenotherapy was available during the study as an effective treatment for the disease. Nonetheless, the subjects were denied that intervention because of the study's predication on nontreatment.[39] Moreover, participants in the Tuskegee study were prevented from obtaining private treatment for the disease even though medical and health services were available.[40] When some of the Tuskegee study subjects died, the USPHS induced family members to give consent for anatomical examination for the last stage of the study.

The subjects of the Tuskegee study were told that the objective of the study was to treat them, so instead of obtaining their informed consent, the USPHS deliberately deceived them.[41] Also, the study was not submitted to nor approved of by an ethics committee.[42] However, ethics review procedures did not come into existence until the 1960s.[43] For the USPHS, it is arguable that since ethics review procedures are not retrospective, the USPHS was justified to believe that the Tuskegee study, which began in the 1930s, was excluded from review. Though this argument offers some vindication, the USPHS remains morally responsible for the ethically problematic research.

In the early 1970s, the Tuskegee study was made public, necessitating the empanelling of an ad hoc advisory committee. The committee presented a report to the Assistant Secretary for Health in 1973 with scathing findings that the Tuskegee study was not undertaken with the informed consent of

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36. *Id.*

37. JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT (1993).

38. *The 40-Year Death Watch*, MED. WORLD NEWS, Aug. 18, 1972, at 15-17; Doleres Katz, *Why 430 Blacks with Syphilis Went Uncured for 40 Years*, DETROIT FREE PRESS, Nov. 5, 1972.

39. Allan M. Brandt, *Racism and Research: The Case of the Tuskegee Syphilis Study*, Hastings Center Rep. 21, 26-27 (1978), *available at* http://www.sciencemag.org/cgi/content/full/284/5416.919 (last visited Aug. 25, 2003).

40. *See id.* at 25.

41. *See id. See also* Amy L. Fairchild & Ronald Bayer, *Uses and Abuses of Tuskegee*, 284 SCIENCE 919 (May 7, 1999), *available at* http://www.sciencemag.org/cgi/content/full/284/5416/919 (last visited Sept. 23, 2003).

42. JONES, *supra* note 37, at 1.

43. *See* Ferguson, *supra* note 19. *See also* Roman, *supra* note 19.

research subjects and that the subjects were unjustifiably denied penicillin when it became available in the 1950s.[44] Civil litigation brought by surviving research subjects and the estates of diseased ones followed, but ended in monetary settlements. More troubling for the Tuskegee study was that despite the 1940s enunciation of the Nuremberg Code on the ethics of medical research and the wide public uproar ignited by the publicizing of the unethical research at the Jewish Chronic Disease Hospital in the 1960s,[45] the Tuskegee study continued without alteration. The unjustifiable continuation of the Tuskegee study may be with some racist undertones.[46] Brandt strongly argued that the historical context of the study captured the racist prejudice against African Americans, and then-prevailing medical attitudes toward blacks, disease, and sex. Furthermore, it underpinned the dismissive and lackadaisical attitude of the medical community and U.S. government until horrors of the study were brought to the peoples' conscience by the U.S. press.[47] A contemporary consequence of the Tuskegee study is the current distrust of medical experimentation and medical researchers that African-Americans hold.[48]

B. The Nuremberg Medical Case

It was the trial of Karl Brandt and others (now called the Medical Case) between 1946 and 1947 by the Nuremberg Military Tribunal that shook the confidence of the international community in the propriety of leaving research subject protection and welfare to the sole judgment and conscience of an investigator.[49] The Karl Brandt trial revealed horrendous experiments conducted by some Nazi scientists and physicians on prisoners in concentration camps without their consent or any form of ethics or institutional review.[50]

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44. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, FINAL REPORT OF THE TUSKEGEE SYPHILIS STUDY AD HOC ADVISORY PANEL (1973).

45. JAY KATZ, EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS 10-11 (1972).

46. Some authors have argued that there is a connection between racism and certain experimentation with human subjects. *See* Annette Dula, *Yes, There Are African-American Perspectives on Bioethics*, *in* BIOETHICS: AN INTRODUCTION TO THE HISTORY, METHODS, AND PRACTICE 252-54 (Nancy S. Jecker et al. eds., 1997); Herbert Aptheker, *Racism and Human Experimentation*, 53 POL. AFFAIRS 27-60 (1974); Brandt, *supra* note 39.

47. Brandt, *supra* note 39.

48. THE HUMAN RADIATION EXPERIMENTS, FINAL REPORT OF THE PRESIDENT'S ADVISORY COMMITTEE (1996). *See also* Fairchild & Bayer, *supra* note 41.

49. M. GRODIN, *Historical Origins of the Nuremberg Code*, *in* THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 121-44 (G.J. Annas & M. Grodin eds., 1992); Matthew Lippman, *The Nazi Doctors Trial and the International Prohibition on Medical Involvement in Torture*, 15 LOY. L.A. INT'L COMP. L.J. 410 (1993).

50. Such unethical experiments included the following: deliberate infection with typhus, malaria, and epidemic jaundice, yellow fever, smallpox, paratyphoid, cholera, and diphtheria to test the efficacy of experimental vaccines and drugs; high-altitude experiments in which nonconsenting subjects were locked in low pressure chambers that mimicked the atmospheric

Though the defendants at the Nuremberg Military Tribunal claimed that their actions were justifiable under the existing domestic law and were not condemned by then prevailing international law, the Tribunal presented ten basic principles of ethical, moral, and legal complexion that provided the measure of the defendants' actions.[51] These principles crystallized into what is known as the Nuremberg Code,[52] and they set minimum standards for the ethical conduct of biomedical research. Normatively, the Nuremberg Code is at least part of customary international law[53] and binds member states of the United Nations.[54] However, its existence has not prevented subsequent research scandals.[55]

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conditions and pressures prevailing at high altitude up to 68,000 feet; freezing experiments in which victims were denuded and exposed for long hours to temperatures below freezing point or placed inside a tank of ice water; deliberate infliction of battle-like wounds and aggravated infection thereof to test the efficacy of sulfanilamide and other drugs; deliberate poisoning of the food of victims to determine the effects of certain poisons and bullets on human beings; sexual sterilization experiments using surgery, high-dose x-rays, and pharmacological techniques; and the deliberate killing of some Jewish prisoners to provide skulls and skeletons for cranial and racial research at the Reich University of Strasbourg. *See United* States v. Karl Brandt, *reprinted in* KATZ, *supra* note 45, at 292-94.

51. Excerpt of the judgement of the Nuremberg Military Tribunal is reproduced in CLINICAL INVESTIGATION IN MEDICINE: LEGAL, ETHICAL, AND MORAL ASPECTS 116-19 (Irving Ladimer & Roger W. Newman eds., 1963).

52. For the early attempts at the international level to codify the principles enunciated by the Nuremberg Military Tribunal, see ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 232-44 (1962).

53. Pascal Arnold & Dominique Sprumont, *The 'Nuremberg Code': Rules of Public International Law*, *in* ETHICS CODES IN MEDICINE: FOUNDATIONS AND ACHIEVEMENTS OF CODIFICATION SINCE 1947 90 (Ulrich Tröhler & Stella Reiter-Theil eds., 1998).

> Due to the Nuremberg Code's continuing and uniformed applications (*usus*) by a majority of countries, as well as the general recognition of its binding nature (*opinio juris*), these basic principles have become rules of customary international law. In fact, they are applied in the common interest of all nations and are so deeply rooted in the international legal consciousness that they constitute peremptory public international law (*ius cogens*). This means that they cannot be modified by any State or professional organization, either by statute or ethical guidelines.

Id. *See also* Todres, *supra* note 12, at 750-52.

54. CHRISTINE V. D. WYNGAERT & GUY STESSENS, INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS 50 (1996).

55. For instance, in 1963, twenty-two chronically ill and debilitated patients at the Jewish Chronic Disease Hospital (JCDH) in Brooklyn were given injections of live cancer cells to study their immunologic status, or their rejection responses. The study was a non-therapeutic clinical research project and was funded by the United States Public Health Service and the American Cancer Society. *See* letter from Chester M. Southam, M.D. to Emmanuel Mandel, M.D. on July 5, 1963, *reprinted in* JAY KATZ, EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS 10-11 (1972). The patients' consent was not obtained and the study was not submitted for institutional review. *See id.* The litigation that followed exposure of this unethical research, brought by one of the directors of JCDH, gives useful insights into the mood of the public concerning human subject experimentation. *Id.* Despite investigation by the State Department of Education and Kings County District into the JCDH scandal, a director of the JCDH brought an action in court seeking access to medical records of the hospital to investigate

The Western world witnessed other historic medical research scandals. For instance, the cold war motivated unethical radiation experiments conducted or sponsored by U.S. governmental agencies,[56] the controversial experimental drug trials on U.S. soldiers during the 1991 Gulf War,[57] and research on deceased persons and their parts in Canada,[58] the United States,[59] the U.K.,[60]

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facts concerning the alleged unethical and improper experiments on some of the hospital's patients. *See id.* In *Hyman v. Jewish Chronic Disease Hosp.*, 206 N.E.2d 338 (1965), the defendants argued that the hospital records were confidential and that the plaintiff was not personally liable for the wrongdoing and unethical research conducted by the hospital. The court held that as a director, the plaintiff was entitled to know the facts upon which the potential liability of the hospital rested. It further held that the plaintiff was entitled to inspect records that reveal improper and unethical research by the hospital and any confidentiality would be protected by an appropriate order of the court as to concealment of the names of individual patients. In addition, the Attorney General of New York, pursuant to the applicable Education Law, brought a petition in the Board of Regents Grievance Committee (BRGC) for the revocation of the licenses of the principal investigators (Dr. Southam and Dr. Mandel) in the cancer study. The BRGC found the investigators guilty of the allegations in the petition and recommended their censure and reprimand. While accepting the findings of the BRGC, the Board of Regents of the University of the State of New York modified the sentences by suspending the licenses of the investigators for a year but stayed execution of the suspension.

56. *See* Trudo Lemmens, *In the Name of National Security: Lessons from the Final Report on the Human Radiation Experiments*, 6 EUR. J. HEALTH L. 7-23 (1996); George J. Annas, *Some Choice: Law Medicine, and the Market* 157-60 (New York: Oxford University Press) (1998); E. Welsome, *The Plutonium Experiment*, ALBUQUERQUE TRIBUNE, Nov. 15-17, 1993; THE HUMAN RADIATION EXPERIMENTS, FINAL REPORT OF THE PRESIDENT'S ADVISORY COMMITTEE (1996); In re Cincinnati Radiation Litigation, 874 F. Supp 796 (S.D. Ohio 1995), Beckwith, J. observed:

> The allegations in this case indicate that the government of the United States, aided by officials of the City of Cincinnati, treated at least eighty-seven of its citizens as though they were laboratory animals. If the Constitution has not clearly established a right under which these plaintiffs may attempt to prove their case, then a gaping hole in that document has been exposed. The subject of experimentation who has not volunteered is merely an object.

Id.

57. *See* George J. Annas, *Changing the Consent Rules for Desert Storm*, 326 NEW ENG. J. MED. 770 (Mar. 12, 1992). Though use of the experimental drugs (pyridostigmine bromide 30 mg tablets and pentavalent botulinum toxoid vaccine) without prior consent of soldiers was allowed by the U.S. Food and Drug Administration (FDA), and subsequently by the court, the ethics of that incident remain controversial. *See id. See also* Annas, *supra* note 56, at 132-39; E.J. Schuchardt, *Walking a Thin Line: Distinguishing Between Research and Medical Practice During Operation Desert Storm*, 26 COLUM. J. L. & SOC. PROB. 77-115 (1992); G.J. Annas & M.A. Grodin, *Treating the Troops: Commentary*, 21 Hastings Center Rep. 24 (1991); *Informed Consent for Human Drugs and Biologics; Determination That Informed Consent Is Not Feasible, Fed. Reg. 1990;* 55: 52813-52817; 21 C.F.R. § 50.23(d); Doe v. Sullivan, 756 F. Supp 12 (D.C. Cir. 1991); Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991).

58. Charlie Gillis, *Doctor Left Autopsies Unfinished in Halifax: Children's Organs Found in Warehouse*, NAT'L POST, Oct. 3, 2000, at A8.

59. Paul Wildie, *Husband Sues After Brain Tissue Taken From Dead Wife*, NAT'L POST, Jan. 29, 2000, at A13; Peter Gorner, *Parents Suing Over Patenting of Genetic Test: They Say Researchers They Assisted are Trying to Profit From a Test for a Rare Disease*, CHI. TRIB., Nov. 19, 2000, at A1.

60. Stephen White, *The Law Relating to Dealing with Dead Bodies*, 4 MED. L. INT'L 145 (2000).

and Australia,[61] without a family member's consent.[62] However, contemporary research scandals in the West mainly concern conflict of interest issues.[63] Interestingly, a recent medical research scandal in Nigeria exhibits patterns of the historic genre. This may excuse any effort to sensitize developing countries to the ethically problematic aspects of medical research by drawing their attention to the unhappy historical moments of experimentation with human subjects.[64]

3. Trovan Clinical Trial in Nigeria by Pfizer.

During the first quarter of 1996, there was an epidemic outbreak of meningitis in Kano, a northern Nigerian city. Doctors Without Borders (a medical non-governmental organization) rushed to the area to provide treatment with a cheap and internationally recommended antibiotic, chloramphenicol. Within weeks of the epidemic, Pfizer also learned about it from an internet site and quickly mobilized its research team to fly into the Nigerian city of Kano and conduct a clinical trial of its new drug, trovafloxacin (hereafter, trovan). It seemed that objections from Dr. Juan Walterspiel, a Pfizer medical scientist, regarding the ethics of the trial could not deter Pfizer, which later dismissed Dr. Walterspiel from its employment.[65]

The trial, which started on or about March 22, 1996, was to determine the efficacy of trovan in the treatment of meningococcal meningitis and to compare it to ceftriaxone, the gold standard for treating the disease. The trial

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61. Michael Perry, *Body-Parts Supermarket Causes Uproar in Australia: No consent for Research*, NAT'L POST, Mar. 20, 2001, at A13.

62. *See generally* Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L & COMP. L. REV. 19 (2002).

63. There is a growing body of literature on conflict of interest in biomedical research. *See* David Blumenthal, *Biotech in Northeast Ohio Conference: Conflict of Interest in Biomedical Research*, 12 HEALTH MATRIX 377 (2002); J.A. Goldner, *Dealing with Conflicts of Interest in Biomedical Research: IRB Oversight as the Next Best Solution to the Abolitionist Approach*, 28 J.L. MED. & ETHICS 379 (2000); K.C. Glass & T. Lemmens, *Conflict of Interest and Commerciliazation of Biomedical Research: What Is the Role of Research Ethics Review?*, *in* THE COMMERCIALIZATION OF GENETIC RESEARCH: ETHICAL, LEGAL AND POLICY ISSUES 79 (T. Caulfied & B. Williams-Jones eds., 1999); CONFLICTS OF INTEREST IN CLINICAL PRACTICE AND RESEARCH (R.G. Spece et al. eds., Oxford University Press 1996); M. Little, *Research, Ethics and Conflicts of Interest*, 25 J. MED. ETHICS 259 (1999); R.A. Phillips & J. Hoey, *Constraints of Interest: Lessons at the Hospital for Sick Children*, 159 C.M.A.J. 955 (1998); *A Curious Stopping Rule from Hoechst Marion Roussel*, 350 LANCET 155 (July 19, 1997); *Good Manners for the Pharmaceutical Industry*, 349 LANCET 1635 (June 7, 1997); E.J. Emmanuel & D. Steiner, *Institutional Conflict of Interest*, 332 N. Eng. J. Med. 262 (1995); K.C. Glass & T. Lemmens, *Research Involving Humans*, *in* CANADIAN HEALTH LAW AND POLICY 459, 466-75 (J. Downie et al. eds., 2002); Grimes v. Kennedy Krieger Institute, 782 A.2d 807 (2001).

64. Henry K. Beecher, *Medical Ethics and Medical History: Experimentation in Man*, *in* CLINICAL INVESTIGATION IN MEDICINE: LEGAL, ETHICAL AND MORAL ASPECTS, *supra* note 51, at 2-39.

65. Tamar Lewin, *Families Sue Pfizer on Test of Antibiotic*, Aug. 30, 2001, *at* http://www.mercola.com/2001/sep/8/pfizer.htm (last visited Nov. 11, 2003).

was conducted in the Kano Infectious Disease Hospital, part of the hospital complex of Aminu Kano University Teaching Hospital. Two hundred Nigerian children were enrolled in the study; one hundred of them were assigned to the trovan arm, while the other one hundred were used as active controls and were given ceftriaxone, though it was alleged that some of the children in the control group were not given the proper dosage of ceftriaxone. At the end of the trial, five children on the trovan arm died and six children on the control arm died. Many others were alleged to have suffered brain damage, paralysis, or became deaf. Pfizer is yet to make any follow-up visit to the Nigerian research participants.

Pfizer was accused of not obtaining informed consent from the parents of the children enrolled in the study. The parents of the research participants could not speak English, and they believed that their children were receiving effective treatment rather than being enrolled in clinical research.[66] Pfizer denied the claims made against it, alleging that nurses at the hospital explained the study in lay terms to the parents and obtained their verbal consent. Pfizer further alleged that those parents were informed that alternative treatment, offered by Doctors Without Borders (operating in the same hospital), was available, and that in terms of percentage, the death toll from the study was lower than that of the disease. Pfizer claimed that the study was primarily a humanitarian effort that saved about 189 lives, and made drugs and equipment available to the hospital. However, a commentator questioned Pfizer's humanitarian claims and asked: "But why . . . did [Pfizer] not fly in substantial supplies of the rather more expensive drug it was using as a comparison to Trovan so that every sick child could have a better chance of life?"[67]

More relevant for this article, however, is the allegation that ethical approval for the trovan study was not given by Nigerian authorities, contrary to Pfizer's contention.[68] In 1997, when Pfizer submitted its application to the U.S. Food and Drug Administration for the use of trovan in the treatment of a meningitis epidemic, it included a document purporting to have approval for the Nigerian study given by the Kano Infectious Disease Hospital's ethics committee. However, in a recent telephone interview by the Washington Post with some of the Nigerian doctors who participated in the study (and those alleged to have been members of the ethics committee),[69] it was revealed that the ethical approval letter was written one year after the study had taken place and was backdated. The telephone interview further disclosed that the Kano

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66. *Id.*

67. Sarah Boseley, *Ailing Ethics: A Clinical Trial Raises Disturbing Questions About Drug Companies' Activities in Africa*, THE GUARDIAN, Jan. 20, 2001, at 20, *available at* http://www.guardian.co.uk/comment/story/0,3604,425450,00.html (last visited Sept. 5, 2003).

68. *See* Sam Eferaro, *NAFDAC Okayed Pfizer's Trovan Trials*, VANGUARD DAILY (Lagos) Jan. 8, 2001. The Nigerian National Agency for Food and Drug Administration and Control (NAFDAC), however, did approve the importation of trovan into Nigeria. *Id.*

69. Joe Stephens, *Doctors Say Trial's Approval Was Backdated*, WASH. POST, Jan. 16, 2001, at A1.

Hospital did not have an ethics committee at the time of the clinical trial.[70] What is often not clear in some of the materials on the Nigerian trovan trial is whether Pfizer also obtained ethical review and approval of the Nigerian study in United States, as required by international guidelines and U.S. domestic legislation. If the Washington Post's position on the lack of ethical approval for the trovan study was accepted, then it is arguable that the omission contributed to the death of some of the Nigerian children in the study, though it is not clear that if there had been a proper and effective ethics committee, it would have stopped the study or made it achieve positive results.

Trovan reached the U.S. market in 1998, and made about $160 million in the first year, but its use was not approved for children. In 1999, following complaints of liver damage, the FDA further restricted its use.[71] The trovan study in Nigeria has been the subject of administrative inquiry in Nigeria,[72] and has been litigated in Nigerian and the U.S. courts.[73] It has also helped to draw attention to the unacceptable consequences of some biomedical studies sponsored by external agencies and corporations in developing countries. Probably more important, it has helped to highlight the importance of and need for ethics review of research in many developing countries.

4. The Concept and Nature of Ethical Review.

As part of the international and domestic response to some of the above scandals, many current research guidelines embody an important procedural ethics requirement.[74] This means that a research protocol must receive the prior approval of an ethics committee before its execution.[75] Guideline 2 of the Council for International Organization of Medical Sciences (CIOMS) provides that every research proposal involving human beings must be "submitted for review of their scientific merit and ethical acceptability to one or more scientific review and ethics review committees."[76] In weaker terms, the World Medical Association research guideline (the Declaration of Helsinki) stipulates that experimental protocol involving human subjects "should be

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70. *Id.*

71. *See* Lewin, *supra* note 65.

72. *Pfizer Drug Trial in Nigeria Being Investigated*, 357 LANCET 9250 (Jan. 13, 2001).

73. *See* Lewin, *supra* note 65.

74. WORLD HEALTH ORGANIZATION, OPERATIONAL GUIDELINES FOR ETHICS COMMITTEES THAT REVIEW BIOMEDICAL RESEARCH (2000) [hereinafter WHO]; *see also* NBAC, *supra* note 3, at 5. The NBAC observed that "ethically sound research must comply with an important *procedural requirement*–prior ethical review by a body that is competent to assess compliance with these substantive ethical principles." *Id.*

75. *See generally* BOWEN HOSFORD, BIOETHICS COMMITTEES: THE HEALTH CARE PROVIDER'S GUIDE 8-16 (1986).

76. COUNCIL FOR INTERNATIONAL ORGANIZATION OF MEDICAL SCIENCES, INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS CIOMS, Guideline 2 (2002), *available at* http://www.cioms.ch/frame_guidelines_nov_2002.htm (last visited Sept. 5, 2003) [hereinafter CIOMS].

submitted for consideration, comment, guidance, and where appropriate, approval to a specially appointed ethics review committee."[77] The guideline by International Conference on Harmonization (ICH-GCP)[78] and many domestic and national guidelines require similar provisions. Research on identifiable human tissues or data is included within the rubric of "research involving human beings," or "human experimentation."[79]

Generally, the normative character of some of the guidelines makes them legally and judicially unenforceable,[80] though other means of enforcement, such as discipline by a professional group or denial of funding by a grant agency, may be available. Institutional or ethical review of clinical research, or any research involving human subjects, has become an acceptable standard for determining the ethics of human experimentation.[81] The framework of institutional review is intended to protect the rights, safety, and welfare of research subjects,[82] and to promote public confidence and trust in biomedical investigation and integrity of the process.[83] Institutional review has also become the cornerstone of biomedical research funding and its emergence was suggested to have been partly responsible for the progressive increase in biomedical research budgets and funding in the United States.[84] Though the mere existence of an ethics review committee neither guarantees the complete absence of unethical research[85] nor necessarily facilitates societal confidence in the integrity and responsibility of scientific researchers, it does promise to

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77. World Medical Association, *Ethical Principles for Medical Research Involving Human Subjects*, Oct. 2000, World Medical Assembly, art. 13 [hereinafter *Declaration of Helsinki*].

78. INTERNATIONAL CONFERENCE ON HARMONIZATION OF TECHNICAL REQUIREMENTS FOR REGISTRATION OF PHARMACEUTICALS FOR HUMAN USE—GOOD CLINICAL PRACTICE: CONSOLIDATED GUIDELINE, ICH, May 1996. *See also*, WHO, *Guidelines for Good Clinical Practice (GCP) for Trials on Pharmaceutical Products*, WHO Technical Report Series, No. 850 (1995); *Proposal for a European Parliament and Council Directive on the Approximation of Provisions Laid Down by Law, Regulation or Administrative Action Relating to the Implementation of Good Clinical Practice in the Conduct of Clinical Trials on Medicinal Products for Human Use*, COM (97) 306 final.

79. *See* LADIMER & NEWMAN, *supra* note 51, at 18. *See also* CIOMS, *supra* note 76, Guideline 1, commentary; *Declaration of Helsinki*, *supra* note 77, art. 1.

80. *See* The Common Rule, 45 C.F.R. § 46; the U.S. Food and Drug Administration, 21 C.F.R. § 50, 21 C.F.R. § 56, 21 C.F.R. § 312; U.S. Agency for International Development, 22 C.F.R. § 225 (all explaining that in the United States, the guideline on human subjects protection and the ethical review of research involving human participants is statutory and judicially enforceable).

81. *See* NUFFIELD COUNCIL ON BIOETHICS, *supra* note 6, at 101.

82. *See* WHO, *supra* note 74, at 1.

83. Robert A. Pearlman, *Introduction to the Practice of Bioethics*, *in* BIOETHICS: AN INTRODUCTION TO THE HISTORY, METHOD AND PRACTICE, *supra* note 46, at 260-61.

84. NATHAN HERSHEY & ROBERT D. MILLER, HUMAN EXPERIMENTATION AND THE LAW 1-2 (Aspen Systems Corporation 1976).

85. NUFFIELD COUNCIL ON BIOETHICS, *supra* note 6, at 103 (documenting examples of unethical biomedical research conducted in the United States despite the existing Nuremberg Code).

be a veritable framework for curbing the excesses of protocols that pay scant attention to other overriding societal values.[86] As Pope Pius XII once said that "science is not the highest value to which all other orders of values . . . should be subordinated."[87] Thus, the existence of ethics review reaffirms society's conviction that social or moral considerations should be infused into scientific enterprise.[88]

Apart from professional or industrial self-regulation, there are at least four regulatory models of ethics review.[89] Thus, a valid statute or piece of legislation could make ethics review a legal requirement for the conducting of research involving human beings.[90] Penal sanctions could accompany non-compliance.[91] Less specifically, formal legislation may compulsorily require biomedical research institutions to devise their own ethics review systems. Furthermore, government research agencies may develop guidelines that make ethics review a prerequisite for funding.[92] Lastly, ethics review may be incorporated by a cross-reference national legislation.[93]

Whatever the mode of regulation, an ethics review committee should possess certain core characteristics.[94] It should be independent of the investigators conducting the research, as well as competent and multi-disciplinary in nature so as to provide a complete review of the scientific and ethical aspects a protocol.[95] It should not have, or must at least declare, any interest that conflicts with an objective assessment of a protocol,[96] and should be able to monitor a study after approval.[97] An ethics review committee should have the power to reject a protocol that it considers to be ethically problematic, and to

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86. A.M. Capron, *Human Experimentation, in* MEDICAL ETHICS 156 (Robert M. Veatch ed., 2nd. ed. 1997).

87. Pope Pius XII, *The Moral Limits of Medical Research and Treatment* 1952, Rome, Italy: Address Presented at First International Congress on Histopathology of Nervous System, *at* http://www.ewtn.com/library/PAPALDOC/P12PSYCH.htm (last visited Mar. 19 2003).

88. *Id.*

89. Marie Hirtle, Trudo Lemmens, & Dominique Sprumont, *A Comparative Analysis of Research Ethics Review Mechanisms and the ICH Good Clinical Practice Guideline*, 7 EUR. J. HEALTH L. 267 (2000).

90. *See supra* note 80. *See also* Simon Verdun-Jones & David N. Weisstub, *The Regulation of Biomedical Research Experimentation in Canada: Developing an Effective Apparatus for the Implementation of Ethical Principles in a Scientific Milieu*, 28 OTTAWA L. REV. 297, 340 (1996-97).

91. Hirtle, Lemmens, & Sprumont, *supra* note 89, at 268.

92. *Id.*

93. *Id.*

94. Verdun-Jones & Weisstub, *supra* note 90, at 330-39; CIOMS, *supra* note 76, Guideline 2; Declaration of Helsinki, *supra* note 77, art. 13.

95. WHO, *supra* note 74, at 2-3.

96. *Id.* at 4.

97. JUDITH WILSON ROSS, HANDBOOK FOR HOSPITAL ETHICS COMMITTEES 31-70 (1986); HOSFORD, *supra* note 75.

accept a scientifically and ethically sound protocol with or without modifications.[98]

A. *Ethical Review in Nigeria*

Nigeria does not have any formal regulatory system of ethics review, or research guideline produced by the country's medical research institutions or governmental agencies that fund medical research. This regulatory deficiency was probably responsible for the trovan tragedy in Nigeria. No state or federal statutory enactment in Nigeria directly regulates the conduct of research involving human subjects, though a variety of statutes may indirectly impinge on human subject experimentation in Nigeria. It is arguable that the regulatory void in many African countries,[99] including Nigeria, is a deliberate health policy by these countries, geared towards attracting desperately needed biomedical research sponsored by developed foreign countries, multinational corporations, and international organizations.[100] Often access to health care services and expensive interventions needed to combat the scourge of diseases, like HIV/AIDS, can only be obtained in many developing countries through participation in clinical trials. Thus, attracting these trials by means of favorable regulatory environment ensures access to highly needed health care.

The unsatisfactory regulatory situation in many African countries could also be the result of institutional incapacity in bioethics or the feeling that available international ethical guidelines make domestic regulation otiose.[101] With struggling economies, absence of R & D capacity, and faced with the HIV/AIDS pandemic, in addition to other public health emergencies like malaria and tuberculosis, African countries are tempted to take advantage of foreign-sponsored research enterprises, even when they entail insignificant respect for the autonomy, rights, and welfare of research subjects. Thus, poverty and disease, in combination with other factors, make it difficult for some developing countries to adopt a formal regulatory approach that may

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98. CIOMS, *supra* note 76, Guideline 2. *See also*, Benjamin M. Meier, *International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent*, 20 BERKELEY J. INT'L L. 513, 542 (2002) (observing that the ethical committee recommended by the Helsinki Declaration did not have any power to reject protocols that infringed informed consent rules).

99. The few African countries that have research ethics guidelines include Uganda and South Africa. *See generally* Sana Loue & David Okello, *Research Bioethics in the Ugandan Context II: Procedural and Substantive Reform*, 28 J.L. MED. & ETHICS 165 (2000); *Guidelines on Ethics for Medical Research, at* http://www.mrc.ac.za/ethics/ethics.htm (last visited Sept. 22, 2003); *Guidelines for Good Practice in the Conduct of Clinical Trials in Human Participants in South Africa, at* http://196.36.153.56/doh/docs/policy/trials/trials_contents.htm (last visited Sept. 22, 2003).

100. *See* Miller, *supra* note 15, at 212; Meier, *supra* note 98, at 532-34.

101. Zulfiqar A. Bhutta, *Ethics in International Health Research: A Perspective from the Developing World*, 80 BULL. WORLD HEALTH ORG. 114, 115 (2000), *available at* http://who.int/docstore/bulletin/pdf/2002/bul-2-5-2002/80(2)114-120.pdf (last visited Sept. 5, 2003).

inhibit potentially beneficial biomedical experimentation. But it is doubtful whether under-regulation or zero regulation in a developing country legitimizes a clinical trial sponsored therein in breach of international ethical guidelines, the Nuremberg Code, and the domestic law of the sponsors.[102]

Evidence of a regulatory structure in Nigeria arises only by implication of its membership in certain international bodies, either directly or through professional organizations in Nigeria. Because the Nigerian Medical Association (NMA)[103] is a member of the World Medical Association,[104] the Helsinki Declaration, which provides for ethics review of research involving human beings, applies in Nigeria to research conducted by members of the Nigerian Medical Association.[105] The obvious gap is that there is no other form of an ethical review requirement for human subject research conducted by non-physicians in Nigeria, physicians who are not members of the Nigerian Medical Association, and private entities in Nigeria.[106] Though the Nuremberg Code has force in Nigeria as a peremptory norm of public international law,[107] it does not impose a requirement for ethical review. The unsatisfactory regulatory situation in Nigeria may be a reflection of its comparatively low biomedical research activities. After a visit to some teaching hospitals in Nigeria in 2001 and 2002, my personal impression was that some of them only have a faint idea of what ethical review means, and only a few of them probably have an established ethical review committee, functioning more or less on an ad hoc basis. For instance, there are ethical review committees in the teaching hospitals of the University of Lagos, and the University of Ibadan.[108] These are Nigerian universities in big cities that attract significant international collaboration in biomedical research. For instance, the collaboration in the 1990s between some Nigerian investigators and US researches on the genetic and environmental determinants of hypertension, breast cancer, and diabetes mellitus in Nigeria.[109]

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102. *See* Todress, *supra* note 12; Lewin, *supra* note 65 (regarding possible legal liability in this kind of scenario).

103. Nigerian Medical Association, *at* http://www.nigeriannma.org (last visited Sept. 5, 2003).

104. *Id.*

105. P.I. Okolo, *Medical Ethics in Nigeria*, *in* MEDICAL PRACTICE & THE LAW IN NIGERIA 8-19 (Benjamin C. Umerah ed., 1989).

106. *See* A.A. Christakis & J. Panner, *Existing International Ethical Guidelines for Human Subjects Research: Some Open Questions*, 19 LAW, MEDICINE, & HEALTH CARE 214, 217 (1991) (addressing limitations of the Helsinki Declaration, which indirectly applies in Nigeria). "International ethical guidelines are not, however, despite any invocation to such effect, designed to be a code capable of regulating conduct in specific situations. Without further elaboration and implementation on a local level, the broad aspirational notions expressed remain no more than that—a valuable but incomplete system." *Id.*

107. Tröhler & Reiter-Theil, *supra* note 53.

108. Marshall, *supra* note 1, at 4.

109. *Id.*

It is tempting to suggest that even the few Nigerian institutions that provide ethical review committees do so in response to collaborative studies with the United States whose legislation obliges such a review in a host country.[110] The corollary is that many potential research subjects in Nigeria are likely to be denied of the protections afforded by the existence of a regular, functional, and competent ethics committee.[111]

B. Ethical Review of Externally Sponsored Research in Nigeria.

As observed above the ethical review of biomedical research is generally not developed in Nigeria and is likely to be available only with respect to externally sponsored research. Guideline 3, CIOMS (2002) provides for the ethical review of externally sponsored research as follows:

> An external sponsoring organization and individual investigators should submit the research protocol for ethical and scientific review in the country of the sponsoring organization, and the ethical standards applied should be no less stringent than they would be for research carried out in that country. The health authorities of the host country, as well as a national or local ethical review committee, should ensure that the proposed research is responsive to the health needs and priorities of the host country and meets the requisite ethical standards.[112]

To qualify as an externally sponsored research, the research (or part of a multipart trial) should be undertaken in a host country "but sponsored, financed, and sometimes wholly or partly carried out by an external international or national organization or pharmaceutical company with the collaboration or agreement of the appropriate authorities, institutions and personnel of the host country."[113]

Guideline 3 aims to ensure that biomedical research undertaken in a resource-poor country, such as many African and developing countries, is given proper ethical consideration that recognizes the rights, dignity, and

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110. *See, e.g.*, the Common Rule, 45 C.F.R. § 46.101. Similarly, the National Bioethics Advisory Committee observed that in "29 percent of studies reported by U.S. researchers, the host country ethics review committee was established because of U.S. regulations." NBAC, *supra* note 3, at 82. *See also* N. Kass & A. Hyder, *Attitudes and Experiences of U.S. and Developing Country Investigators Regarding U.S. Human Subjects Regulations, in* National Bioethics Advisory Commission, II ETHICAL AND POLICY ISSUES IN INTERNATIONAL RESEARCH: CLINICAL TRIALS IN DEVELOPING COUNTRIES (2001).

111. *See* WHO, *supra* note 74.

112. CIOMS, *supra* note 76, Guideline 3.

113. *Id.*

welfare of the research subjects.[114] This provision becomes more crucial in the context of low regulatory visibility in many African host countries, and the temptation for researchers from developed and wealthy sponsoring countries to think that the abundance of impoverished research subjects in a region of near regulatory void is a warrant for ethical impropriety.[115] Globalization not only of goods and services but also of clinical trials has brought the aforementioned temptation within the realm of reality.[116] Because of a number of factors present in developing countries-for instance low income, widespread unemployment, illiteracy, poverty and disease-citizens of developing countries are much more vulnerable and available to be research subjects.[117] These factors, in addition to a favorable regulatory climate in many developing countries, comparative reluctance by citizens of developed countries to enroll as research subjects, bureaucratic control of research in many wealthy nations, and low cost of conducting clinical trials in developing countries, make it more advantageous for some biomedical researchers and industries in the North to conduct their clinical trials in developing countries.[118]

Regrettably, the globalization of biomedical research has left in its wake evidence of the unsavory consequences of the economic inequality between the north and south.[119] For instance, Chang described how the human-subject experimentation relating to H. Pylori bacterium conducted by the United States National Cancer Institute in a rural province of China in 1988 led to an increase of about forty percent in the disease infection.[120] Without any form of legally enforceable post-trial obligation on visiting researchers, research injuries of this kind will be rampant in developing countries. The willingness of drug agencies in some developed countries to accept data generated from a clinical trial in a developing country would only intensify the current rush for human research subjects abroad.[121] Though globalization of clinical trials

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114. Robert J. Levine, *International Codes of Research Ethics: Current Controversies and the Future*, 35 IND. L. REV. 557, 563 (2002).

115. Ileana Dominguez-Urban, *Harmonization in the Regulation of Pharmaceutical Research and Human Rights: The Need to Think Globally*, 30 CORNELL INT'L L. J. 245, 270-71 (1997).

116. *See* Flaherty & Stephens, *supra* note 10, at A3. "Drugmakers in the United States and other wealthy nations are increasingly testing new medicines in developing countries where costs are low, patients plentiful and government oversight lax." *Id.*

117. Shah, *supra* note 13, at 1-6; Miller, *supra* note 15, at 219-20.

118. *Id. See also* NBAC, *supra* note 3, at 1.

119. Esther Chang, *Fitting a Square Peg into a Round Hole?: Imposing Informed Consent and Post-Trial Obligations on United States Sponsored Clinical Trials in Developing Countries*, 11 S. CAL. INTERDISC. L.J. 339 (2002) (discussing the ethical and legal problems of conducting clinical trials in developing countries and the reaction of the US National Bioethics Advisory Commission in 2000).

120. *Id.*

121. US Food & Drug Administration, *Guidance for Industry: Acceptance of Foreign Clinical Studies* (2001), *available at* http://www.fda.gov/cber/gdlns/clinical031301.htm (last visited Sept. 22, 2003). *See also* Lisa R. Pitler, *Ethics of AIDS Clinical Trials in Developing Countries: A Review*, 57 FOOD & DRUG L. J. 133, 152 (2002).

is theoretically unproblematic, it is necessary that rapid internationalization of ethical guidelines and standards should accompany this globalization and hinder the potential opportunities for abuse of clinical trials in poor, developing countries. Thus, to reduce the risk of ethical misconduct during biomedical research in a host country, Guideline 3, above, stipulates a two-fold process of ethical review.

First, the relevant ethical review board in the sponsoring country would scrutinize the proposed research both for its scientific and ethical validity. Even at this stage, the sponsoring country's review board is required to take into consideration the customs and traditions of the host country that may influence the ethics of the proposed research. Since members of the review board are geographically distanced and likely to be unfamiliar with the cultures of a foreign country, adequate cultural sensitivity, and an understanding of how the culture affects the review process may be difficult to achieve. In recognition of this problem, the commentary on Guideline 2 recommends that a sponsor country's ethical review committee should include someone conversant with the customs and traditions of the host country.[122] If we accept Benatar and Singer's call for a proactive approach to international research ethics,[123] then it becomes clear that a sponsor's ethics committee would have socioeconomic and political considerations that may be external to strict ethical review.[124] These authors contend that because of gross inequality in global health, foreign investigators should demonstrate sufficient knowledge of the social, economic, and political circumstances of the host country in which their research takes place. Host countries may ultimately benefit from this demonstration because the foreign investigators "might influence political leaders in their countries to promote more equitable relations with the host country in which the research was conducted."[125] This represents an ideal to be pursued. However, whether a sponsor's ethics committee should reject ethical protocol based on an investigator's insufficient knowledge of the socioeconomic and political history of the host country is not clear.

The second stage of the two-fold review process of externally sponsored research is the submission of the protocol to the relevant ethics board in the host country, which must ensure that the research is scientifically and ethically

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122. CIOMS, *supra* note 76, commentary on Guideline 2.

123. Solomon R. Benatar & Peter A. Singer, *A New Look at International Research Ethics*, 321 BMJ 824 (2000).

124. These considerations have already been identified by Benater and Singer as knowledge of:

> (a) the sociology of pharmaceutical research; (b) the political relation between the sponsoring and host countries–for example, how the host country fits into the sponsoring country's policy, what economic aid is provided, the nature of any debt relations, and the extent of arms trading between the two countries; and (c) the human rights achievements of the sponsoring and host countries.

Id. at 826.

125. *Id.*

sound with regard to its overall circumstances and that it meets the host country's needs and priorities.[126] It is important for the host country's ethics committee to review not only the ethical merit of the protocol, but also its relevance to the host country's priorities, which could be medical or socio-economic.[127] For instance, in a resource-poor host country with a small pool of doctors, which are desperately needed for more pressing medical emergencies, their diversion to externally sponsored research on a less prevalent disease, such as cancer, may be in dissonance with the priorities of the host country. Dickens noted the ability of sponsored studies in host countries to distort the priorities of the host and reflect those of the sponsors.[128] He opined that the "diversion of assets from host countries' priorities to those of developed study-sponsoring countries, even when what is accomplished in a host country is of value, is a form of imperialism."[129]

Though a host country's ethical review is potentially capable of obviating this bioethical imperialism, considerable problems arise for host countries without any form of a regular and functional ethical review board. In a bid to attract potentially beneficial biomedical research, a poor host country may quickly raise an ethics committee with little or no idea of its mandate. Such a review committee will simply rubber-stamp the protocol at the expense of the rights, welfare, and dignity of research subjects.[130] What should be done in these circumstances? Should a sponsoring country abandon the research due to the incapacity of ethical review in the host country? Should it conduct such research even when it compromises international ethical guidelines or domestic legislation of the sponsor? In other words, is under-regulation or zero regulation an excuse for conducting ethically problematic research in a host country?[131]

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126. The National Bioethics Advisory Commission recommended that "[c]linical trials conducted in developing countries should be limited to those studies that are responsive to the health needs of the host country." NBAC, *supra* note 3, at 8.

127. *See* B.M. Dickens, *Research Ethics and HIV/AIDS*, 16 MED. LAW 187, 195 (1997). *See generally* Anthony Costello & Alimuddin Zumla, *Moving to Research Partnerships in Developing Countries*, 321 BMJ 827 (2000), *available at* http://www.bmj.bmjjournals.com (last visited Oct. 4, 2003).

128. *Id.*

129. *Id.*

130. The NUFFIELD COUNCIL ON BIOETHICS observed that:

> In some instances, researchers may submit research for approval in developing countries, only to have it 'approved' within a few days, with no amendments of changes proposed. Under these circumstances concerns have been expressed that officials in developing countries do not recognize the need for effective ethical review and consider it to be simply a formality.

NUFFIELD COUNCIL ON BIOETHICS, *supra* note 6, at 104.

131. It has been suggested that ethical and legal lapses by U.S. investigators who conduct clinical trials abroad which result in injury to participants are actionable in the United States. *See* Todres, *supra* note 12, at 750. Similarly, some of the victims of the Nigerian trovan trial brought a case in the U.S. that is still pending. *See* Lewin, *supra* note 65.

Though different answers to these questions are possible, a strict adherence to the provisions of the CIOMS guideline would mean that a sham ethical review is equivalent to no review at all. This means that, absent a competent and functional ethics committee in the host country, executing a research protocol may amount to an infraction of international ethical guidelines. Moreover, the loose regulatory situation in the host country does not exempt the sponsor from any domestic legislation (in the sponsoring country) that compulsorily requires ethical review in a host country. Even without such a requirement, it is morally unconscionable for a foreign investigator or agency to conduct in a host country research that would be ethically problematic and impermissible in the sponsor's country.

Furthermore, the provisions of CIOMS as to the constitution[132] and composition[133] of an ethics review board does not differentiate between a host and sponsoring country, or a developing and developed country. Thus, a sponsoring country should, despite the willingness of a host country to forgo strict compliance with ethical review requirement, insist on a proper review conducted by a competent ethics board. The sponsor should exhibit a stand on ethical review that countervails the desperation of a host country. Dickens suggests that a sponsor could assist in developing the ethical review capacity for the host country.[134] Another author suggests that funding ethical review in the host country should be reflected in the protocol and be part of the ethical review in the sponsoring country.[135] These suggestions are legitimate and acceptable provided the sponsor does not, in the guise of providing institutional capacity, supplant the ethical review in the host country. Thus, help should relate to such matters as training, education, and supply of equipment. Where, however, the sponsor is a private, multinational corporation with considerable commercial interest in the research, it may find the unsatisfactory regulatory situation in the host country very convenient, and probably unwilling to insist on real ethical review.

C. Conflict of Ethical Expectations.

Even with the availability of competent and efficient ethical review in both of sponsor and host countries, cultural relativism potentially ensures contradictory review by both committees. For instance, a seroprevalance study in Tanzania entailed sampling the blood of an infant upon birth as well as its mother's blood.[136] A U.S. Institutional Review Board approved the study on

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132. *See* CIOMS *supra* note 76, Guideline 2.

133. *Id.*

134. *See* Dickens, *supra* note 127, at 828.

135. *See* Robert Mittendorff II, *Primum Non Nocere: Implications for the Globalization of Biomedical Research Trials*, 25.2 FLETCHER F. WORLD AFF. 239, 247 (2001).

136. *See* Michele Barry, *Ethical Considerations of Human Investigation in Developing Countries: The AIDS Dilemma*, 319 NEW ENG. J. MED. 1083 (1988).

the condition that research participants would be informed of the test results.[137] However, Tanzanian authorities demanded that the research subjects should neither know of the blood draws nor the test results. This attitude reflected local sensitivity to the trauma consequential to disclosure of HIV status and lack of effective intervention in Tanzania. Because of this conflict, the study was abandoned.[138] Conflict in ethical expectations is a significant problem that demands urgent attention and critical analysis. A host country's ethical committee may find proposed research ethical and in accordance with its cultural norms and traditional lifestyle. However, an ethics committee of the sponsor with a different cultural background may find the same protocol unethical. In that case, the protocol would not pass the requirement of concurrent review and approval; thus, potentially beneficial research would be abandoned due to cultural differences.[139] However, there may be ways to negotiate this problem.[140] First, a protocol that satisfies the ethical requirement of the host country may easily find favor with the ethical committee in the sponsor-country, even when it does not strictly comply with the sponsor's ethical guidelines.[141] Second, the host country's ethical review committee might be given a presumptive claim to ethical guidance.[142] Third, the host and sponsor country's ethical review committees may cooperate and agree that each reviews specific and different aspects of the protocol in a non-contradictory manner. This type of cooperation is encouraged by CIOMS.[143]

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137. *Id.*

138. *Id.*

139. NUFFIELD COUNCIL ON BIOETHICS noted that:

> Where there are irreconcilable differences between research ethics committees, a committee may choose not to approve the research. If a committee from a sponsoring country does not approve the research, the sponsor cannot fund it. If a research ethics committee from a developing country does not approve the research, then the research cannot be conducted within that country.

NUFFIELD COUNCIL ON BIOETHICS, *supra* note 6, at 108.

140. *See* NUFFIELD COUNCIL ON BIOETHICS, *supra* note 6, at 107-08 (suggesting a negotiation that mediates the differences between the two committees). *See also* Christakis & Panner, *supra* note 106, at 219.

141. Dickens, *supra* note 127, at 196. This may easily be the case where the sponsor country has cultural affinity with the host country. For instance, a U.S. Institutional Review Board may be willing to accept the review of a Canadian Ethics Review Board due to cultural and legal similarities between the two countries.

142. *See* Christakis & Panner, *supra* note 106, at 219.

> The host country for the research, or, more specifically, the representatives of research subjects, should have a presumptive claim to ethical guidance. In the event of a conflict, the host country's ethical standards, if they are more restrictive, should always prevail. In other words, if there are tow interpretations of what would be ethical—one favoring the research and the other barring the research—if the interpretation barring the research is favored by the host community, the research must be viewed as unethical.

Id.

143. *See* CIOMS, *supra* note 76, Guideline 3, commentary.

In the Nigerian context, however, empirical data gathered by Marshall shows that the aforementioned bioethical negotiation and mediation may be difficult to achieve. She reported that some Nigerian investigators perceived U.S. institutions to be inflexible and not amenable to culturally sensitive modifications suggested by the Nigerian investigators.[144]

5. Policy and Legal Options for Nigeria.

A. Promulgation of a Research Ethics Guideline.

As this review shows, Nigeria does not have formal and systematic guidelines for the conduct of research involving human participants, except to the extent that the Helsinki Declaration or the guidelines of a sponsoring country are indirectly applicable. This regulatory deficiency is deplorable considering the significant number of teaching hospitals in the country, some of which are already engaged in important international biomedical research collaboration.[145] Under-regulation increases the potential risk of exploitation in Nigeria by international corporations seeking clinical trials in countries with zero or minimal regulation.[146] Moreover, Nigeria's regulatory situation disqualifies it from taking advantage of certain provisions of the U.S. Common Rule. For instance, there is a provision in the Common Rule that permits reliance on a host country's ethics guidelines.[147] The criteria for making deter

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144. *See* Marshall, *supra* note 1, at C-25.

> Nigerian investigators discussed administrative issues regarding the process of obtaining approval from ethical review committees. Several investigators commented on the difficulties of responding to the requirements of funding agencies in the United States and at local Nigerian institutions. They said it was particularly frustrating to try to respond to what they perceived as inconsistent requirements for ethical review. A physician in Lagos reported difficulties at many levels: dealing with the informed consent document itself, having to "fight with Washington" to change the consent form, and then going through the process of making the form useful and appropriate for his patients in Nigeria.

Id.

145. *See* Marshall, *supra* note 1, at C-11.

146. I have already argued that some developing countries deliberately adopt a policy of zero or minimal regulation in order to attract needed biomedical research. In that context, "exploitation" may not be an appropriate word to use for a corporation or foreign researcher that takes advantage of the policy.

147. The Common Rule, 45 C.F.R. § 46.101(h) states:

> When research covered by this policy takes place in foreign countries, procedures normally followed in foreign countries...may differ from those set forth in this policy. [An example is a foreign institution which complies with guidelines consistent with the World Medical Assembly Declaration (Declaration of Helsinki amended 1989) issued either by sovereign states or by an organization whose function for the protection of human research subjects is internationally recognized.] In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head

minations of equivalence and the other complex issues surrounding it have not been systematically addressed by the relevant authorities in the United States.[148] It is clear, however, that even assuming determinations of equivalence to be easy, Nigeria does not stand to gain from the above provision without any formal research ethics guidelines in Nigeria.

Accordingly, it is strongly recommended that urgent steps be taken in Nigeria to regulate biomedical research by the promulgation of research ethics guidelines. The guidelines could be statutorily enacted by each of the thirty-six States in Nigeria and/or the Federal Government of Nigeria.[149] Relevant U.S. legislation could be helpful as a guide. Alternatively, the Nigerian Federal Ministry of Health, the Nigerian Medical Association, the National Institute of Medical Research, Lagos, and the Nigerian Institute of Pharmaceutical Research, Abuja could alone, or in combination, produce a formal and non-statutory guideline similar to the Canadian Tri-Council Policy Statement.[150] There are numerous examples of domestic and international guidelines to draw from.[151] Nigeria will particularly benefit from the examples of fellow African countries, such as the guidelines in Uganda[152] and South Africa.[153]

The AIDS pandemic in Uganda attracted considerable HIV/AIDS related research sponsored by foreign entities, and provided the catalyst for a profound national reflection on the ethics of biomedical research. This led to the 1997 promulgation of formal ethics guidelines for the conduct of research involving human participants in Uganda. The new Ugandan guideline took three years to materialize. The guideline is not a legally binding instrument and a summary account of its legislative history and provisions was given by Loue and

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may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy.

Id.

148. *See* BERNARD M. DICKENS, THE CHALLENGE OF EQUIVALENT (2001).

149. This may eventually turn on the legislative competence of the federal and state governments with respect to biomedical research involving human participants.

150. *See generally* Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans, MEDICAL RESEARCH COUNCIL OF CANADA, NATURAL SCIENCES AND ENGINEERING RESEARCH COUNCIL OF CANADA, SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA (1998), *available at* http://www.nserc.ca/programs/ethics/english/ethics-e.pdf (last visited Oct. 10, 2003).

151. *See* Dickens, *supra* note 148, at 15. (noting the multiplicity of such domestic and international guidelines).

152. GUIDELINES FOR THE CONDUCT OF HEALTH RESEARCH INVOLVING HUMAN SUBJECTS IN UGANDA (Nat'l Consensus Conference on Bioethics and Health Research in Uganda, 1997) [hereinafter THE UGANDAN GUIDELINE].

153. *See* GUIDELINES ON ETHICS FOR MEDICAL RESEARCH (1993), *available at* http://www.mrc.ac.za/ethics/ethics.htm (last visited Oct. 4, 2003). *See also* GUIDELINES FOR GOOD PRACTICE IN THE CONDUCT OF CLINICAL TRIALS IN HUMAN PARTICIPANTS IN SOUTH AFRICA (2000), *available at* http://196.36.153.56/doh/docs/policy/trials/trials_01.html (last visited Oct. 4, 2003).

Okello.[154] The Ugandan guideline was preceded by a National Consensus Conference (NCC) with a diverse and all-encompassing representative membership.[155] No doubt, the desirable constitution of the NCC facilitated acceptance of the guidelines it formulated. The provisions of the Ugandan guideline reflect an adroit contextualization of current international and domestic ethics guidelines in some developed countries. Specifically, the Ugandan guidelines reflect the need for an ethics guideline to be responsive to the peculiarities of a country, its history, culture, political, economic, social, and health conditions.[156]

The Ugandan guideline underscores the primacy of ethical review in the research enterprise by establishing a three-tier ethical review process,[157] including the power to terminate or suspend any protocol conducted in contravention of original approval.[158] Inculcating these lessons from Uganda would require that Nigeria begin to mobilize public debate on the desirability and means of realizing a formal ethical guideline regulating the conduct of research involving human subjects. The Nigerian media should play a leading role in that regard.[159] Nigeria does not need to await an epidemic explosion of the scourge of HIV/AIDS before abandoning its flippant attitude towards biomedical research regulation. If any catalyst was needed, then the trovan trial in which several Nigerian children died was enough.[160] It is regrettable that the Nigerian press quickly withdrew its searchlight on the trovan episode soon

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154. Sana Loue and David Okello, *Research Bioethics in the Ugandan Context II: Procedural and Substantive Reform*, 28 J. L. MED. & ETHICS 165 (2000). Loue and Okello also observed that the new Ugandan guideline lacked "a viable enforcement mechanism to ensure compliance with the Guidelines." *Id.* at 171.

155. For instance:

> Voting representatives included individuals from various governmental organizations such as the Ministry of Health, the Ministry of Defense, the Attorney General's Office, the Uganda National Council of Science and Technology (UNCST), the National Drug Authority, and the National Cancer Institute; Makerere University; various medical associations, such as the Protestant Medical Association; nursing and pharmacists' professional organizations; various churches, legal service agencies, human rights organizations, and media personnel. The NCC had been widely advertised to encourage attendance and participation of non-affiliated persons. These include, for instance, university students, participants in ongoing research, and freelance media personnel.

Id. at 165.

156. Because of the oppression of many Ugandans during the regimes of the country's tyrannical and despotic leaders, the Ugandan guideline broke ground with tradition and custom by requiring individual and voluntary informed consent rather than consent from a local leader, husband, or head of the family.

157. "The Guidelines establish multiple levels of review, beginning at the institutional level with institutional review committees (IRCs) and extending to the AIDS Commission for HIV-related research and to the NCST for all research, including that which is HIV-related." Loue & Okello, *supra* note 154, at 165.

158. *Id.* at 166.

159. The Nigerian Medical Association should also play an active role in promoting public awareness of the ethics of biomedical research and the need for formal regulation.

160. *See* Shah, *supra* note 13, at 4.

after it became known to the public, leading to a loss of regulatory momentum gained at the time of publication of the scandal.

B. Building and Strengthening Capacity in Ethical Review.

The review of research protocol by a competent and independent ethics review committee is a fundamental safeguard for research participants and promotes public confidence in the ethics of biomedical research.[161] Despite the importance of ethical review, the procedure is lacking in some developing countries and poorly executed in others. Recall that the trovan scandal in Nigeria centered on the alleged lack of ethics approval before the commencement of the trial.[162] As stated earlier, some Nigerian research institutions do not have an ethics review committee. Where evidence of ethics review capacity is present, it is probably due to collaboration with international researchers and research institutions, such as the United States.

For the few Nigerian institutions with any semblance of an ethical review process, ethics review is debilitated by a host of factors including administrative cost and lack of expertise in bioethics. According to an empirical study of some investigators in Nigeria, a researcher personally bore the administrative cost related to a protocol evaluation of an ethics review committee, despite the researcher's limited resources.[163] It is, therefore, suggested that the proposed Nigerian biomedical research guideline should contain detailed provisions on the constitution, membership, function, and funding of an ethics review committee. Without sufficient funding and training programs for ethics committees, the ethics of biomedical research will not improve.[164] The Nuffield Council on Bioethics estimated that the operating costs of a research ethics committee in the UK was about £36,000 and up to U.S. $500,000 per annum in the United States.[165] Though the cost of operating a research ethics committee in Nigeria is likely to be lower, it still represents a significant amount that may unduly burden the parent institution of an ethics committee. Thus, the federal government of Nigeria, through the Federal Ministry of Health, should financially support the ethics committees established in federal universities and research institutions, and the State Ministry of Health should provide similar support for a State university ethics committee.

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161. WHO, *supra* note 74, at v.

162. *See* Stephens, *supra* note 13, at A1.

163. Marshall, *supra* note 1, at C-25.

164. *See* Peter A. Singer & Solomon R. Benatar, *Beyond Helsinki: A Vision for Global Health Ethics*, 322 BMJ 747-48 (2001), *available at* http://www.bmj.bmjjournals.com (last visited Oct. 4, 2003).

165. The NUFFIELD COUNCIL ON BIOETHICS, *supra* note 6, at 106.

Moreover, Nigeria, and indeed many developing countries, will require international help in building and strengthening ethics review committees.[166] Singer and Benatar have suggested the creation of a global alliance between international donors to promote bioethical capacity in developing countries. Among the duties of this proposed bioethical body would be to establish thirty bioethics training centers in developing countries that would each produce twelve trainees a year.[167] This training project is estimated to cost about $100,000,000 in total.[168] Some international organizations or agencies are already responding to the problems of capacity building in developing countries. For instance, the Forgarty International Center (FIC), at the National Institutes of Health, supports and promotes international collaborative research in priority global health areas with a goal of reducing inequities in global health.[169] Part of FIC's objective is to "develop human capital and build research capacity in the poorest nations of the world where the need is the greatest."[170] Accordingly, in 2001, FIC announced five awards and three planning grants for the bioethical training of faculty from institutions in developing countries.

Similar support was provided by the Rockefeller Foundation in 1980 through the International Clinical Epidemiology Network (INCLEN), which identified and supported medical schools in a number of developing countries to train faculty in clinical epidemiology. Regionally, the Pan African Bioethics Initiative (PABIN) is a new African regional forum that intends to promote the development of systematic ethical review capacity in African countries.[171] In this regard, PABIN has already organized regional conferences, including a recent one in Addis Ababa, Ethiopia on 28-30 April 2003.[172] Similarly, the African Malaria Vaccine Testing Network (AMVTN), now African Malaria Network Trust (AMANET) was established in 1995 to facilitate "the planning, coordination and execution of malaria vaccine trials

166. Assistance in capacity building outside the realm of ethics review was rendered by the Swiss Tropical Institute (STI) between 1997 and 1998. *See* KFPE, *supra* note 14, at 24-26. During this time, STI helped the Ghanaian Navrongo Health Research Centre (NHRC) establish a microbiology laboratory to fight the epidemic meningitis afflicting northern Ghana. *See id.* STI has also provided equipment, and training for Ghanaians through exchange programs. *See id.* It will be exciting to see such assistance rendered in the area of ethical review.

167. *See* Singer & Benatar, *supra* note 164, at 747.

168. *Id.*

169. *See* Gerald T. Keusch, *Welcome to the Forgarty International Center*, *available at* http://www.fic.nih.gov/about/welcome.html (last visited Oct. 4, 2003).

170. *Id.*

171. *See* The NUFFIELD COUNCIL ON BIOETHICS, *supra* note 6, at 109.

172. *See* Pan-African Bioethics Initiative, *An International Conference on Good Health Research Practices in Africa*, *available at* http://www.fond-merieux.org/enseignement/PABIN%20meeting%20in%202003.pdf (last visited Oct. 4, 2003).

in Africa."[173] AMANET's objectives include developing research and ethics capacity in African countries in connection with its malaria vaccine project.[174]

Another option would be for a research ethics committee in Nigeria to charge fees for the review of research protocols. However, this may undermine the independence of an ethics committee and raise a conflict of interest that is inherently problematic in a commercial or for-profit ethics committee. To ameliorate these concerns, the Nuffield Council on Bioethics suggested that fees should be paid into a central fund or to a local or national government and devoted to financial support of ethics committees.[175] Absent any visible form of governmental support for ethics committees in Nigeria, it may be prudent to pay more attention to this option and develop ways to mitigate its negative impact on the independence of ethics committees.

CONCLUSION:

Despite Nigeria's involvement in biomedical research since colonial times, Nigeria does not have any formal framework for regulating research involving human participants. Although the Nuremberg Code and the Declaration of Helsinki apply in Nigeria, it is without the benefit of an implementing and elaborating domestic regulatory instrument. In 1996, Nigeria witnessed a biomedical research scandal that depicted lack of respect for the dignity and welfare of research participants. The research was not preceded by a competent ethics review of the protocol.

The under-regulation of medical research in Nigeria poses an enormous risk of harm to research participants. This risk increases with the globalization of clinical trials. Globalization of biomedical research makes it more lucrative for western biotechnology firms to conduct clinical trials in developing countries that have an abundance of research subjects afflicted with poverty and disease and lacking access to adequate health care. This situation renders citizens of many developing countries vulnerable and liable to research exploitation. Globalization of clinical trials has helped to underscore the inadequacies of current international and domestic research guidelines from developed countries. It has also highlighted the low regulatory visibility in some developing countries such as Nigeria. Thus, there is a need to rethink ethical principles guiding the conduct of biomedical research because their application in cross-cultural settings raises special difficulties.

Some of the provisions of CIOMS that attempt to deal with difficult issues of international biomedical research, such as the requirement for double

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173. The African Malaria Vaccine Testing Network, *at* http://www.amvtn.org (last visited Sept. 17, 2003).

174. *See* Trust Rules, The Constitution of the African Malarie Vaccine Testing Network, Art. 7 (2002), *available at* http://www.amvtn.org/Documents/AMANET_Trust_Rules.pdf (last visited Oct. 4, 2003).

175. *See* The NUFFIELD COUNCIL ON BIOETHICS, *supra* note 6, at 106.

review of externally sponsored research, are praiseworthy. However, their concrete application may be hampered by many factors, including the lack of bioethical capacity in some developing countries. Thus, this paper suggests that urgent steps be taken in Nigeria to promulgate a biomedical research guideline. Nigeria can draw from the Ugandan experience, whose recent guideline reflects the country's historical, economic, political, and social circumstances. Nigeria also has an urgent need for effective and competent ethics committees. International and regional agencies can help Nigeria develop ethics review capacity through funding, training, and education programs. Ethics review committees in Nigeria may also consider charging fees for protocol review, but this should be developed in a way that obviates harm to their independence.

ROLLIN', ROLLIN', ROLLIN' ON THE RIVER: A STORY OF DROUGHT, TREATY INTERPRETATION, AND OTHER RIO GRANDE PROBLEMS

Damien M. Schiff*

I. INTRODUCTION

Colonel Edward Hatch, Commander of the U.S. Ninth Cavalry, in his report to Congress detailing the actions he and his troops took to put down a disturbance that took place in late December of 1877 in the town of El Paso, Texas, over the attempted private appropriation of what theretofore had been public salt ponds, made the following observation:

> As long as the frontier remains as it is now, and there is little probability of it changing, troubles of a like nature, or even more serious, are likely to occur. One which must be looked for sooner or later is in connection with the water taken from the Rio Grande for irrigation. As soon as the attempt is made to largely extend cultivation in this valley (there will not be enough water for all, and both sides have an equal right), from this troubles are certain to arise sooner or later, which may involve the two countries seriously.[1]

Colonel Hatch's prescience is remarkable, although few Americans today are aware of the serious water crisis now besetting the Rio Grande Basin of southern Texas and northern Mexico. The natural cause of this crisis is drought, its legal cause the "Treaty between the United States of America and Mexico respecting utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande."[2] The problems posed by this dispute are more than

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1. H.R. EX. DOC. 45-85, at 5-6 (1878).

2. Feb. 3, 1944, U.S.-Mex, 59 Stat. 1219 [hereinafter 1944 Water Treaty]. The souring relationship now developing between the two countries is masked by the usual diplomatic flatteries and conceits exemplified by the closing line of the State Department's Joint Communique issued after the signing of International Boundary and Water Commission (IBWC) Minute 308 in late June of 2002: "The work carried out . . . demonstrates–once again–the excellent atmosphere that exists in the cooperative relationship between the United States and Mexico." U.S. DEP'T OF STATE, JOINT COMMUNIQUE OF THE UNITED STATES AND MEXICO CONCERNING THE WATER PROBLEM IN THE RIO GRANDE 2 (June 29, 2002), *at* http://www.ibwc.state.gov/PAO/CURPRESS/CurPress2/jointcommuniquefinal.htm (last visited Aug. 12, 2002). *But compare* Ross E. Milloy, *A Rift Over Rio Grande Water Rights*, N.Y.

academic. Scarcity of water in the Rio Grande Basin has produced serious economic consequences for both countries. The drought has cost Texas $175 million in crop losses since 1996.[3] In the Mexican state of Chihuahua alone, drought-related crop losses have cost the region 80,000 farm jobs.[4] Exacerbating the meteorological crisis is a 1.37 million acre-feet[5] debt that Mexico owes to the United States under a much maligned provision of the 1944 Water Treaty. The dispute over the treaty's interpretation could lead to the upset of a sixty-year old Rio Grande legal regime.

This Comment will analyze the 1944 Water Treaty and its subsequent developments, known as Minutes, to determine the legal standing of the signatory countries. Following that analysis, this Comment will discuss each side's position concerning the water debt and related provisions of the treaty. The argument herein is that the treaty ought to be retained because it is a proven framework through which the division and management of vital water resources have been made possible for the last half-century. But the retention of the treaty need not require the maintenance of the status quo. To the contrary, for the treaty to remain a fruitful basis for bi-national accord, the International Boundary and Water Commission (IBWC) must take up the charge of interpreting the treaty's provisions in a way that will preserve its essential purpose, viz. the equitable division of the waters of the Rio Grande and of the Colorado and Tijuana Rivers. This task must entail an extension of the time period within which Mexico is to pay its accrued water debt; a concerted effort by both sides substantially to reduce water waste caused by hydraulic infrastructure inefficiency; and the adoption of a plan to regulate expansion of beneficial uses in the Rio Grande Basin. The IBWC must nevertheless tread lightly, for any substantial move on its part, even with the approval of both countries' departments of state, may be tantamount to an amendment to the treaty, which would require ratification by the United States and Mexican Senates. That approval is by no means assured. If, however, the parties and the IBWC can steer an even course, with the aid of the aforementioned measures the current crisis will be resolved and the framework provided by the treaty itself will be preserved.

TIMES, Sept. 18, 2001, at A14 (quoting a Texas local irrigation official: "We are upset, angry and scared.... We've got farmers going out of business because Mexico has broken its promises on releasing water. That water is our lifeline, and they're shutting it off."). *See also* Dudley Althaus, *When Water Eludes Us All*, HOUSTON CHRONICLE, June 1, 2002, 2002 WL 3267505 (quoting a Mexican environmentalist: "What happens if this drought lasts three or four more years? . . . It would mean the collapse of the state [of Chihuahua]. If it's the survival of the state versus the needs of 2,000 Texas farmers, you have to balance the costs.").

3. Richard Boudreaux, *U.S., Mexico Reach Deal to End Water Dispute*, L.A. TIMES, June 29, 2002, at A5. Suffice it to say that this article's title represents a gross overstatement.

4. Chris Kraul, *Fox Vows to Repay Mexican Water Debt to U.S.*, L.A. TIMES, May 16, 2002, at A3.

5. One acre-foot is the quantity of water required to cover an area of one acre to a depth of one foot.

II. THE 1944 TREATY

A. *Historical Antecedents*

The 1944 Water Treaty was the natural offspring of over a century of river diplomacy between the United States and Mexico. On its face, the treaty purports to share equitably between the two countries the waters of the Rio Grande and of the Colorado and Tijuana Rivers. Much has changed in the region since the time of the treaty's ratification.[6] Today, with the exception of San Diego, the border region consists of ten million persons living in fourteen sister-city pairs.[7] The past sixty years have witnessed the creation of the maquiladora industry, which has brought great wealth and industrial development to the area.[8] The Rio Grande Basin itself has been the site of tremendous population growth: a 400 percent increase since 1950, spurred in part by NAFTA-related economic enrichment.[9] These changes, coupled with a severe decade-long drought, have created a wedge dividing the two countries. To understand how the present dispute has come about, one must first look to the past and to the prior dealings of the two countries over their shared streams.

1. Nineteenth-Century Treaties and Diplomacy

The first treaty between the United States and Mexico that touched upon the Rio Grande was the 1848 Treaty of Guadalupe Hidalgo,[10] commonly known as the instrument that ended the Mexican-American War. Article V of the treaty established the Rio Grande as the international boundary line dividing the two countries, but it is Article VII which proved to be a bone of contention between the treaty signatories in their subsequent water disputes. Article VII states that the Rio Grande, where it serves as the international boundary line, shall be open to the citizens of both countries for navigation, "and neither [country] shall, without the consent of the other, construct any

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6. At the turn of the century, the city of Juarez amounted to 8,000 persons, El Paso to 16,000; today, Juarez has more than a million, El Paso 600,000. Albert E. Utton, *Coping With Drought On An International River Under Stress: The Case of the Rio Grande/Rio Bravo*, 39 NAT. RESOURCES J. 27, 32 (1999). In the lower Rio Grande Basin, the population of Monterrey, Mexico, has increased over 1,600 percent in the last one hundred years; that of Brownsville, Texas, by the same factor. *Id.* at 33.

7. William A. Nitze, *Meeting the Water Needs of the Border Region*, POLICY PAPERS ON THE AMERICAS, Apr. 2002, at 6, *at* http://www.csis.org/americas/mexico/Nitze.pdf (last visited Nov. 12, 2003).

8. *Id.*

9. Hugh Dellios, *Sharing the Rio Grande*, CHI. TRIB., July 7, 2002, 2002 WL 2672875.

10. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

work that may impede or interrupt, in whole or in part, the exercise of this right . . . ."[11]

Reaffirmed in part by the 1853 Gadsden Purchase,[12] Article VII of the Treaty of Guadalupe Hidalgo was used by Mexico in the closing years of the nineteenth century to protest American development in the New Mexico portion of the Rio Grande Basin, especially the contemplated construction of the Elephant Butte Dam, which would substantially decrease the flow of the Rio Grande downstream and thereby reduce available water supplies to Mexican farmers and municipal residents. In 1889 the two sides took the first step toward resolving their differences by creating the International Boundary Commission (IBC), forerunner of the IBWC of the 1944 Water Treaty.[13]

The newly created IBC proved unable, however, to avoid a controversy over the American damming of the Rio Grande at Elephant Butte, New Mexico. Mexico contended that the United States was precluded by Article VII of the Treaty of Guadalupe Hidalgo from in any way impeding the navigability of the Rio Grande where it forms the international boundary; that actual and proposed American development had reduced the flow of the river; and, as a consequence, that its navigability was impaired.[14] Perhaps because the argument was a too-thin mask for its real interest in a sufficient water supply from the Rio Grande, Mexico offered an argument based upon a distinct theory: as the uses of the Mexicans in the Rio Grande Basin were so much older than those of the Americans, the Mexican claims ought not to be prejudiced by the effects of the newer uses.[15]

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11. *Id.* at 928.

12. Treaty with Mexico, Dec. 30, 1853, U.S.-Mex., 10 Stat. 1031, 1034 [hereinafter Gadsden Purchase].

13. Convention between the United States of America and the United States of Mexico to facilitate the carrying out of the principles contained in the treaty of November 12, 1884, and to avoid the difficulties occasioned by reason of the changes which take place in the bed of the Rio Grande and that of the Colorado River. Mar. 1, 1889, U.S.-Mex., 26 Stat. 1512, 1513 (extended indefinitely by the 1944 Water Treaty, *supra* note 2, at 1222).

14. James Simsarian, *The Diversion of Waters Affecting the United States and Mexico*, 17 TEX. L. REV. 27, 31-32 (1938).

15. *Id.* at 32. This argument represents a civil law version of the doctrine of "prior appropriation," defined in the seminal U.S. Supreme Court case of *California v. Arizona*, 238 U.S. 423, 459 (1931), as:

> [T]o take and divert a specified quantity [of water] and put it to beneficial use in accordance with the laws of the State where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations.

The decision is germane to the present inquiry because it, and its equally important predecessor, *Kansas v. Colorado*, 206 U.S. 46 (1907), were treated by the American (and perhaps by the Mexican) negotiators to the 1944 Water Treaty as a tacit rejection of the Harmon Doctrine, which holds that an upper-riparian nation can utilize all of the flow of a river, regardless of the harm done by the decrease in available water to a lower-riparian nation. For the opinions of the American negotiators, see *Hearings before the Committee on Foreign Relations United States Senate Seventy-Ninth Congress First Session on Treaty with Mexico Relating to the Utilization*

These arguments were rejected by the United States, based upon its theory of a state's absolute sovereignty and right of use over streams that flow through the state's territory, in spite of Mexico's counter argument that such

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of the Waters of Certain Rivers, 79th Cong., 1st sess, at 98-100 (Jan. 1945) [hereinafter *Hearings*]. For an exposition of the Harmon Doctrine, see *infra* note 210.

The import of *California v. Arizona* cannot be fully grasped without first noting that the Court had already decided, in *Kansas v. Colorado*, that interstate water law disputes were appropriately adjudicated as between sovereigns. To reach that conclusion, the Court began with the premise that "each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters," *Kansas*, 206 U.S. at 93, and the proposition that a state may choose whether to follow the traditional common law rule with respect to rivers or the one typically found in the sere climes of the western States. *Id.* at 94. In either case, the Court will treat the states of the Union in this field as sovereigns, "[e]ach state [standing] on the same level with all the rest," so that their relations *inter sese* are governed by "equality of right." *Id.* at 97. The upshot of this language is that the Mexican position of the late 1890s—which we shall see remained basically the same up through the signing of the 1944 Water Treaty—was not far removed from the opinion of the Supreme Court in the same area of international law, a fact no doubt used by Mexico as a bargaining tool during the negotiations leading up to the 1944 Water Treaty.

It is interesting to note that the Court has continued to move toward the old Mexican position, which is based upon the principles of equitable use. The Court now disfavors the strict application of the prior appropriation doctrine as between states when it would deprive a state of all use of a watercourse's flow. In *Colorado v. New Mexico*, 459 U.S. 176, 178 (1982), the Court was faced with a New Mexico statute that had authorized the total appropriation of the Vermejo River. A strict application of the prior appropriation doctrine would have denied Colorado, *the upper-riparian state*, any diversion from the Vermejo. *Id.* at 180. Rejecting New Mexico's argument that its senior use claims should be recognized unless doing so would endanger an "existing economy built upon junior appropriations," *id.* at 184, the Court held that the rule of prior appropriation should not be rigorously applied if the hardship thus placed upon the junior user would be greater than the benefit gained by the senior user. *Id.* at 186. On remand to the special master, Colorado failed to prove by a clear and convincing standard that its proposed diversion of the Vermejo River would produce for it a benefit greater than the harm that would be done to New Mexico by the same diversion. Colorado v. New Mexico, 467 U.S. 310, 321 (1984). Beyond the benefit-harm balancing test, the Court noted that, for a state to divert water for future uses under a theory of equitable apportionment, it was required to prove that the senior user could adopt reasonable conservation measures to ameliorate the effects of the proposed diversion by the junior user. *Id.* at 323-24.

The Court has for some time followed this doctrine of equitable apportionment in adjudicating interstate water disputes. The doctrine, designed to secure a just and equitable allocation of a river's flows, is applied by considering

> physical and climactic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former.

Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) (decided in the same year as ratification of 1944 Water Treaty). The foregoing list is not exhaustive of the factors taken into account, although prior uses will be given great weight when the balancing is done.

Given that the Supreme Court has adopted a riparian jurisprudence very similar to that espoused by Mexico in the years leading up to the negotiation of the 1944 Water Treaty, should any dispute over the treaty's provisions find its way before an international tribunal, Mexico could undoubtedly use the U.S. Supreme Court's adoption of the Mexican position in arguing its case.

a position was inappropriate for an international watercourse like the Rio Grande.[16] The dispute came to the forefront in the early part of the twentieth century, and saw its temporary resolution in the 1906 Rio Grande Convention.[17]

2. *The 1906 Rio Grande Convention*

The terms of the 1906 Rio Grande Convention are simple and straightforward. Article I requires the United States to deliver to Mexico, at the completion of the Elephant Butte Dam along the Rio Grande in New Mexico, an annual quantity of 60,000 acre-feet of water,[18] and to pay for all the costs involved in the annual transport of water to Mexico.[19] Especially important is Article II, which states that, in the event of "extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to Mexico shall be diminished in the same proportion as the water delivered to lands [from the Elephant Butte Reservoir] in the United States."[20] This phrase is substantially similar to that found in Article 10 of the 1944 Water Treaty, which permits the United States to reduce deliveries of water from the Colorado River to Mexico.[21] In fact, American negotiators to the 1944 Water Treaty used the language of Article II of the 1906 Rio Grande Convention as the basis for the "extraordinary drought" provisions of the later document.[22] Emphasizing the purportedly ad hoc nature of the agreement, Article V makes clear that the convention would have no precedential value and could not be construed by either party as a definitive acknowledgment by the United States of some principle of international law governing the division of the waters of shared streams.[23] This valuable provision avoided tying the hands of American negotiators in the bargaining sessions leading up to the signing of the 1944 Water Treaty. For this and other reasons, the convention has been lambasted by Mexican commentators.[24] It was, then, in a somewhat

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16. Simsarian, *supra* note 14, at 32.

17. Convention With Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 [hereinafter 1906 Rio Grande Convention].

18. *Id.* at 2954.

19. *Id.*

20. *Id.*

21. 1944 Water Treaty, *supra* note 2, at 1237-38. *See also infra* Part II.B.

22. *See* Charles J. Meyers & Richard L. Noble, *The Colorado River: The Treaty With Mexico*, 19 STAN. L. REV. 367, 411-15 (1966-67). *See also Hearings*, *supra* note 15, at 92-93. "As I say, that particular provision was patterned after a similar one that is to be found in the treaty of 1906 with Mexico, and we experienced no difficulty with that." Statement of Frank B. Clayton, Counsel, American Section, International Boundary Commission, *cited in* Meyers & Noble, *supra*, at 411 n.202.

23. 1906 Rio Grande Convention, *supra* note 17, at 2955.

24. The Mexican complaint stems from the alleged difference in meaning between the English and Spanish versions of the convention. In Article IV of the same, the English version uses the phrase "of any claim" in reference to the extent of the Mexican renunciation of future

unfriendly and strained environment that negotiations leading to the 1944 Water Treaty commenced.

3. The Making of the 1944 Water Treaty

Following the triumph (or fracas) of the 1906 Rio Grande Convention, little effort was made toward negotiating a comprehensive water treaty until the late 1920s, at which time the American and Mexican sections of the International Water Commission[25] began formal talks with the aim of negotiating a solution.[26] Their hopes were soon dashed when a series of impasses arose during discussions. To begin with, Mexico asked for an annual Colorado

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grounds of protest; the Spanish version reads "derecho" for "claim." Wherever else the word "claim" is used in Article IV or V, the Spanish word used is "reclamación." The American drafters of the convention were from the eastern U.S. and, being unfamiliar with the niceties of water law jargon, used the word "claim" to mean both water right and legal right. Mexican negotiators understood "reclamación" in the traditional sense, i.e. the right of prior appropriation. It was this right only that Mexico was willing to give up; it did not intend to forfeit its "derecho based on current Treaties and the norms of International Law; and, in any event, the Spanish language does not have words to express the foreign legal terms of the appropriation doctrine, instead needing to supplement them with short phrases in conformity with the meaning of each sentence." 1 ERNESTO ENRÍQUEZ COYRO, EL TRATADO ENTRE MÉXICO Y LOS ESTADOS UNIDOS DE AMÉRICA SOBRE RÍOS INTERNACIONALES 253 (1975).

Coyro's argument is that Mexico did intend to give up any additional future claim to the annual 60,000 acre-feet entitlement it received under the convention, but it had no intention of putting to rest its earlier claims (derechos) based upon the Treaty of Guadalupe Hidalgo and international law in general. *Id.* The use of the word "reclamación" conjured in Mexican minds the doctrine of prior appropriation; the English equivalent in the convention, viz. claim, was interpreted by the Americans in its traditional—but not Mexican—sense of a right enforceable in a court of law. *Id.* Coyro quotes from a letter of Mexican Ambassador to the U.S. Joaquín Casasús, who represented Mexico during the convention's negotiation, wherein Casasús claims that

> the purpose of the Treaty is to give us [Mexico] the water we have claimed, without having to declare we have had a right to it, because then it would admit that they [the U.S.] have had no reason or motive for the prolonged discussions over the subject.

Id. at 260. Coyro concludes that the 1906 Rio Grande Convention was "an injury for Mexico in light of current Treaties and International Law; for the U.S.A., the success of an imposition of its power." *Id.* at 266.

During the Senate ratification hearings for the 1944 Water Treaty, the American Commissioner of the International Boundary Commission, L.M. Lawson, described the Mexican position in 1906 as "the principle whereby established beneficial uses of water are deemed entitled to protection against encroachment resulting from upstream diversions." *Hearings*, *supra* note 15, at 23. He added that the same principle was applied in calculating the Rio Grande and Colorado River allotments made under the 1944 Water Treaty. *Id.* But when asked by Senator Downey of California whether it was true that, prior to the 1906 Rio Grande Convention, Mexico had "direct-flow rights in the Rio Grande of 60,000 acre-feet," Lawson pithily replied "[s]he may have had the rights, but she did not have the water." *Id.* at 42.

25. The International Water Commission is an ad hoc committee consisting of American and Mexican representatives whose powers and privileges were eventually transferred to the International Boundary Commission.

26. Charles A. Timm, 10 DEPT. OF STATE BULL. 282, 285 (1944).

River allotment of 4.5 million acre-feet; the United States was willing to go only so far as 750,000 acre-feet.[27] The Mexican and American sections also disagreed as to the precedential value that ought to be accorded the 1906 Rio Grande Convention.[28] Lastly, the two sides strongly disagreed over the proper division of the waters of the Rio Grande: the U.S. section wished to have current uses protected,[29] while the Mexican section demanded that all waters reaching the main channel of the Rio Grande be shared equally between the two countries.[30]

A related stumbling block to these negotiations was whether Mexico would guarantee the perpetuation of the Texas agricultural projects south of Fort Quitman.[31] In that part of the Rio Grande, seventy percent of the river's inflows come from the Mexican tributaries of the Rio Conchos and San Juan River,[32] but Texas farmers would be the ones relying most upon the Rio Grande's flows in that segment.[33] As aforementioned, Mexico wished to allow each country to exploit fully its own tributaries and then merely to divide equally between each other the flows that reached the Rio Grande.[34]

Although the two countries maintained a discussion of the water dispute through diplomatic communiques,[35] the immediate impetus for the recommencing of negotiations leading to the ratification of the treaty was the

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27. H.R. DOC 71-359, at 5 (1930).

28. *Id.* Point I(a) of the statement of the Mexican Section of September 2, 1929, in regard to the 1906 agreement, claimed that "it was not the main purpose of this convention to settle the problems of the waters between the two countries, notwithstanding that it so states." *Id.* at 6.

29. "The American section feels that a treaty should be entered into between the United States and Mexico whereby existing uses that have grown up in either country for the waters of the Rio Grande would be recognized and perpetuated . . . ." *Id.* at 28.

30. *Id.* at 61. The Mexican section wanted no restriction on Mexico's use of its Rio Grande tributaries and justified its position with what can best be termed as the Mexican variant of the Harmon Doctrine: "The Mexican section stated that it could not agree to this or to any restriction on the complete sovereignty of Mexico and its right to use all of the water of its tributaries to the Rio Grande . . . ." *Id.* at 14.

31. Timm, *supra* note 26.

32. *Id.* at 285.

33. *Id.*

34. *Id.*

35. In a letter dated December 27, 1939, Under Secretary of State Welles suggested to the Mexican Ambassador to the U.S. Castillo Nájera that a solution could be reached by having Mexico give the United States *X* amount of water from the Rio Grande and by having the United States give Mexico *X* amount of water from the Colorado River. 5 FOREIGN RELATIONS OF THE U.S. 1029 (1940). Castillo Nájera first responded that Mexico would prefer an agreement covering both present and future uses of the two streams. *Id.* at 1031. Later, in a memorandum dated February 5, 1940, the Ambassador became ugly, first alleging that the Rio Grande problem was due to "immoderate American uses thereof," *id.* at 1033, and then making what can only be termed a thinly veiled threat in reference to proposed American developments that would be dependent upon the water of the Rio Grande: "if Mexico should in the future, as must sooner or later happen, utilize those waters, there would be danger that, in the end, *the works completed by the United States would be useless.*" *Id.* at 1033-34 (emphasis added). The United States was thereby put on notice that Mexico would be no pushover in subsequent treaty negotiations.

assembling by the U.S. Department of State of what came to be known as the "Committee of Fourteen," comprised of two representatives from each of the seven Colorado River Basin states, and the "Committee of Sixteen," comprised of the members of the Committee of Fourteen and two representatives from the hydroelectric power interests of the Colorado River.[36] At an April 1943 meeting of these committees and State Department officials, a resolution was adopted detailing the guideposts to be followed in future treaty negotiations with Mexico.[37] Talks with Mexico were conducted on the basis of this resolution; emerging from these discussions was the 1944 Water Treaty, whose terms resolved the earlier impasse of the Texas agricultural developments by guaranteeing them a minimum annual quantity of Rio Grande water.[38]

The settling of the division of Rio Grande waters was only part of the task of the treaty's negotiators; a separate analysis of the Colorado River was also required. Indeed, in many respects, the Colorado River is the exegetical key to understanding the water-sharing provisions of the 1944 Water Treaty taken *in toto*. During negotiations, Mexico had asked for an annual allotment of 3.6 million acre-feet of water, with the United States making a counteroffer of 750,000 acre-feet (equaling Mexico's peak consumption of Colorado River water up to that point in history).[39] Mexico was able to win its treaty water allotment of 1.5 million acre-feet, despite fierce opposition from the lower Colorado River Basin states, because of the fear in the minds of American negotiators that, by holding out, Mexico could win a far more favorable award

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36. Timm, *supra* note 26, at 288.

37. *Id.*

38. 1944 Water Treaty, *supra* note 2, at 1226-27. The simplest explanation for this concession is that, in exchange for the annual Rio Grande guarantee, Mexico obtained a guarantee for Colorado River water greater than it otherwise would have received. For a contrary view, see the reply of L.M. Lawson, American Commissioner of the International Boundary Commission, to Senator Downey of California's question concerning the same issue:

> I can say that at no time was there the question of trading waters between the two countries or the question of the amount that might be used in a trade between the two countries. The settlement was entirely on the basis of each stream system. There is no connection in amounts, there is no connection in physical situation or geography, that would have any connection between the two rivers.

Hearings, *supra* note 15, at 34. And yet, Senator Hayden of Texas, speaking in reference to the Boulder Canyon Project Act, discussed *infra* note 42, was of the opinion that the allotments from the two rivers ought to have been considered together:

> The reason why the Texas delegation [to the House of Representatives] urged and voted for the passage of the Boulder Canyon project was an assurance to them from the California delegation that if the Boulder Dam was built it would enable more water to be given to Texas . . . .
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> . . .
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> [I]t was understood at the time that in consideration of the Boulder Canyon project, Texas would benefit by an arrangement with Mexico.

Hearings, *supra* note 15, at 33-34.

39. Timm, *supra* note 26, at 287. Note the reduction from the 1929 offer, *see* text accompanying *supra* note 27, by about one million acre-feet in the Mexican request.

under the provisions of a 1929 inter-American arbitration treaty, to which the United States and Mexico were parties.[40] The main opposition to ratification of the 1944 Water Treaty came from California, which did not want its

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40. Inter-American Arbitration Treaty between the United States of America and other American Republics, Jan. 5, 1929, 46 Stat. 3153 [hereinafter Arbitration Treaty]. The purpose of the treaty was to "adopt obligatory arbitration as the means for the settlement of [the signatories'] international differences of a juridical character." *Id.* at 3154. It is clear from the 1944 Water Treaty Senate ratification hearings that the proponents of the treaty believed Mexico could obtain, under the Arbitration Treaty, an award for Colorado River water far better than what it received under the 1944 Water Treaty. *See, e.g.*, the statement of Jean S. Breitenstein, attorney and representative for six of the seven Colorado River Basin states (California not included): "Of course, as many have commented, there may be voluntary arbitration. It is my opinion that there may also be compulsory arbitration under the 1929 treaty." *Hearings*, *supra* note 15, at 1539. And later, "So, I say that if we should come to arbitration on this matter in 10, 20, or 50 years, the equities would be weighed as they then existed," *id.* at 1541, meaning that Mexico could have declined to sign the treaty, proceeded to develop beneficial uses to the water then flowing through its territory from the Colorado River (which exceeded 1.5 million acre-feet per year), and sought an arbitration award protecting those expanded uses. See the opinion of Fred Wilson, attorney for the New Mexico Interstate Streams Commission, as to why the ratification of the 1944 Water Treaty was imperative:

> [I]n view of the fact that the engineers agree that at the present time about 9,000,000 acre-feet of water per annum passes the boundary into Mexico and will continue to do so for many years to come, Mexico's uses will rapidly expand, and may well ultimately reach in excess of 5,000,000 acre-feet per annum. Thus, her position in any arbitration proceeding in the future or in any future treaty negotiations would be much more advantageous than at the present time.

Id. at 1583. When asked during the hearings whether he thought the Arbitration Treaty would apply to the Colorado River, Clifford Stone, director of the Colorado Water Conservation Board, responded:

> We consulted with lawyers who have had experience in those matters, and we made a study of the treaty, and the conclusion seemed inescapable to us that the 1929 arbitration treaty did apply to this situation and that Mexico could come within the terms of that arbitration treaty in asking for an adjustment of this problem.

Id. at 1443. After hinting that the arbitration panel would not contain a majority friendly to American interests, Senator Connolly of Texas, chairman of the Foreign Relations Committee, stated frankly, "I am very definitely of the opinion that if we do not get a treaty of some kind, if I were a Mexican citizen I would certainly insist on an arbitration of this matter." *Id.*

A review of the Arbitration Treaty supports the opinion that the subject matter of the 1944 Water Treaty could have been brought to binding arbitration. Article 1 of the treaty stated that the parties would submit their differences to arbitration when "it has not been possible to adjust [them] by diplomacy and which are juridical in their nature . . . ." Arbitration Treaty, *supra*, at 3158. Article 1(b) defines a juridical question as including "[a]ny question of international law." *Id.* Under such a broad formulation, it would be an easy task to consider the division of the waters of the Rio Grande and Colorado River a juridical question subject to binding arbitration. As for Senator Connolly's insinuation that the arbitration panel might be biased against U.S. interests, Article 3 of the treaty required the parties to arbitration each to pick two arbitrators, one of whom could not be a national of the nominating party; once done, the four nominees would select a fifth arbitrator. *Id.* at 3160. Probably, then, the arbitration panel would not have contained a majority of American citizens — perhaps merely one. Senator Connolly's assessment of U.S. prospects under the Arbitration Treaty does not appear off the mark.

Colorado River allotment under the Boulder Canyon Project Act[41] reduced because of concessions in allotments due Mexico.[42] Although the opposition was defeated and the treaty ratified, the basis for the original objection to the treaty has not disappeared.[43]

From the foregoing one may safely conclude that Mexico was not without bargaining power in negotiating the 1944 Water Treaty; it could play Rio Grande parties, desirous of a treaty, against California, ardently opposed to any allotment that might threaten its own Colorado entitlements; it had the ace in the hole of the 1929 Arbitration Treaty,[44] which portended a settlement far more favorable to Mexico than any it would otherwise receive from the United States; and it could reap the benefits from a United States less anxious than before to assert its rights under a theory of absolute territorial sovereignty over the flow of international streams.[45] Having established some sense of the historical backdrop of the 1944 Water Treaty, it is time to turn now to its provisions.

B. The 1944 Water Treaty's Provisions

The 1944 Water Treaty purports to create a legal regime able to govern all potential uses of the waters of the Colorado and Tijuana Rivers and of the Rio Grande.[46] For the purposes of this Comment, the most important sections

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41. 45 Stat. 1057 (1928).

42. The Boulder Canyon Project Act, *id.*, had affirmed the earlier Colorado River Compact, which divided the waters of that River among the seven basin states. Under the agreements, California was to receive an allotment of 4.4 million acre-feet per year, which would not be reduced unless it should "become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin . . . ." *Id.* at 1059. Therefore, the smaller the Colorado River concession in any water-sharing treaty with Mexico, the more secure California's water supply would be, and hence the state's opposition to the 1944 Water Treaty's Article 10 allotment of 1.5 million acre-feet per year to Mexico.

43. *See* Meyers & Noble, *supra* note 22, at 411-15 (disputing the claim that the "extraordinary drought" clause of Article 10 is an effective protection for Colorado River Basin states' interests in the case of drought, mainly because the treaty language comes with no interpretative guidelines: "All told, it seems extremely unlikely that the United States can, as a practical matter, ever expect to rely on article 10 to reduce deliveries to Mexico."). *Id.* at 415.

44. See the comments of Senator Connolly of Texas, quoted *supra* note 40.

45. "It must be realized that each country owes to the other some obligation with respect to the waters of these international streams . . . ." *Hearings*, *supra* note 15, at 19 (statement of Edward R. Stettinius, Jr., Secretary of State).

46. Some commentators have claimed that one of the major shortcomings of the 1944 Water Treaty is its failure to take into account what are now considered to be beneficial uses of water, but which were not so considered at the time of the treaty's ratification, e.g. ecological uses, Native American claims, and groundwater. *See, e.g.*, Stephen P. Mumme, *Reinventing the International Boundary and Water Commission*, BORDERLINES, July 2001, at 6, *at http://www.us-mex.org/borderlines/bkissues.html* (last visited Jan. 7, 2003). Article 3(7) of the treaty states that the IBWC may consider "[a]ny other beneficial uses which may be determined by the

of the treaty are: Article 4, dealing with the allocation of the waters of the Rio Grande; Articles 10 through 15, dealing with the allocation of the waters of the Colorado River; and Article 24, containing the enumeration of IBWC powers and privileges *vis à vis* the treaty's interpretation and application, as well as the grant of authority to the IBWC to resolve disputes arising under the treaty.[47] Article 4(A) allots to Mexico:

> (a) all of the waters reaching the Rio Grande from the San Juan and Alamo Rivers; (b) one-half of the main channel flow below the lowest, i.e. farthest downstream, international

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Commission." 1944 Water Treaty, *supra* note 2, at 1225. The power conferred presumably would enable the IBWC to adapt to changed circumstances. *But see* Stephen Mumme, *The Case For Adding An Ecology Minute To The 1944 United States-Mexico Water Treaty*, 15 TUL. ENVTL. L.J. 239 (2002) (arguing that the treaty's article 3 preferential listing precludes explicitly giving priority to ecological uses of water, and so urging that the IBWC use its flood control power to "contribute to Delta ecosystem management by means of the creative use of drainage related, ostensibly, to flood control." *Id.* at 252).

The IBWC has recently evinced a willingness to wade into the waters of environmental issues in the border region. Minute 306: Conceptual Framework for United States-Mexico Studies for Future Recommendations Concerning the Riparian and Estuarine Ecology of the Limitrophe Section of the Colorado River and its Associated Delta, Dec. 12, 2000, U.S.-Mex, *at* http://www.ibwc.state.gov/html/foreign_affairs.html (last visited Apr. 30, 2003) [hereinafter Minute 306], is a good example of the interest the IBWC now shows in ecological matters falling within its treaty mandate. Recommendation 1 requires the IBWC to establish "a framework for cooperation . . . to ensure use of water for ecological purposes." *Id.* at 2. Point 2 provides for a technical task force to define the "habitat needs of fish, and marine and wildlife species of concern to each country" in the Colorado River Delta. *Id.* Lastly, Point 3 creates a forum for the exchange of information concerning Delta ecology. *Id.* Minute 306, however, represents the practical limits of the IBWC's liberal interpretation of the 1944 Water Treaty's Article 3(7) beneficial uses clause, for both countries have chosen to address border ecology problems through other routes, e.g. the Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area. Aug. 14, 1983, U.S.-Mex., 35 U.S.T. 2916 (popularly known as the La Paz Agreement). Article 9 of the same requires each country to designate a national coordinator to implement the Agreement's various mandates; for the United States, this coordinator is the Environmental Protection Agency. *Id.* at 2919-20. The last clause of Article 12 states that "[n]othing in this Agreement shall prejudice or otherwise affect the functions entrusted to the International Boundary and Water Commission, in accordance with the Water Treaty of 1944." *Id.* at 2921. The import of Articles 9 and 12 is clear: the IBWC has some say in the handling of environmental problems occurring within the border region, but its authority is by no means exhaustive or exclusive, or even substantial. Given this limitation, the efforts made hitherto by the IBWC ought in fairness to be considered more than merely token.

47. The limits of this Comment preclude an exhaustive *resumé*; however, mention should be made of other salient portions of the treaty. Article 3 lists examples of beneficial water uses that the IBWC may follow. 1944 Water Treaty, *supra* note 2, at 1225. Article 5 lays the groundwork for the construction of international storage dams along the Rio Grande (Amistad and Falcon Dams are the fruit of this provision). *Id.* at 1228-30. Article 16 concerns the Tijuana River Valley. *Id.* at 1249-50. Lastly, the Senate, through its advice and consent, appended several provisions to the treaty that became a part of the same upon ratification. These amendments concern Congress's assertion of the power of the purse for monies spent on construction projects approved by the treaty or the IBWC and the procedures for confirmation of certain IBWC officials. *Id.* at 1263-66.

> storage reservoir; (c) two-thirds of the flow reaching the main channel from the Conchos, San Diego, San Rodrigo, Escondido, and Salado Rivers and Las Vacas Arroyo; and (d) one-half of all other unmeasured flows reaching the main channel.[48] Article 4(B) allots to the U.S.: (a) all of the waters reaching the main channel from the Pecos and Devils Rivers, the Goodenough Spring, and the Alamito, Terlingua, San Felipe, and Pinto Creeks; (b) one-half of the waters flowing below the lowest major international storage dam; (c) one-third of the waters reaching the Rio Grande from the Conchos, San Diego, San Rodrigo, Escondido, and Salado Rivers and Las Vacas Arroyo; and (d) one half of all other flows in the main channel not otherwise accounted for.[49]

From a superficial review of the treaty's provisions, it appears that both Mexico and the United States can each fully exploit two tributaries (a nod to the Mexican bargaining position); both Mexico and the United States receive an equal share of unmeasured inflows; and the United States is guaranteed one-third of the inflow from six Mexican tributaries to ensure an adequate water supply for its southern Texas agricultural industry (an apparent concession by Mexico).[50] The ultimate source of the current controversy lies not in these allocation provisions, but in the guarantee clause of Article 4(B)(c). That provision states that the one-third flow allotted to the United States from the aforementioned six Mexican tributaries "shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet . . . annually."[51] This clause represents the greatest bargaining coup the United States achieved in negotiating the treaty.[52] By it, Mexico is handed an immoveable obstacle to its complete exploitation of its six tributaries: regardless of how much water actually flows into the Rio Grande from the named tributaries, the United States remains entitled to a yearly average of no less than 350,000 acre-feet.[53] The same clause permits Mexico, in the case of

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48. 1944 Water Treaty, *supra* note 2, at 1225-26.

49. *Id.* at 1226-27.

50. *See supra* note 30.

51. 1944 Water Treaty, *supra* note 2, at 1226-27.

52. See the statement of Frank B. Clayton, counsel to the American Section of the IBC: "We want a commitment to deliver on the Rio Grande the same quantity of water that the treaty provides for and not to make us subject to a unilateral increase on [Mexico's] part, on either river." *Hearings*, *supra* note 15, at 123.

53. In the current controversy, Mexico had claimed that it was not legally obligated to pay its current water debt until the conclusion of the five-year accounting period. Boudreaux, *supra* note 3. This position makes sense given that the 350,000 acre-foot figure is not an entitlement per se but merely a baseline to be compared with an average over five years of actual Mexican contributions. Technically, Mexico cannot be in debt simply because it has fallen behind a preferred schedule of water transfers, as *a hypothesi* a five-year average cannot be calculated

"extreme drought or serious accident to the hydraulic systems on the measured Mexican tributaries," to add any debt incurred during a five-year cycle to the following accounting period.[54] The clause in no way reduces Mexico's water debt; it simply buys another five years for Mexico to meet its obligation. Moreover, the clause says nothing about what is to be done when Mexico incurs water debts under two successive accounting periods. The treaty deems Mexico's debt to be liquidated when at least two major international reservoirs are filled with waters belonging to the United States.[55]

No analysis of the 1944 Water Treaty's allotment provisions would be complete without a review of the articles dealing with the Colorado River; the fairness or inequity of the treaty's water allocation can only be fairly judged when both the Rio Grande and Colorado River are considered together. Article 10(a) allots to Mexico a "guaranteed annual quantity of 1,500,000 acre-feet."[56] Subparagraph (b) also allots to Mexico any remaining water that reaches Mexico from the Rio Grande, provided that the U.S. obligation never exceeds 1,700,000 acre-feet per year.[57] Using almost identical language to that found in Article 4(B)(c), Article 10 concludes by allowing the United States, in cases of "extraordinary drought or serious accident to the irrigation system in the United States," to reduce its 1,500,000 acre-feet per year obligation to Mexico in proportion with the degree to which U.S. consumptive uses have been reduced.[58] Unlike Mexico's Rio Grande obligation, the United States is required to furnish Mexico with water on a yearly basis without benefit of multi-year accounting periods and without the option of adding a water debt incurred during one year onto the following year's obligation.[59] In place of these protections, the United States is afforded the option of reducing its treaty obligation to Mexico to the extent that the precipitating cause of the water shortage has reduced water consumption throughout the Colorado River Basin.[60] The disparity in the drought provisions for the Colorado River and Rio Grande under the treaty creates the appearance of inequity; but, the Mexican response, both official and unofficial, to the present water crisis has been, essentially, that the region is naturally arid, that it is beset by drought,

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until five years have passed. But now the question is moot, as Mexico has incurred a debt extending over two five-year cycles.

54. 1944 Water Treaty, *supra* note 2, at 1227.

55. *Id.* at 1227-28. Mexico may liquidate its debt by furnishing sufficient inflows to the main channel from the measured tributaries to surpass the 350,000 acre-feet per year average, i.e. the foregoing does not exhaust Mexico's debt-payment options. Nonetheless, if one-third of the inflows from the measured tributaries were greater than the five-year average exceeding 350,000 acre-feet, the U.S. would be entitled to the larger quantity.

56. *Id.* at 1237.

57. *Id.*

58. *Id.* at 1237-38. For the source of the "extraordinary drought" language, see *supra* note 22.

59. 1944 Water Treaty, *supra* note 2, at 1237.

60. *Id.* at 1237-38.

and, consequently, that there is an insufficient supply of water to satisfy all demands on both sides of the border.[61]

The drafters of the treaty presumably were aware that disputes would arise as to the proper interpretation and application of the treaty's provisions, especially those relating to water debts. Accordingly, Article 24 stands as the empowering instrument for the IBWC to serve as the first and ordinarily final arbiter of disputes arising under the treaty. Subparagraph (c) entrusts the IBWC with supervisory powers.[62] Subparagraph (d) mandates that the IBWC "settle all differences that may arise between the two Governments with respect to the interpretation of this Treaty, subject to the approval of the two Governments."[63] When matters are presented to the IBWC for their resolution, the Commission issues its decisions in the form of Minutes.[64]

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61. "This is a dry region, ours. We've known it for 1,000 years" (statement of Alvaro Rivera Fernandez, head of Tamaulipas farmers union). Dellios, *supra* note 9. "It's not raining; that's the fundamental problem" (statement of Monserrat Terrazas, general director of a farmers irrigation association in Delicias, Chihuahua). Althaus, *supra* note 2. "We can't pay [the debt] off, we don't have the water" (statement of Enrique Martinez, governor of Coahuila). Tim Weiner, *Water Crisis Grows Into a Test of U.S.-Mexico Relations*, N.Y. TIMES, May 24, 2002, at A3. "We don't have any water. . . . The harsh truth is that drought is a fact of life in northern Mexico and the southwestern United States." (statement of Patricio Martinez, governor of Chihuahua). *Id.* "The water the U.S. is demanding doesn't exist." (statement of Silvia Hernandez, head of the Mexican Senate committee on North American relations). *Id.*

62. 1944 Water Treaty, *supra* note 2, at 1256.

63. *Id.* The provision goes on to require that, whenever the IBWC commissioners fail to resolve a contested matter, the dispute is to be referred to the two Governments for its resolution; the mode of resolution is "where proper . . . the general or special agreements which the two Governments have concluded for the settlement of controversies." *Id.* As will be shown, both sides have interpreted that language to allow recourse to the International Court of Justice. *See* Herbert Brownell & Samuel D. Eaton, *The Colorado River Salinity Problem with Mexico*, 69 AMER. J. INT'L L. 255, 259 (1975). U.S. action during the current controversy clearly shows its desire to resolve the dispute through the IBWC without recourse to independent bodies.

64. 1944 Water Treaty, *supra* note 2, at 1258. For a Minute to take effect, it must be approved by both Governments within thirty days of the Minute's presentation to the Governments. *Id.* Article 2 provides that whenever "joint action or joint agreement by the two Governments" is called for, the matter is to be handled through the U.S. Department of State and the Mexican Ministry of Foreign Relations. *Id.* at 1223. It is clear from the tenor of Articles 2, 24, and 25, that once approved, the IBWC Minutes become binding upon the two countries. This is so even though the U.S. Senate need not give its advice and consent for approval of the Minutes. The Senate did see fit prior to ratifying the treaty to add several provisions ensuring that the Congress would have, *inter alia*, the power of the purse for IBWC projects requiring U.S. contribution and confirmation privileges for the U.S. IBWC Commissioner. *Id.* at 1263-67. Although according to paragraph (h) of the Senate amendments to the treaty, the word "agreements" as used in Article 24 of the treaty proper must be interpreted to mean only those entered into as treaties between the two countries; nothing is stated explicitly about the nature of IBWC Minutes. Some U.S. officials insist that IBWC Minutes are "international agreements" not requiring ratification by the signatories. Brownell & Eaton, *supra* note 63, at 270. This is not surprising; after all, to call a Minute a Treaty would ipso facto make Senate ratification necessary. The real question is whether the IBWC Minutes are mini-treaties masquerading as nebulous "agreements."

Historically, Mexico has had little difficulty in meeting its 4(B)(c) obligation; as late as 1992, Mexico was debt-free.[65] At the conclusion of the five-year accounting period in 1997, Mexico owed the United States just over one million acre-feet of water.[66] In accordance with Article 4, Mexico's debt was added to the following accounting cycle, which closed in October of 2002.[67] Currently, Mexico owes to the United States 1.37 million acre-feet of water under the provisions of subsection 4(B)(c) of the 1944 Water Treaty.[68] As for the Colorado River, the United States to date has always met its annual treaty obligation to Mexico.[69] Once other potential future uses are considered, such as for ecological preservation or the recognition of Native American claims, the River's resources become exhausted.[70] If U.S. stakeholders press for a greater share of the river's bounty, a fresh controversy may well erupt over a United States proportional reduction in Mexican Colorado River allotments under Article 10 of the treaty.

The U.S. Supreme Court has long recognized the legal and constitutional distinction between treaties and executive agreements. That difference is explicated in the case of *United States v. Belmont*, 301 U.S. 324 (1937), which concerned the legitimacy of an executive agreement between the U.S. and Soviet Governments. The respondent, an American citizen, had accepted a bank deposit from a Russian corporation. Subsequently, the Soviet Government appropriated all property and assets from every Russian corporation, ostensibly including the respondent's deposit holding. In 1933, the Soviet Government assigned to the United States all claims it had to monies owed to it from American nationals, including the respondent's deposit holding. *Id.* at 325-26.

The Court held that the agreement was valid without the Senate's ratification. What was accomplished through the exchange of diplomatic notes was "within the competence of the President," as "the Executive had authority to speak as the sole organ of [the national] government." *Id.* at 330. The Court concluded that an international compact, like the one under review, "is not always a treaty which requires the participation of the Senate." *Id.* For a recent affirmation of the same principle, see *Weinberger v. Rossi*, 456 U.S. 25, 30 n.6 (1982) (recognizing that the "President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause . . . .").

65. U.S. SECTION, INT'L BOUNDARY AND WATER COMM'N, UPDATE OF THE HYDROLOGIC, CLIMATOLOGIC, STORAGE AND RUNOFF DATA FOR THE UNITED STATES IN THE MEXICAN PORTION OF THE RIO GRANDE BASIN: OCTOBER 1992-SEPTEMBER 2002, at 2 (2002) (on file with author) [hereinafter UPDATE].

66. *Id.* at 4.

67. Minute 308: United States Allocation of Rio Grande Waters During the last Year of the Current Cycle, June 28, 2002, U.S.-Mex., *at* http://www.ibwc.state.gov/html/foreign_affairs.html (last visited Nov. 12, 2003) [hereinafter Minute 308].

68. Press Release, U.S. Section, International Boundary and Water Commission, USIBWC Announces Water Transfer (Apr. 3, 2003), *at http://www.ibwc.state.gov/PAO/CURPRESS/CurPress/*watertransfer55bweb.htm (last visited Nov. 12, 2003) [hereinafter USIBWC Press Release].

69. *But see* Nitze, *supra* note 7, at 3 (arguing that expected population growth in the lower Colorado River Basin will make shortfalls in the Mexican allotments likely).

70. *Id.*

C. *Climatological Data for the Rio Grande Basin*

The six Mexican treaty tributaries, whose Rio Grande inflows provide the source of the U.S. treaty entitlement—the Conchos, San Rodrigo, San Diego, Salado, and Escondido Rivers, and Las Vacas Arroyo—drain an area of more than 53,000 square miles, with the Rio Conchos alone draining half.[71] The basin region itself is semi-arid, having an annual average rainfall of between 14 and 20 inches.[72] Although drought here is not uncommon, the typical storm can produce, even in a short period of time, tremendous runoffs, which are carried through the treaty tributaries to the Rio Grande.[73]

Treaty tributary inflows to the Rio Grande have varied significantly since runoffs were first measured for treaty accounting in 1953. The average yearly U.S. allotment has been 405,000 acre-feet, well above the required minimum of 350,000 acre-feet.[74] Not surprisingly, tributary inflows are much smaller during years of drought: between 1993 and 1999, the average rainfall in the tributary drainage basin was 90 percent of normal[75]; treaty tributary inflows during the period 1994 to 1997 averaged 30 percent of the required minimum amount of 350,000 acre-feet.[76] In the early 1980s, the basin endured a drought similar in severity to that of the mid 1990s, but the inflows of the earlier period amounted to more than 70 percent of the required minimum of 350,000 acre-feet.[77] In 1982, for example, rainfall was about 80 percent of normal and treaty tributary inflows amounted roughly to 75 percent of the required minimum.[78] During 1997, rainfall was in excess of 110 percent of normal, yet treaty tributary inflows amounted only to 25 percent of the required minimum.[79] One is thus presented with an anomaly: the drainage basin underwent a drought during the early 1980s similar to that of the 1990s, but inflows during the earlier period were substantially greater than those during the similar drought years of the 1990s.

This aberration can be explained in part by Mexican water management. In the Delicias Irrigation District of the Mexican state of Chihuahua (one of the largest districts in the basin), about 28,000 acres of land were irrigated with 110,000 acre-feet of water from the Rio Conchos in 1995.[80] By 1997,

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71. U.S. SECTION, INT'L BOUNDARY AND WATER COMM'N, UPDATE OF THE HYDROLOGIC, CLIMATOLOGIC, STORAGE AND RUNOFF DATA FOR THE UNITED STATES IN THE MEXICAN PORTION OF THE RIO GRANDE BASIN: OCTOBER 1992-SEPTEMBER 2001 TECHNICAL ANNEX 1 (2002) (on file with author) [hereinafter TECHNICAL ANNEX].

72. *Id.*

73. *Id.* at 2.

74. *Id.* at 3.

75. *Id.* at 7.

76. *Id.*

77. TECHNICAL ANNEX, *supra* note 71.

78. *Id.* at Figure 12.

79. *Id.*

80. *Id.* at Table 4.

nearly 200,000 acres were irrigated with more than one million acre-feet of water; but in 2000, 110,000 acres were irrigated with 660,000 acre-feet.[81] Mexican water managers apparently gambled that the rains of 1996-1997 signaled the end of the drought, and therefore increased reservoir releases to Mexican farmers.[82] Presumably, the subsequent reduction in irrigated acreage was because of below-normal rainfall for the years 1997 to 1999.[83] Whether or not the decisions of the Mexican water managers were prudent, the conclusion that can be drawn from these data is that the drought of the last decade is not a sufficient explanation, by itself, for the size and duration of Mexico's water debt.

III. THE POSITION OF MEXICO IN THE PRESENT CONTROVERSY

A. *Mexican Water Law*

Under Paragraph 5 of Article 27 of the Mexican Constitution, all waters within the national territory are owned by the federal government.[84] Therefore, as part of the national "patrimony," they are inalienable; any person or corporation seeking to exploit them for commercial use must first apply for a concession from the government.[85] Through the 1992 *Ley Federal de Aguas*,[86] the National Water Commission of Mexico[87] was granted the authority to enforce the provisions of the Water Act as the designated arm of

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81. *Id.* These figures come close to the pre-drought average of 228,000 acres irrigated with 1.2 million acre-feet. *Id.*

82. Mary Kelly & Karen Chapman, *Sharing the Waters* 1 (May 17, 2002), *at* http://www.americaspolicy.org/commentary/2002/0205water.html (last visited Nov. 12, 2003).

83. TECHNICAL ANNEX, *supra* note 71, at Figure 11.

84. "Son propiedad de la nación las aguas de . . . los ríos y sus afluentes directos o indirectos . . . [y] las corrientes constantes o intermitentes y sus afluentes directos o indirectos, cuando el cauce de aquéllas, en toda su extensión o en parte de ellas, sirva de límite al territorio nacional o a dos entidades federativas . . ." MEX. CONST. art. 27 [The property of the nation includes the waters of rivers and their direct or indirect tributaries, streams that either run without interruption or are occasionally dry, and their direct or indirect tributaries, whenever the river bed serves as part or all of a territorial boundary, federal or international], *available at* http://www.ccdhcu.gob.mx/_leyinfo (last visited May 1, 2003).

85. "[E]l dominio de la Nación es inalienable e imprescriptible y la explotación, el uso o el aprovechamiento de [las aguas] de que se trata, por los particulares o por sociedades constituidas conforme a las leyes mexicanas, no podrá realizarse sino mediante concesiones, otorgadas por el Ejecutivo Federal, de acuerdo con las reglas y condiciones que establezcan las leyes." *Id.* (The ownership of the Nation is inalienable and cannot be transferred, and the exploitation, use, or availment of (the relevant waters), by persons or corporations formed in accordance with Mexican law, may not be done save through concessions, granted by the Federal Executive, in accord with the rules and conditions that the laws establish).

86. D.O., 1 de diciembre de 1992, *available at* http://www.ccdhcu.gob.mx/leyinfo (last visited May 1, 2003) [hereinafter Water Act].

87. *Comisión Nacional de Aguas* (CNA), a decentralized body of the Mexican Ministry of Agriculture and Water Resources. *Id.* at art. 3(V).

the federal executive,[88] to serve as the arbiter for disputes among concession holders, to promote efficient water use and a culture of conservation, and to encourage scientific investigation and technical development concerning water resource management.[89]

Because water cannot be bought and sold like a commodity, water concessions easily lend themselves as objects of political patronage or subornation. The ruling government is given a perverse incentive to keep water rates to municipal and poor farm users artificially low so as to curry favor with voters; the upshot is a community indifferent to water waste.[90] Conservation is therefore a high priority for the CNA, but it cannot afford to underwrite needed infrastructure improvements because water rates are not high enough to supply the funds, while a "culture of nonpayment" makes the issue of rate charges inconsequential.[91]

B. Criticisms of Mexican Water Management

In spite of Mexico's recent legislative efforts to improve its water management,[92] U.S. water stakeholders continue to accuse Mexico of glaring inefficiency with some support for their charges. A recent Texas A&M University study concludes that crops in the Mexican downstream state of Tamaulipas are growing abundantly, while Texas crops have suffered severely from insufficient irrigation.[93] Most irrigation in Mexico is still done by flooding fields from earthen ditches.[94] In the Delicias region of northern Mexico, an estimated 65 percent of water released to local farmers for the irrigation of crops is lost before reaching the fields.[95] Mexico also has fended off allegations of water hoarding, especially directed against Chihuahua Governor Patricio Martinez.[96] The atmosphere between stakeholders on both sides of the border has become acrid.

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88. *Id.* at art. 4.

89. *Id.* at art. 9 (VIII, IX, XI).

90. Nitze, *supra* note 7, at 19.

91. *Id.* at 15. CNA experts estimate that as much as sixty percent of treaty tributary water is lost through evaporation and seepage. *Id.* at 14.

92. In addition to the aforementioned Water Act, *supra* note 86, Mexico has tried to improve its water management by seeking funds from the World Bank for hydraulic infrastructure modernization and by updating its water-rights registry, which details who is entitled to what in terms of water use. Nitze, *supra* note 7, at 7.

93. Kraul, *supra* note 4.

94. Althaus, *supra* note 2.

95. *Id.*

96. Weiner, *supra* note 61. The governor has claimed that the waters of the state of Chihuahua are "sovereign"—an unorthodox Mexican constitutional interpretation.

C. *Mexican Rejoinder*

Mexico has defended itself by claiming that the present drought has so depleted its water resources that it can barely supply the minimum needs of its own citizens, let alone meet its treaty obligations.[97] Acknowledging that some of its reservoirs along treaty tributaries are far from empty,[98] Mexico nevertheless asserts that, were water to be released from those same reservoirs, it would be lost through evaporation, seepage, or unlawful diversion long before it reached the Rio Grande.[99] Unlike the option afforded the United States with its Colorado River obligation,[100] Mexico has no similar authority under the treaty to reduce unilaterally its required inflows to the Rio Grande, even in the case of an "extraordinary drought."[101] The only ambiguity Mexico can exploit is the treaty's silence as to the course to be taken when Mexico has water debts extending over two consecutive accounting cycles. But even here, the ambiguity does little to bolster the Mexican position, for at best the issue is one of how the two-cycle debt is to be paid, and not whether it can be reduced or transfers deferred.[102]

Some Mexican commentators have called upon their government simply to abandon the treaty and refuse to pay any water debt because the treaty itself is inequitable.[103] These critics point to the inconsistency in the way the treaty

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97. Two IBWC Minutes to be discussed below lend credence to the Mexican position. Minute 293: Emergency Cooperative Measures to Supply Municipal Needs of Mexican Communities Located Along the Rio Grande Downstream of Amistad Dam, Oct. 4, 1995, U.S.-Mex., *at* http://www.ibwc.state.gov/html/ foreign_affairs.html (last visited Nov. 12, 2003) [hereinafter Minute 293], recognizing a grave imminent water shortage for Mexican border-region municipal water users, authorized a transfer of waters belonging to the U.S. in the Rio Grande international reservoirs to Mexico to alleviate any immediate suffering. Minute 308, *supra* note 67, made note of the amount of water required by Mexico to meet the basic needs of its citizens for the short term and guaranteed that the United States would not call upon Mexico to make further water transfers that would decrease Mexican water levels in the international reservoirs to below that critical amount.

98. The debate over water loss through seepage or evaporation becomes moot when the water is immediately available to both countries, as it is in the case of the aforementioned reservoirs.

99. Of the largest reservoir on the Rio Conchos, *La Boquilla*, Mexican experts claim that any water released during the summer from the dam would be lost to evaporation or seepage before it arrived at the Rio Grande. Althaus, *supra* note 2. Some Texan water experts agree. *Id.*

100. 1944 Water Treaty, *supra* note 2, at 1237-38.

101. *See id.* at 1227.

102. As will be seen shortly, Minute 234: Waters of the Rio Grande Allotted to the United States from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo, Dec. 2, 1969, U.S.-Mex., *at* http://www.ibwc.state.gov/html/foreign_affairs.html (last visited Nov. 12, 2003) [hereinafter Minute 234], lays out the means by which Mexico may liquidate its Article 4(B) debt.

103. *See* Althaus, *supra* note 2 ("Newspaper columnists, especially those from the political left, have railed against the 1944 Treaty, arguing that Mexico owes nothing to its northern neighbor. Some have called on [Mexican President Vicente] Fox to renegotiate the treaty.").

deals with debtor signatories, an example of which is found in Article 10, concerning the United States' obligation to deliver annually to Mexico 1.5 million acre-feet of water and the option given the United States in times of "extraordinary drought" to reduce its yearly obligation "in the same proportion as consumptive uses in the United States are reduced."[104] Had this provision been afforded Mexico in Article 4, there might not be today a Rio Grande water controversy, for Mexico could theoretically have claimed a reduction of its treaty obligation due to "extraordinary drought." Mexico might nevertheless argue that the present drought is so extraordinary as to go beyond that which was contemplated by the parties when the treaty was signed; or that massive agricultural and industrial development, in part spurred by NAFTA,[105] has so increased the regional demand for water as to make the treaty's Rio Grande water allotments obsolete. These arguments have not yet surfaced officially in any IBWC Minute because the remedy they imply—a reallocation of Rio Grande water—is a step which arguably would move the debate beyond the IBWC Article 24 interpretation and application power into the theater of treaty renegotiation.

IV. *REBUS SIC STANTIBUS*

A. The doctrine defined

Under the 1944 Water Treaty, in the case of "extraordinary drought" Mexico may add onto a second five-year cycle any and all debt accrued during the previous accounting period. [106] Between 1953 and 1992, Mexico was able to meet its Article 4(B) minimum obligations, and so had no need for the drought clause.[107] Because inflows assigned to the United States from the Mexican treaty tributaries averaged less than 350,000 acre-feet per year between the years 1992 and 1997, Mexico availed itself of the drought clause to add its accrued debt onto another cycle, viz. 1997 to 2002.[108] As noted above, with the closing of the present accounting cycle Mexico's debt is at 1.37 million acre-feet.[109] Mexico claims that its debt is due to a combination of the adverse effects of extraordinary drought and the steady increase in Mexican beneficial uses.[110] Because the pertinent circumstances under which

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104. 1944 Water Treaty, *supra* note 2, at 1237-38.

105. *See* Dellios, supra note 9.

106. 1944 Water Treaty, *supra* note 2, at 1227.

107. UPDATE, *supra* note 65, at 8.

108. At the conclusion of the 1992-1997 accounting cycle, Mexico owed the United States a little more than one million acre-feet. *Id.* at 9.

109. USIBWC Press Release, *supra* note 68.

110. *See, e.g.*, Dellios, *supra* note 9 (quoting Mexican Agriculture Secretary Javier Usabiaga: "We have said, and we will continue to say, that with a careful administration of water, we will not have a problem making the [water] payments" (brackets in original)). Boudreaux, *supra* note 3 (quoting Mexican President Vicente Fox: "Today both governments

the treaty was entered into in 1944 have changed vitally, one might argue that it would be fundamentally unfair to force Mexico to continue to observe its Article 4(B) duties; therefore, they ought to be discharged. If the dispute were to find its way before an international tribunal, Mexico could justify this position through the doctrine of *rebus sic stantibus*, the meaning and application of which is the subject of the following sections.

1. Definition of rebus sic stantibus

a. The treatise writers

Dating at least to Roman times,[111] and meriting in the field of international law the grudging acceptance of no less a luminary than Grotius,[112] the doctrine of *rebus sic stantibus*[113] allows a state to excuse itself from a treaty obligation when it finds that the circumstances surrounding its accession to the treaty, upon which the provisions of the treaty were based, have so changed that the purpose of the treaty has to some degree been frustrated; in other words, a state's continued observance of the treaty's terms would produce an

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and both countries understand that the problem is a lack of water, that it hasn't rained enough in 10 years and that nobody is hiding water."). See also David Rennie, *Mexico and U.S. Heading for Border Water War*, DAILY TELEGRAPH (London), May 31, 2002, at 19 (LEXIS Database), in reference to severe opposition to the treaty in Mexican media and political circles, quoting a Mexican official: "It has become a very emotional and political debate. [The treaty's critics] are taking advantage of this to accuse President Fox of being too close to the U.S."; Ricardo Sandoval, *Officials to begin cutting off water to Valley farmers today*, DALLAS MORNING NEWS, May 21, 2002, at 12A (LEXIS Database) (quoting Felipe Calderon Hinojosa, member of President Fox's PAN political party: "The drought is strong.... We must recognize our international responsibilities and the need for water consumption by the population [in the lower Rio Grande Basin]. We must measure jointly our resources before arguing over water that does not exist, because no one can be obliged to do the impossible.").

111. *See* Saul Livitnoff, *Force Majeure, Failure of Cause and Théorie de L'Imprévision: Louisiana Law and Beyond*, 46 LA. L. REV. 1, 4 n.12 (1985) (citing Cicero and Seneca as possible originators of the doctrine).

112. The question also is commonly raised, whether promises contain in themselves the tacit condition, 'if matters remain in their present state.' To this question a negative answer must be given, unless it is perfectly clear that the present state of affairs was included in that sole reason of which we made mention. Thus constantly in the histories we read that ambassadors gave up their mission and returned home from the journey on which they had been set out, alleging as the reason that matters had been so changed that the entire matter or cause of the mission was at an end.

2 HUGO GROTIUS, DE JURE BELLI AC PACIS 424 (Francis W. Kelsey trans., Clarendon Press 1925) (1626).

113. The full doctrine is "conventio omnis intelligitur rebus sic stantibus," meaning literally "every treaty is understood by the things then standing." *See* 2 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 83 (Fred B. Rothman & Co. 1985) (1855).

inequitable result.[114] The treatise writers have formulated similar definitions,[115] the main difference among these being the degree to which things must change in order for the doctrine to be applied.[116] Lauterpacht's exposition is the soundest, if only because it is the most conservative in delimiting the doctrine's effective scope: "[a] vital change in circumstances fundamentally affecting the intention of the treaty as it had been understood by the two parties is a valid ground for liberation from or nullification of the treaty."[117] If there be any agreement among the commentators, it is that a state ought to have some principle of international law at its disposal to allow it to avoid the especially harsh consequences that would follow from a strict adherence to a treaty's provisions, when the circumstances upon which the treaty was formed have changed to a significant degree. The challenge lies in keeping states from reducing an implied escape clause to a mere diplomatic cover for the abandonment of inconvenient promises.

b. The Vienna Treaty Convention formulation

Attempting to solve this problem, Article 62 of the Vienna Convention on the Law of Treaties,[118] entitled "Fundamental change of circumstances," restricts the application of *rebus sic stantibus* to a change of circumstances existing "at the time of the conclusion of a treaty, which was not foreseen by the parties," if and only if (a) the changed circumstances formed the "essential basis" for the parties' consent; and (b) "the effect of the change is radically to transform" the parties' treaty obligations.[119]

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114. But something more than mere inequity is required. *See infra* note 116.

115. "The principle that a treaty ceases to be binding when an essential change of the circumstances in which it was concluded has occurred." T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 306 (*revised by* Percy H. Winfield, MacMillan & Co. 7th ed. 1930) (1895). Phillimore defines it thusly: "When that state of things which was essential to, and the moving cause of the promise or engagement, has undergone a material change, or has ceased, the foundation of the promise or engagement is gone, and their obligation has ceased." PHILLIMORE, *supra* note 113, at 83.

116. Basic changes in circumstances taken for granted by the parties may permit suspension or denunciation of the treaty. GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 138 (Professional Books Ltd. 6th ed. 1976) (1947). Oppenheim would require a "vital change" in circumstances. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 550 (1905). He notes that traditionally a change in a state's form of government, e.g. from monarchy to republic or vice versa, has been considered insufficient to merit the application of the doctrine. *Id.* at 551. Rather, the doctrine is appropriately applied when the change in circumstances, combined with a state's continued observance of the treaty, would threaten "the existence or necessary development of a State." *Id.* at 550.

117. 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW 421 (E. Lauterpacht ed., 1970).

118. 8 I.L.M. 679 (1969) (voted for by the United States but not ratified by the U.S. Senate) [hereinafter Vienna Treaty Convention].

119. *Id.* at 702. Subsection (2) of Article 62 precludes the application of *rebus sic stantibus* in treaties concerning boundaries, or where the change in circumstances has been caused by a party's breach. *Id.* Subsection (3) notes that the remedies available to a state that has successfully invoked *rebus sic stantibus* include termination, withdrawal, and suspension. *Id.*

The first part of the Vienna formulation requires that the change in circumstances not have been foreseen by the parties.[120] Therefore, merely because a change has occurred that makes a state's continued adherence to a treaty onerous is not a sufficient reason for the application of *rebus sic stantibus*; the change must also be one for whose effects the treaty made no provision.[121] This requirement recognizes that treaties are often entered into for the purpose of insuring against untoward events; the hope is that by settling ahead of time what a state is to do in case *X* happens, that state may be better prepared for meeting the burdens it must bear if and when *X* comes about.[122] Foreseeability is not at issue, insofar as it does not matter whether the parties to the treaty ought to have predicted a change in circumstances, but only whether in fact they did so predict. Although this distinction may be academic if one assumes that foreseeability in the abstract can be proved only by foreseeability in the concrete, nevertheless, a state seeking to invoke *rebus sic stantibus* under the Convention need only assert that it did not foresee the change of circumstances.[123]

In addition to the foreseeability requirement, a party seeking to apply *rebus sic stantibus* must prove that the circumstances now changed were essential to the treaty, and that the change radically altered the nature of the parties' obligations under the treaty. [124] The purpose of these elements is to prevent a state from undoing the effects of what has turned out to be a bad bargain.[125] Granted, a state may already have a natural incentive not to misuse the doctrine: if the state were to excuse itself from a treaty whenever it might be expedient so to do, such conduct "would certainly destroy all its credit

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120. *Id.* art. 62(1).

121. This conclusion follows necessarily from the requirement of Article 62(1), that the changed circumstances not have been foreseen by the party invoking *rebus sic stantibus*; in other words, the necessary legal predicate for the application of the doctrine does not entail a review of the potential harm a party might suffer through its continued adherence to the treaty. Simply put, the change in circumstances must have been unexpected, i.e. "not foreseen."

122. The point can be explicated by analogy to the Reporter's Comment accompanying UCC § 2-615, Excuse by Failure of Presupposed Conditions. Under that section, a failure of a basic assumption of the contract does not excuse a party from the contract "when the contingency in question is sufficiently foreshadowed at the time of contracting to be included among the business risks which are fairly to be regarded as part of the dickered terms, either consciously or as a matter of reasonable, commercial interpretation from the circumstances." UNIF. COMMERCIAL CODE § 2-615, 1B U.L.A. 195, 196 (1989). The circumstances surrounding a state's accession to a treaty can fittingly be understood in like manner.

123. When speaking of the parties' state of mind, Article 62 refers only to a change of circumstances "not foreseen by the parties." 8 I.L.M. at 702. The implication is that foreseeability must be actual.

124. *Id.*

125. Because "the goal of a treaty is always in some measure, and often to an entire measure, political, and changes in political circumstances are notoriously difficult to assess.... [*rebus sic stantibus*] came into marked disrepute for the obvious reason that there was no check on the occasions when it might plausibly be used." D.P. O'CONNELL, INTERNATIONAL LAW 296-97 (1965).

among the nations." [126] At the very least, one may conclude that, by its terms, Article 62 works toward making states' bad-faith use of *rebus sic stantibus* a more difficult business.

2. *Commentators' opinions on rebus sic stantibus*

Most of the treatise writers have shared the fear of the drafters of the Vienna Treaty Convention that states might use *rebus sic stantibus* in bad faith. Oppenheim acknowledges that the doctrine might easily be used in bad faith to shirk or disregard a party's treaty obligations.[127] Lawrence recognizes that the real difficulty in understanding the doctrine is in how to define an "essential change,"[128] a problem that the drafters of Article 62 arguably failed to address by referring merely to circumstances that are "an essential basis of the consent of the parties"[129] as a necessary condition to the doctrine's application. For O'Connell, *rebus sic stantibus* works like an escape clause, but one which ought to be disfavored because it cannot practicably be checked; consequently, its place in international law is limited and must be taken only as a potential modifier—not terminator—of treaties.[130]

But simply using synonyms for substantial change, such as "essential," "vital," or "fundamental," is not helpful in understanding the operation of the doctrine in the absence of some unifying theory for governing its application. O'Connell would apply the doctrine using Anglo-American contract theory, under the headings of frustration of purpose (failure of a basic assumption) or impossibility.[131] The doctrine would then apply by operation of law, a view at odds with the Vienna formulation, which takes into account the parties' intent. The two positions are not irreconcilable;[132] but if, according to Lauterpacht, *rebus sic stantibus* is understood as a variant of frustration or impossibility, the doctrine's scope will be "severely circumscribed."[133] Before reaching the theoretical undergirding of *rebus sic stantibus*, our discussion of the doctrine focuses first upon the relationship between the 1944 Water Treaty

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126. OPPENHEIM, *supra* note 116, at 551.

127. *Id.* at 550.

128. LAWRENCE, *supra* note 115, at 306.

129. 8 I.L.M. at 702.

130. O'CONNELL, *supra* note 125, at 297. He also claims that a treaty having an arbitration or revision clause cannot be susceptible to the doctrine's use if the latter be understood as an implied term of the treaty. *Id.* Article 24 of the 1944 Water Treaty makes the IBWC the principal arbitrator of disputes arising under the treaty. 1944 Water Treaty, *supra* note 2, at 1256. Whether this fact would preclude Mexico's use of the doctrine will be discussed in the following section on frustration of purpose. *See infra* Part IV.B.3. This view is a variant of the doctrine of *casus foederis*, literally meaning "the case of the treaty"; it holds that a treaty cannot be avoided when the complained of events were made part of the treaty's provisions.

131. O'CONNELL, *supra* note 125, at 298 (following Fitzmaurice, *id.*).

132. Changed circumstances that frustrate or make impossible the performance of a treaty may be probative of the parties' actual intent at the time of the treaty's creation.

133. LAUTERPACHT, *supra* note 117, at 422.

and the U.S. Supreme Court, any role the latter might have in the interpretation of the former, the latter's interpretation of treaties generally, and, in particular, the latter's position *vis à vis rebus sic stantibus*.

3. The U.S. Supreme Court and treaties

The U.S. Constitution extends the judicial power of the United States to cases "arising under this Constitution, the Laws of the United States, and Treaties made, or shall be made, under their Authority."[134] The Supreme Court therefore has the authority to hear disputes arising under the treaties to which the United States is a party.[135] It does not necessarily follow, however, that the Court has the power to hear disputes arising under the 1944 Water Treaty. The appellate procedure adopted by Article 24(d) is two-fold: the Commissioners of the IBWC are to try to reach an agreement, and if they fail, the dispute is to be referred to the two governments "for discussion and adjustment of the difference through diplomatic channels and for application where proper of the general or specific agreements which the two Governments have concluded for the settlement of controversies."[136] At first blush the 1944 Water Treaty leaves no room for intervention on the part of the U.S. Supreme Court.

Nevertheless, a case can be laid out wherein the Court's intervention might be sought and be legally binding upon the Executive Branch. Assuming *arguendo* that the United States and Mexico were to agree to an application of *rebus sic stantibus* that reduces or eliminates Mexico's Article 4(B) debt, such an agreement could undoubtedly be taken for a modification of the parties' existing rights and therefore tantamount to a treaty amendment requiring the U.S. Senate's "Advice and Consent."[137] But who could challenge the Executive Branch's interpretation of the agreement?

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134. U.S. CONST. art. III, § 2.

135. But it is one thing for the Court to hear disputes arising under a treaty and another to approve of or circumscribe the actions concerning a treaty of a coordinate branch of the federal government. This latter version of judicial review of treaties has traditionally been considered under the heading of political question. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring) (setting forth a three-part analysis: one, whether the text of the Constitution commits the question to a political branch of government; two, whether the question requires for its resolution expertise that the Court does not have; and three, whether prudential considerations weigh against the Court hearing the question); in the context of property rights, see *U.S. v. Sandoval*, 167 U.S. 278, 290 (1897) ("The mode in which private rights of property may be secured, and the obligations imposed upon the United States by treaties fulfilled, [belong] to the political department of the government to provide.").

136. 1944 Water Treaty, *supra* note 2, at 1256.

137. *See* U.S. CONST. art. II, § 2, cl. 2. *See also* UNITED STATES AND MEXICO COLORADO RIVER DELTA SYMPOSIUM 23-24 (Sept. 11-12, 2001), *at http://www.ibwc.state.gov/FAO/CRDS0901/EnglishSymposium.pdf* (last visited Nov. 12, 2003) [hereinafter SYMPOSIUM]: "[A]ny amendment of the treaty, i.e. a modification of existing rights and obligations, would require that agreement be submitted to the United States Senate for its advice and consent." (reduction of the statement of U.S. Department of State symposium representative Mary Brandt).

a. A question of standing

As a preliminary matter, not all international agreements are treaties as understood by Article II of the Constitution. Although it is well settled that the Executive Branch's authority under the Constitution to conduct the nation's foreign policy includes the power to make various kinds of bilateral and multilateral accords, agreements, and understandings, without compliance with the Treaty Clause,[138] the line between an international agreement and a treaty, for constitutional purposes, is a blurry one. In dealing with the 1944 Water Treaty, an IBWC Minute that pretended to change Mexico's existing Article 4(B) debt might fairly be interpreted as a substantial change in the parties' rights and obligations theretofore assumed.[139]

The argument can be made that such an agreement would be a de facto treaty amendment, therefore triggering the requirements of the Treaty Clause; but, it is an entirely separate and much more difficult question as to who would have standing to challenge the Executive Branch's claim that the agreement falls within that Branch's foreign policy prerogative. This issue is resolved through recourse to the Supreme Court's standing jurisprudence, which is divided into two categories: the constitutional and the prudential. In the former category, the threshold question is whether the plaintiff presents a case within the meaning of Article III, section 2 of the Constitution. That query is answered by determining (1) whether the plaintiff has a sufficient stake in the matter to justify federal jurisdiction and the Court's remedial powers, and (2) whether the plaintiff has suffered or will suffer some injury because of the impugned action.[140]

If the plaintiff passes the constitutional test, standing then turns upon the Court's prudential judgment. A plaintiff will fail this prudential test if (1) his alleged injury is a "generalized grievance" shared by a large class of

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138. *See* 1944 Water Treaty, *supra* note 64.

139. "[A] treaty is amended only if the obligations imposed by that treaty change." New York Chinese Television Programs, Inc. v. U.E. Enterprises, 954 F.2d 847, 854 (2d Cir. 1992). In deciding whether the United States's "derecognition" of Taiwan affected the reciprocal copyright protection agreements in force between the two countries, the court agreed with the "defendants' assertion that a significant amendment to a treaty must follow the mandate of the Treaty Clause, and therefore must be proposed by the President, and be ratified following the advice and consent of the Senate." *Id.* at 853.

140. Warth v. Seldin, 422 U.S. 490, 498-99 (1975). There is a long line of case law supporting the proposition that the plaintiff, in order to have standing, must assert some constitutional right personal to himself, or at least personal to someone so closely connected to the plaintiff as to make the two parties practically indistinguishable. *See* McGowan v. Maryland, 366 U.S. 420, 429 (1961); United States v. Raines, 362 U.S. 17, 20-22 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958); Voeller v. Neilston Warehouse Co., 311 U.S. 531, 537 (1941); Hendrick v. Maryland, 235 U.S. 610, 621 (1915); Tyler v. Judges of Court of Registration, 179 U.S. 405, 408-10 (1900).

citizens,[141] (2) he asserts rights not personal to himself,[142] or (3) the Constitutional provision at issue cannot be read either explicitly or implicitly to grant persons in the plaintiff's position a right to relief.[143] As an exception to the requirement that the plaintiff assert rights personal to himself, the Court will permit a plaintiff to assert the rights of third parties if the interests involved are grave enough, they would be violated by the impugned action, and the connection between the plaintiff and the third parties is more than a mere "incidental congruity of interest."[144]

b. Standing and the Treaty Clause

Applying this standing test to the hypothetical agreement aforementioned, it is possible that a number of persons or entities would have standing to contest the Executive Branch's interpretation. To begin with, thirty-four Senators, representing one-third plus one of the Senate, who would vote against the agreement were it to be presented, could assert that their Treaty Clause voting rights were violated by the Executive Branch's failure to present the agreement to the Senate.[145] The Senators' constitutional stake would be substantial; their injury—inability to vote—would be a direct result of the Executive Branch's action; the injury would not be a "generalized grievance"; and the rights asserted would be personal to the Senators. In sum, they would likely have standing to contest the agreement.

It is less clear whether standing would exist for a state, such as Texas, or for individual citizens, to contest the Executive Branch's failure to present the impugned agreement to the Senate for ratification. For these parties, the central question would be whether their injuries, presumably caused by the diminution in water that was to be supplied by Mexico, could be linked to the deprivation of the Senators' voting rights, which would be the primary injury stemming from the violation of the Treaty Clause. The Court has held that the injury complained of can be indirectly related to the Constitutional violation, but in all cases it must be "fairly traceable to the defendant's acts or omissions."[146] The issue would be decided upon whether the state's or the citizen's interests were related to those of the Senators in such a way as to be more than

141. Warth, 422 U.S. at 499.

142. *Id.*

143. *Id.* at 500.

144. *Id.* at 510.

145. This situation is distinguishable from the facts of *Goldwater v. Carter*, 444 U.S. 996 (1979), discussed *supra* note 135; whereas in *Goldwater* the matter in dispute was the constitutional role the Congress was required to play in a President's abrogation of a treaty, in a hypothetical Rio Grande dispute the issue would be whether the Executive Branch had agreed to a de facto amendment to the 1944 Water Treaty, which would require Senate ratification. *See* New York Chinese Television Programs, 954 F.2d at 853.

146. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 261 (1977).

mere "incidental congruity of interest."[147] Given the gravity of a Treaty Clause violation, the Court would be most reluctant to extend standing to third parties if the persons whose injury would be direct and primary, i.e. the 34 Senators in the present example, had not sought redress of their own accord.[148] But even if this be so, it is at least theoretically possible that the Court could be called upon to adjudicate a matter arising under the 1944 Water Treaty, despite the absence of any explicit provision in the latter for judicial review.[149]

c. The U.S. Supreme Court's general rules for treaty interpretation

The modern rule followed by the Court in treaty interpretation has been to take the treaty as a contract between the parties, subject to the normal modes of contract interpretation.[150] *Chan v. Korean Airlines, Ltd.*[151] presented the question of whether the Warsaw Convention precluded a limit on liability where adequate notice of the limit was not given. The Court held, in an opinion by Justice Scalia, that where the text of the treaty is clear, the Court has no power to insert an amendment[152]:

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147. Warth, 422 U.S. at 510.

148. *See id.* at 499.

149. This standing discussion does not exhaust the ways in which the decisions of the Supreme Court could play a role in the adjudication by an international tribunal of the present Rio Grande controversy. Because the Court's decisions regarding the uses of streams running through the several states are analogous to those rendered by an international tribunal judging the rights of sovereign nations, they form authoritative precedent in international law. The Court's opinions in interstate water disputes were so used by the Trail Smelter Arbitral Tribunal, which settled the case of the *Trail Smelter*, a controversy between the U.S. and Canada over the latter's operation of an iron smelter near the British Columbia-Washington State border. *Trail Smelter Arbitral Tribunal Decision, reprinted in* 35 AMER. J. INT'L L. 684 (1941). The smelter, between the years 1925 and 1937, caused severe damage to Washington State through its sulphur dioxide emissions. *Id.* at 692-93. In ruling in favor of the U.S., the tribunal stated that

> as regards, both air pollution and water pollution, certain decisions of the Supreme Court of the United States . . . may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such states, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.

Id. at 714.

150. For the earlier view, see Haver v. Yaker, 76 U.S. 32, 35 (1869): "In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land" (deciding whether the relate-back theory for determining the effective date of treaties would apply when its operation would divest a private citizen of a property interest). *See also* Choctaw Nation v. U.S., 318 U.S. 423, 431 (1943) ("[T]reaties are construed more liberally than private agreements.").

151. 490 U.S. 122 (1989).

152. *Id.* at 134. The drafting history of the treaty, known as *travaux préparatoires*, may be consulted only when the text is ambiguous. *Id.*

> Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by the just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.[153]

Simply put, "[a] treaty is in the nature of a contract,"[154] made between nations to which "general rules of construction apply."[155] The words of a treaty are to be taken according to their ordinary meaning in international law.[156] Moreover, in interpreting international agreements and treaties, one must allow for a heavy presumption in favor of the literal meaning of the words used therein.[157] Accordingly, the following may be taken as the general rules of construction adhered to by the Supreme Court in the interpretation of treaties: (1) the plain meaning of the words is controlling; (2) *travaux préparatoires* may be referred to only where the text is ambiguous; and (3) treaties as a whole are interpreted as contracts between states.

4. The U.S. Supreme Court's interpretation of rebus sic stantibus

Research has turned up but one case in which the Supreme Court has directly addressed the doctrine of *rebus sic stantibus*, viz. *Trans World Airlines, Ltd. v. Franklin Mint Corp.* In *Franklin Mint*, the respondent had lost cargo which it had shipped with the petitioner TWA, and sought damages according to the Warsaw Convention.[158] Under the Convention, the calculation of damages is tied to a state's gold standard, which in the United States was last at $9.07 per troy ounce before Congress eliminated it in 1978.[159] The respondent had shipped coins valued at over $250,000, but under the treaty's gold standard provisions, the damages would have amounted to about $6,000, based upon the *weight* of the coins.[160] Franklin Mint argued that a treaty ceases to be binding when there has been a substantial change since its promulgation,[161] a position tantamount to *rebus sic stantibus*. The Court noted that the "doctrine of *rebus sic stantibus* does recognize that a nation that is party to a treaty might conceivably invoke changed circumstances as an excuse for terminating its

153. *Id.* at 135 (quoting *The Amiable Isabella*, 6 Wheat. 1, 71 (1821)) (Story, J.).
154. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984).
155. *Id.* at 262 (Stevens, J., dissenting).
156. *Id.* at 263.
157. *Id.* at 262.
158. Trans World Airlines, 466 U.S. at 245 (majority opinion).
159. *Id.*
160. *Id.* at 246.
161. *Id.* at 253.

obligations under the treaty."[162] Nevertheless, Franklin Mint lost; the Court found that a private party could not invoke the doctrine on behalf of a treaty signatory merely because the private party finds "the continued existence of the treaty inconvenient."[163] *Franklin Mint* confirms that the Supreme Court recognizes *rebus sic stantibus* as a part of international law.

The Court's opinion does not reach the question of how and when the doctrine ought to be applied by states, although from the case's result it is clear that merely an inequitable result (which surely is the case when Franklin Mint's damages represent less than three percent of its actual loss) is not a sufficient basis for the doctrine's application. This result underscores the Court's reluctance to disturb the contractual balance struck by a treaty, even where that balance has proved to be a bad bargain in light of a change in circumstances. In its effort to limit in theory the scope of the doctrine's application, the Court is in accord both with the treatise writers and the Vienna drafters.

The search for a unifying theory for the application of *rebus sic stantibus* to the controversy over Mexico's Article 4(B) debt leads now to a review of the contract doctrines of impracticability, impossibility, and frustration of purpose. Their exposition and application to Mexico's water debt under the 1944 Water Treaty is the subject of the following section.

B. Rebus sic stantibus and contract theory

The relevance of this investigation into contract theory is based upon three premises, two of which have already been dealt with, viz. a treaty is interpreted as a contract among states, and *rebus sic stantibus* is susceptible to a contract-theory interpretation.[164] The third premise is this: the plain language[165] of the treaty permits Mexico what amounts to a delay in debt payment in the case of an "extraordinary drought," but no other remedy. Therefore, to justify noncompliance Mexico must allege either (a) the combination of drought and increased beneficial uses has made Mexico's continued adherence to the treaty either impracticable or impossible, thereby representing a change in circumstances sufficient to merit the application of

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162. *Id.*

163. *Id.*

164. *See, e.g.*, JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 530 (4th ed. 1998) (wherein it is stated that an unexpected event making a substantial change in contemplated performance is tantamount to *rebus sic stantibus*, "an implied term in every treaty [operating such that the treaty] will cease to be binding when the facts and conditions on which it was based have fundamentally changed.").

165. Bearing in mind that "[t]raditionally, courts will give the language [of the contract] its natural and appropriate meaning, and if the words are unambiguous, will not admit evidence of what the parties may have thought the meaning to be," an exposition of the plain-meaning rule. 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 6.58 (1991).

rebus sic stantibus; or (b)(i) because of drought and increased uses the debt Mexico has incurred amounts to a frustration of the purpose of the treaty, viz. the equitable division of the waters of the three international streams[166]; or, in the alternative, (ii) the failure of a basic assumption of the treaty, the assumption being that the enforcement of the treaty as contemplated by the parties at its creation would not itself produce an inequitable result.

1. Rebus sic stantibus understood through Impracticability[167]

The Restatement (Second) of Contracts permits the discharge of a party's duty to perform, in the absence of contrary language, when that "party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made . . . ."[168] Even assuming that a "basic assumption" is the equivalent of "changed circumstances" within the meaning of *rebus sic stantibus*, one will still find the definition ill-suited for practicable application, as the Restatement definition merely states that one has a good impracticability defense when it would be impracticable to perform—and that is question begging. A similar definition is found in UCC § 2-615, wherein the discharge of a party's duty is predicated upon the failure of a basic assumption rendering performance impracticable.[169] The Reporter's Comment notes that increased cost alone is insufficient reason for discharge, but "[i]n the case of a failure of a production by an agreed source for causes beyond the seller's control, the seller should . . . be excused since production by an agreed source is without more a basic assumption of the contract."[170] It is here that Mexico has by analogy a good argument, one which can be made out in the following manner: if Mexico be considered the seller, the thing sold be water, the agreed source be the heavens, and a failure of production be drought, then the present Rio Grande controversy would meet all of the elements of an impracticability defense, for whence is the water to come save from above?

This analogy becomes untenable, however, when impracticability is predicated upon a meteorological phenomenon: "The fact that storms, or unusual weather conditions make performance more difficult or expensive has generally been held to be no excuse."[171] Because rain, like weather in general, is difficult to predict, it makes sense that parties would seek to allocate the risk of drought between themselves; and even if one cannot make it rain, one can still insure the other party for losses resulting from a lack of rain. The purpose

166. *See* 1944 Water Treaty, *supra* note 2, at 1220.

167. Although the doctrine of impracticability has traditionally been considered a subdoctrine of impossibility, for present purposes the two will be treated separately.

168. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1979).

169. UNIF. COMMERCIAL CODE § 2-615, 1B U.L.A. 195 (1989).

170. *Id.* at 196.

171. 6 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1333 (1962).

of the Article 4(B) requirements was to secure a minimal water supply for Texas irrigators. This guarantee was thought necessary because, south of Fort Quitman, Texas, seventy percent of the flow of the Rio Grande comes from Mexican tributaries. The "extraordinary drought" language of the treaty might thus be understood as an allocation to Mexico of the risks of drought.

But impracticability requires more than the failure of a basic assumption (or changed circumstances); the failure must not have been reasonably foreseeable at the time of contracting.[172] A state may claim *rebus sic stantibus* as a way of avoiding onerous treaty provisions if the state is believed when it claims that it did not foresee at the time the treaty went into force that circumstances might change down the road, whereas a contractual party seeking to excuse himself through impracticability must do more, viz. prove that the events causing the impracticability were not reasonably foreseeable.[173] According to the relevant climatological data, droughts of varying magnitude and severity had occurred prior to the treaty's ratification, and have recurred with some frequency in the sixty years since.[174] In other words, it would be difficult for Mexico to prove that it did not foresee, or ought not to have foreseen, that drought might make its Rio Grande allotment obligations hard to meet. Therefore, Mexican noncompliance with its Article 4(B) obligations, based upon a theory of *rebus sic stantibus* understood through impracticability, cannot be justified.

2. *Rebus sic stantibus understood through Impossibility*

Impossibility is closely related to impracticability, the only difference between the two theories being that, in the case of the latter, performance would be possible but exceptionally burdensome, whereas in the case of the former, performance cannot even be compelled, usually because the thing serving as the basis of the contract has ceased to exist. *Taylor v. Caldwell*[175]

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172. Contrariwise, the Vienna Treaty Convention formulation of *rebus sic stantibus* requires actual, not reasonable or imputed, foreseeability. *See supra* Part IV.A.1.b. *and* note 123.

173. The exemplar for this view is *Eastern Airlines v. Gulf Oil*, 415 F. Supp. 429 (S.D. Fla. 1975). The court, rejecting the defendant's UCC impracticability defense to an output requirements contract, concluded: "Gulf would not prevail because the events associated with the so-called energy crisis were *reasonably foreseeable* at the time the contract was executed." *Id.* at 441 (emphasis added).

174. In discussing the urgent need for a water treaty for the Rio Grande, L.M. Lawson, American Commissioner of the IBC, referred "to a very serious situation; one, of last summer, where a drought condition prevailed for some weeks, threatening investment and involving even community life through the domestic water supply." *Hearings*, *supra* note 15, at 25. Lawson also noted that, immediately prior to the flood year of 1932, there was a "drought period which was so serious that drinking water was shipped in Brownsville, Tex., by carload." *Id.* at 26. *See also supra* Part II.C.

175. 122 Eng. Rep. 309 (K.B. 1863). The plaintiff was a symphony orchestra that had contracted to rent from the defendant a concert hall. The plaintiff had, in reliance upon the contract, made several expenses in preparation for the concert. The hall burned down before

is the paragon case for impossibility. Its definition of the doctrine has become standard: "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[176] The analogy to the present Rio Grande controversy may be drawn thusly: the performance of Mexico (transferring of water) depends upon the continued existence of a thing (water), which has perished (because of drought), rendering performance impossible. To be sure, Mexico can comply with the treaty, but compliance entails the risk of severe water shortages that could affect municipal supplies. The product of the analogy, then, is a form of practical impossibility.

This ungainly result need not discourage further inquiry, for the Vienna Treaty Convention also makes allowance, in Article 61, for "Supervening impossibility of performance."[177] So long as the impossibility stems from the "disappearance or destruction of an object indispensable for the execution of the treaty," the party is excused from performing.[178] Although the Vienna codification of impossibility cannot be said to be superior in clarity or simplicity to that found in *Taylor*, it does carry with it the weight of international law, and therefore makes a more convincing argument for Mexico than does impracticability.

Nevertheless, the 1944 Water Treaty and the impossibility doctrine make an ill fit. In the treaty, the parties did not contract for the delivery of a certain quantity of water, or for water as a thing, but rather for a supply of the thing. It is true that without water the treaty cannot operate, but the water contracted for has neither "disappeared" nor has it been "destroyed"—it simply has not fallen from the sky. In other words, the debt that Mexico has accrued under Article 4(B) represents water that has never existed; it does not stand for water that has once been but now no longer is. Therefore, because here there has been no "perishing" of the thing contracted for, the impossibility defense, under either the *Taylor* or the Vienna formulation, fails.

3. Rebus sic stantibus understood through Frustration (failure of a basic assumption)

The doctrine of failure of a basic assumption has already been treated in part under the headings of impracticability and impossibility, at least insofar as these latter theories require such a failure as a precondition to the working of their defenses. The doctrine of frustration in this respect is differ-

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the concert could take place, and the plaintiff sued for damages based upon breach of the contract, which itself was silent as to what ought to be done if the hall were to become unavailable.

176. *Id.* at 314 (opinion by Blackburn, J.).

177. 8 I.L.M. 679, 702 (1969).

178. *Id.*

ent: when it has served to discharge a party from its contractual obligations, the performance avoided was neither impracticable nor impossible. This is so because frustration is concerned not with the mechanics of performance but with the reason for performance; it operates where there has been a failure of consideration.[179] The English version of the doctrine can be found in Lord Justice Vaughan Williams's opinion in *Krell v. Henry*[180] in the form of a three-part test: (1) what was the foundation of the contract? If that foundation was the impeding (frustrating) event, then (2) was the performance of the contract prevented? If so, then (3) was the impeding event such that neither party could have contemplated its occurrence at the time of contracting? If yes, then the duty is discharged.[181]

In this country, the doctrine has received its most lucid exposition in the opinion of Justice Traynor in *Lloyd v. Murphy*.[182] Traynor described frustration as when "[p]erformance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration."[183] This formulation differs only slightly from that of Vaughn Williams's in *Krell*, but Traynor distinguishes himself in admitting that the "question in cases involving frustration is whether the equities of the case, considered in light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff . . . ."[184]

The purpose of the 1944 Water Treaty is "to obtain the most complete and satisfactory utilization" of three international streams.[185] The purpose of Article 4(B) is to assure Texas irrigators a minimum supply of water.[186]

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179. Courts try to identify both parties' intentions, and "when the presuppositions or assumptions of one or both parties are disrupted or frustrated in a fundamental way some remedial action may be justified." 14 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 77.1 (Joseph M. Perillo ed., 2001). Typically a party can still perform but the reason for performance no longer exists. *Id.* at 243.

180. One of the famed "Coronation Cases." L.R. 2 K.B. 740 (Ct. App. 1903).

181. *Id.* at 751. When element two speaks of the performance being prevented, one must assume the Lord Justice meant that the impeding event renders the contract valueless to one of the parties; if not, then the test more aptly describes impossibility.

182. 153 P.2d 47 (Cal. 1944). The case involved a lessee who had sought a lot on which to conduct a new automobile sales business. After the lease was executed, the U.S. Government issued a war-time regulation severely restricting the market for new automobiles; consequently, the value of the lease was allegedly substantially reduced and the lessee sought discharge.

183. *Id.* at 50.

184. *Id.*

185. 1944 Water Treaty, *supra* note 2, at 1220.

186. See, e.g., the statement of Secretary of State Edward Stettinius before the Senate Foreign Relations Committee during the hearings for the treaty's ratification: "On the lower Rio Grande, where most of the water supply originates in Mexico, a division of the waters was agreed upon which . . . will protect existing uses and make possible considerable expansion in both countries." *Hearings*, *supra* note 15, at 20. As for the American motive in demanding a baseline water guarantee, see the exchange between Senator Downey of California and L.M. Lawson, Commissioner of the IBC:

Would those purposes be frustrated if Mexico were to be excused from its 4(B) obligations; or, in the words of Traynor, would the contract equilibrium made by the treaty be upset? It is here that Mexico can make a good argument, in that the provisions as now enforced have proved to be a burden far beyond any Mexico has borne since the treaty's creation. Even if the drought now besetting the region be not considered beyond the pale of extraordinary, the tremendous increase in beneficial uses on both sides of the border, coupled with water waste, have turned the treaty into a worker of inequity. The value to Mexico of a perpetual treaty purporting to divide fairly the waters of shared streams is nil when the treaty proves to be an unequal allocator. If this substantial unfairness is deemed to frustrate the purpose of the treaty, and if the drought, waste, and increased demand found on both sides of the Rio Grande are deemed a significant change in circumstances, then this may be an apt spot for the application of *rebus sic stantibus*.

V. THE POSITION OF THE UNITED STATES IN THE PRESENT CONTROVERSY

The approach of the United States to the current water dispute has been a simple one: tactfully but insistently to demand Mexican compliance with the terms of the treaty.[187] The United States has no interest in renegotiating a treaty favorable to it, but even if certain incentives existed for renegotiation, the potential political upheaval that would result from upset and betrayed farmers in vote-rich Texas would exceed any benefit to be gained in Anglo-Mexican relations.[188] In any event, the United States points to precedent in resolving the conflict: IBWC Minute 234. This pronouncement of the Commission, made in the wake of Mexico's construction of the Luis Leon Dam along the Rio Conchos,[189] lays out the means by which Mexico is to pay any water debt accruing under Article 4 of the 1944 Water Treaty.[190] Deficiencies may be made up by (a) any water allotted to the United States from the named

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> Senator Downey. Would you then term that [article 4(B)] a very favorable arrangement to the State of Texas and to the users of the Rio Grande?
> Mr. Lawson. Absolutely. It is to their benefit. Mexico is in a position by these [dams] on the [treaty] tributaries to control practically the entire flow.

Id. at 30. Since the signing of the treaty, Mexico has built six reservoirs of varying capacity along treaty tributaries, bringing the total number of Mexican dams in the basin to twelve. TECHNICAL ANNEX, *supra* note 71, at Table 1.

187. "It's our position that with the current water storage, projected inflows and reduced irrigation, Mexico could make deliveries in partial fulfillment of its obligations." (statement of Sally Spener, spokeswoman for the USIBWC), Chris Kraul, *Doubts Sprout About Mexico Water Pledges*, L.A. TIMES, May 29, 2002, at A3.

188. "We feel abandoned by a home-grown president who knew what was happening all along." (statement of Jo Jo White, manager of one of Texas's largest border region irrigation districts), Weiner, *supra* note 61.

189. UPDATE, *supra* note 65, at 3.

190. Minute 234, *supra* note 102.

tributaries in excess of the United States guaranteed minimum allotment[191]; (b) any water allotted to Mexico from the named tributaries, when Mexico gives the United States notice and the United States is able to store such waters; and (c) any water allotted to Mexico that is stored in one of the major international dams along the Rio Grande, to the extent that the United States is able to conserve such waters.[192] Accordingly, the current water dispute, in the eyes of the United States, is simply a matter of inducing Mexico's compliance with these existing provisions.

So as not to appear hard-nosed over the treaty, the United States has sought repeatedly through the IBWC to alleviate any genuine hardship befallen upon Mexico because of drought. One example of this attitude can be found in Minute 240,[193] which was issued in response to a drought in the Baja California region of Mexico that threatened the municipal water supply of Tijuana.[194] Point 1 of the Minute mandated that, for a limited period of time, deliveries of Mexican water allotted under Article 10(a) of the 1944 Water Treaty would be made at a point along the border near Tijuana.[195] These deliveries were significant because they broke with the pre-existing framework for Colorado River allotment transfers to Mexico, but this alteration in practice and established procedure did not preclude the two countries and the IBWC from working out a solution to an emergency situation within the confines of the 1944 Water Treaty.

IBWC Minute 293, issued in 1995, is another good example both of U.S. conciliation and of the IBWC taking significant liberties with the interpretive power granted to it by the treaty. The Minute noted the existence of a drought-induced "critical situation" in the Rio Grande Basin which threatened the water supply for domestic use by Mexican citizens living near the river.[196] The IBWC Commissioners also recognized the conservation measures undertaken by Mexico, including "elimination of irrigation releases, utilization of farm labor [to repair infrastructure], drilling of wells . . . and maintenance of a reserve of . . . 121,606 acre-feet (af) at the international dams for domestic and municipal supply," but conceded that such measures

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191. No better example of "robbing Peter to pay Paul" can be found. The provision's use of "minimum" must be taken for the 350,000 acre-feet per year average. If the Commissioners meant by "minimum" the standard one-third allotment (which may be greater than the 350,000 figure), anything in excess of that amount perforce is Mexican water, as covered by subparagraph (b) of the same Minute. Therefore, the U.S. takes as a Mexican payment water in excess of its guaranteed minimum but water which would normally be allotted to it anyway. That Mexico has not pressed its case under this provision can be explained only by the vagaries of diplomacy and not by any slavish adherence to self-interest.

192. Minute 234, *supra* note 102, at 2.

193. Colorado River Waters: Emergency Deliveries to Tijuana, June 13, 1972, U.S.-Mex., 28 U.S.T. 7169.

194. *Id.* at 7170.

195. *Id.* at 7172-73.

196. Minute 293, *supra* note 97, at 1.

were insufficient to guarantee a minimum supply of water for essential Mexican uses.[197] The treaty provides in Article 9(f) that when there is "extraordinary drought in one country with an abundant supply of water in the other country, water stored in the international storage reservoirs and belonging to the country enjoying such abundant water supply may be withdrawn, with the consent of the Commission, for the use of the country undergoing the drought."[198] The Commissioners, aware that U.S. water levels were below normal in both international reservoirs, nevertheless decided "in the spirit of Article 9 of the 1944 Water Treaty" to consider measures to alleviate Mexico's severe shortage.[199] In spite of the evident international goodwill exuded by both parties, the United States was quick to "reinforce, at the earliest time possible, the Commission's procedures set forth in the 1944 Water Treaty governing ... the measurement, conveyance, storage and diversion of waters belonging to each country."[200] The deal brokered consisted of allowing Mexico to divert for domestic and municipal needs waters from the Rio Conchos reaching the main channel of the Rio Grande normally allotted to the United States, up to 81,071 acre-feet.[201]

Two points can be made about Minute 293 that are relevant to the current water dispute. First, the U.S. concession reveals an important American bargaining position, viz. that the United States will press for Mexican action in accord with Article 4 so long as Mexico retains sufficient water to ensure that domestic and municipal uses can be taken care of. If any further payment by Mexico of its water debt would result in a cutting into of what can be called Mexico's "critical supply" of water, the United States is quick to back away and adopt a more accommodating and publicly conciliatory attitude. Such a method of attack serves several purposes: it satisfies Texas stakeholders as they watch their crops wilt under the ravages of drought; it keeps Mexican critics at bay by blunting the effect of otherwise "inequitable" results under the treaty; and it reinforces the U.S. adherence to Article 3 of the treaty and its preferential guide to beneficial water uses. As far as this last motive goes, it would make little sense for the United States to allow Mexico temporary use of American water destined for irrigation of Mexican crops,

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197. *Id.* at 1-2. Although touted only as a guide, the preferential listing of allowed uses under Article 3 of the treaty carries significant weight. Number one is "Domestic and municipal uses." 1944 Water Treaty, *supra* note 2, at 1225.

198. 1944 Water Treaty, *supra* note 2, at 1235.

199. Minute 293, *supra* note 97, at 2.

200. *Id.* at 3.

201. *Id.* at 4. Note that the waters transferred are those of the Rio Conchos reaching the Rio Grande; until that point, the U.S. has no claim under the treaty to those waters. Of course, if Mexico wishes to supply its citizens with water from the international storage dams, it has no choice but to transfer the waters by way of the Rio Grande. Once the tributary waters enter the main channel, the allotment provisions of Article 4 apply. Point 4 of the same Minute emphasizes that the emergency release of water "does not in any way represent a waiver of the rights established for the United States in Article 4 of the Water Treaty of 1944." *Id.*

given that these same Mexican farmers have as their chief competitor Texas farmers and have as their chief market American grocery stores.[202]

Second, the Minute demonstrates the IBWC's willingness to interpret in a very loose manner the provisions of the treaty in order to achieve a result amenable to both sides. To use the word "abundant" to describe the U.S. supply of water in the Rio Grande international reservoirs, either in 1995 or now, ventures a solecism, but that did not stop the IBWC Commissioners from divining a treaty spirit friendly to Mexican and American interests. The lesson to be learned from this interpretive feat is that no one can tenably accuse the IBWC of stodginess or slavish literalism in acting upon its treaty mandate.[203]

More recently, IBWC Minute 308 recognized Mexican minimum water needs of 243,213 acre-feet stored in the Rio Grande international reservoirs, to supply Mexican citizens for domestic and municipal uses for ten months.[204] This action on the part of the IBWC represents the second time it has acknowledged Mexico's right to a "critical supply" of water.[205] Judging from the foregoing, the United States appears firmly committed to resolving the current water dispute within the framework of the 1944 Water Treaty and the IBWC.[206]

VI. KEY PRECEDENTS INTERPRETING THE 1944 WATER TREATY

It is undisputed that under the 1944 Water Treaty Mexico owes water to the United States. The essential issue is whether the treaty provides the necessary means for the resolution of the current water dispute. The first question to be asked is why, in a treaty which speaks of allotments in terms of halves and thirds, would there be two provisions that speak in the language of hard numbers? The answer is found by recognizing the scope of the treaty as a whole: it does not deal directly with any of the tributaries to the principal rivers named therein, but does so only indirectly insofar as those same tributaries are the sources of the water actually flowing in the Tijuana and Colorado Rivers and Rio Grande.[207] If the treaty had spoken of allotments

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202. Interview with Jorge Vargas, Professor of Law, University of San Diego School of Law, in San Diego, Cal. (Aug. 21, 2002).

203. But that is the very criticism most often leveled against it. *See generally* Mumme, *supra* note 46.

204. Minute 308, *supra* note 67, at 2.

205. *See* Minute 293, *supra* note 97.

206. *See* Kelly & Chapman, *supra* note 82, at 2 (arguing that a "standoff over interpretation of the 1944 Treaty isn't going to solve any problems, and neither will repeated demands for impractical actions — for example, that Mexico divert all its water supplies in the Rio Bravo [Rio Grande] basin toward debt repayment.").

207. That is to say, the 1944 Water Treaty divides the waters of the three international streams but effects the division by reference to inflows from those streams' internal tributaries. *See* 1944 Water Treaty, *supra* note 2, at 1225-27, 1237, 1249.

only in terms of proportions, then neither signatory nation would have had any obligation to deliver water to the other. One country might dam a tributary so that only a trickle of water flowed into a shared river, in which case the other country could then make its claim only for a portion of that trickle.[208] By inserting absolute minimums as part of the proportional division of waters covered by the treaty, an insurance against greedy damming was thereby made.[209] It was in the use of these absolute minimum guaranteed water flows that the treaty struck upon new ground. Whereas in the past a down-river nation might have expected little more than a trickle, now a precedent was set for up-river nations to ensure that their downstream neighbors received a greater portion of the river's water.[210] In light of the construction of the

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208. During the Senate hearings prior to ratification, several Texas water officials stated their belief that, without the treaty, the flow from the Rio Grande would be seriously diminished due to Mexican damming of tributaries for irrigation. *See, e.g.*, statement of L. H. Ramey, General Manager, Hidalgo County Water Control and Improvement District No. 6, Mission Tex.:

> The farmers and grove owners of this district fully realize that the continued diversion of the waters of the Rio Grande by Mexico as well as the impounding and diversion of waters by upstream development on the American side of the river is slowly but surely taking away from them the water that is so necessary to save their investments and allow them to continue the production of the crops that are so well adapted to this area.

Hearings, *supra* note 15, at 1609. Also particularly telling is a subsequent exchange between the chairman of the Foreign Relations Committee, Tom Connolly (a Texan and strong supporter of ratification) and Mr. Ramey:

> The Chairman. If these dams and other dams were constructed on these tributaries and the Mexicans used the water for irrigation, the supply for the Rio Grande would be very materially reduced, would it not?
> Mr. Ramey. It would, and that is our great fear now: that water that has been coming from the Mexican tributaries is now to be cut off and not made available to the Rio Grande.
> . . . .
> The Chairman. Your fear and the fear of the people in the valley is, irrespective of any additional water to be secured under this treaty, that Mexico may appropriate the major portion of the waters now flowing into the Rio Grande and use them on the Mexican side, thereby destroying or impairing—I will not say "destroying"—materially impairing your economy, so that you could not keep up even your present development, to say nothing of expansion.
> Mr. Ramey. That is true, sir.

Id. at 1613.

209. This conclusion follows necessarily, for, if the treaty provided no minimum guarantees, but instead permitted each country to use one-half of the actual flow of the Rio Grande, the upper-riparian country could fully utilize its Rio Grande tributaries without regard to the consequent negative effect on the flow of the Rio Grande. *See also supra* note 186.

210. It is somewhat amusing to note in light of recent denunciations of the treaty for its inequity that, at the time of its ratification, it was hailed as visionary and as a standard for future similar arrangements. *See* Timm, *supra* note 26, at 292 ("[The Treaty] is more than a mere division of water between the two countries: it provides the administrative machinery and the principles for international cooperation in the development of these water resources. As such, it may well be taken as a model for future treaties governing international steams.").

Prior to the 1944 Water Treaty, the United States held that international law permitted an upstream nation to use the waters of a river flowing through its national territories to the fullest extent it desired. As a consequence, downstream nations would have no right against upstream nations for a more equitable sharing of a river's flow. This position, as applied in the United States, became known as the Harmon Doctrine, after the American Attorney General who first propounded it in 1895. Harmon was writing in response to a State Department request for a legal opinion concerning Mexican Minister Romero's protest over American use of the Rio Grande and Colorado River flows, which was harming Mexican users along the border. Romero argued that the citizens of El Paso del Norte had been using the water of the Rio Grande for over 300 years, and therefore deserved some protection against excessive American consumption. 21 OPS. ATT'Y GEN. 274, 276 (1895). After dispensing with Mexican claims based upon interpretations of the Treaty of Guadalupe Hidalgo, *supra* note 10, and the Gadsden Purchase, *supra* note 12, Harmon addressed directly the Mexican contention that the United States was bound to use the Rio Grande and Colorado River, irrespective of any treaty, in an equitable manner: "The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory." 21 OPS. ATT'Y GEN. at 281. He went on to cite Chief Justice Marshall as authority for the proposition that any restriction upon a State's sovereignty must come from the State itself, through treaty or other statute, and cannot be imposed upon it by some external source. *Id.* at 281-82. The Attorney General noted that Mexico did not allege any "wantonness or wastefulness" on the part of the United States; therefore, "the question should be decided as one of policy only, because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States." *Id.* at 283.

This position, viz that the United States was not bound by law to share equitably with Mexico the flows of the Rio Grande and Colorado River but could do so without prejudice to itself out of respect for binational comity, recurs repeatedly in the water disputes of the two countries prior to the 1944 Water Treaty. In a State Department note to Mexican charge d'affaires Gamboa prior to the 1906 Rio Grande Convention, Secretary Adee noted:

> A careful examination of the law of nations on the subject has failed to disclose any settled and recognized right created by the law of nations by which it could be held that the diversion of the waters of an international boundary stream for the purpose of irrigating lands on one side of the boundary stream and which would have the effect to deprive lands on the other side of the boundary of water for irrigation purposes would be a violation of any established principle of international law.

Simsarian, *supra* note 14, at 43. In Article V of the 1906 Rio Grande Convention, both parties expressed the understanding that the United States was providing Mexico 60,000 acre-feet of water annually out of the interests of international comity only. 1906 Rio Grande Convention, *supra* note 17, at 2955. The position that the Harmon Doctrine "was disregarded in the first United States treaty to be signed after its formulation," 5 ALBERT E. UTTON, WATERS AND WATER RIGHTS § 49.03(a) (Lexis L. Publ'g 1991) (1967) (referring to the 1906 Rio Grande Convention), is off the mark. The United States decided to act in spite of the privileges it was accorded under the Harmon Doctrine and merely waived those rights for the time being while explicitly reserving them for future use. *See generally* Jacob Austin, *Canadian-United State Practice and Theory respecting the International Law of Rivers: A Study of the History and Influence of the Harmon Doctrine*, 37 CAN. B. REV. 393 (1959). "From [the time of Attorney General Harmon's opinion,] the United States firmly adhered to the principles of the Harmon doctrine as firmly established international law and the doctrine played a very full role in protecting the interests of the United States .... It may well be that this doctrine still expresses the views of the United States." *Id.* at 408 (written more than a decade *after* the ratification of the 1944 Water Treaty).

Herbert Hoover, then the Federal Representative and Chairman of the Colorado River Commission, which was to draw a compact regulating the use of the Colorado River among the

Hoover and Imperial Dams along the Colorado River and Mexico's multiple dams along the Rio Conchos,[211] the treaty's imposition of the now much-maligned baselines is prescient.

A common criticism of the treaty is that it fails to define "extraordinary drought." That is true[212]; but no one is arguing that an extraordinary drought is not now besetting the Rio Grande Basin. The nub is not "What is drought?"

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states, made reference to the Harmon Doctrine in his letter transmitting the agreed upon compact to the House of Representatives. He impliedly affirmed the substance of that doctrine, but advised that "it was not beyond the bounds of possibility that, *as a matter of international comity*, a treaty or agreement might at some time be entered into by the two nations which would establish some valid rights to the irrigation of these Mexican lands . . . ." H.R. DOC. NO. 67-605, at 5 (1923) (emphasis added).

In the Report to Congress of the International Water Commission, the U.S. Section noted in its statement replying to the Mexican claim that the Colorado river was an international watercourse and therefore had to be treated as a "single geographic unit," that the 1906 Rio Grande Convention water provision "was not to be considered as involving any legal obligation on the part of the United States to provide water for Mexico, [instead] it was done as an act of comity only." H.R. DOC. NO. 71-359, at 5 (1929). It also reaffirmed the American adherence to the Harmon Doctrine: "the jurisdiction of a nation within its own territory and over its own resources is necessarily exclusive and absolute and susceptible only of self-imposed limitations. . . ." *Id.* at 14. In response to the Mexican protest against U.S. plans for construction of the Boulder Dam along the Colorado River, the U.S. Section responded that it had "no knowledge of any treaty or other obligation of the United States which would restrict its act on the Colorado within its own boundaries," but that the American Section would "recommend the granting to Mexico, *as an act of comity and friendship, but not as a right*, the largest amount of water which it had ever taken in any one year." *Id.* at 8 (emphasis added).

Responding to California objections to the 1944 Water Treaty based upon the Harmon Doctrine, then Under Secretary of State Dean Acheson noted "this is hardly the kind of legal doctrine that can be seriously urged in these times." *Hearings*, *supra* note 15, at 1762. Jean Breitenstein, attorney speaking for six of the seven Colorado Basin states supporting the treaty, noted in the same hearing that the Supreme Court of the United States had refused to recognize the Harmon Doctrine as between states. *Id.* at 1539. See the discussion of *Kansas v. Colorado* and related cases, *supra* note 15.

The current Mexican position as to whether the Harmon Doctrine has any continuing authority is clear: "The defeat of the Harmon Doctrine—mentioned so often when talking about the International Law of international watercourses—has as an inevitable corollary in the shared responsibility of the states along any course of water and this is not only true with respect to the fair distribution and the different reasonable uses of the water of these international watercourses." SYMPOSIUM, *supra* note 137, at 15 (quote from Alberto Szekely, Advisor to the Mexican Secretary of Foreign Relations).

Whether the 1944 Water Treaty in fact abrogated the Harmon Doctrine is unclear, especially considering the U.S.-Mexico dispute over the salinity level of the Colorado River. *See infra* Part V.A.

211. Most of the water of the Rio Conchos is diverted in Mexico for crop irrigation or for municipal uses in cities such as Ciudad Chihuahua and Ciudad Juárez. Althaus, *supra* note 2.

212. Given that the present drought, although severe, is by no means unprecedented—even if its effects be severe—it is somewhat surprising that there was little dispute over Mexico's availing itself of its Article 4(B) privilege of extending its debt payment time period, for to have done so meant at least a tacit recognition by the IBWC that the present drought is "extraordinary" within the meaning of the 1944 Water Treaty. *See supra* Part II.C. *See also* UPDATE, *supra* note 65, at 4.

but "What is to be done about it?" Another lacuna is the treaty's failure to say what must be done if Mexico's water debt extends beyond two consecutive accounting periods. In the absence of an explicit provision, it is only natural to refer to Article 24(d) and its charging of the IBWC with a series of mandates, including the duty to "settle all differences that may arise between the two Governments with respect to the interpretation or application of this Treaty, subject to the approval of the two Governments"—the language of an omnibus clause. The apparent intention of the treaty's drafters was to refer all disputes to the IBWC. [213] Any trepidation caused by the specter of an omnipotent IBWC run rampant is quickly dispelled by reference to IBWC Minute 242[214] and the Colorado River salinity controversy.

A. Colorado River Salinity

From the ratification of the treaty until 1961, the United States had no difficulty in assuring that Mexico received its 1.5 million acre-feet of water annually from the Colorado River as mandated by Article 10.[215] In 1961, the Wellton-Mohawk Irrigation Pumping Project began in southern Arizona, its purpose the supplying of water to Arizona users through the reclamation of waters contained in underground aquifers.[216] The drainage from the project, when combined with the Colorado River, initially created a salinity level of 6,000 parts per million (ppm) in the river water delivered to Mexico.[217] This brought the average salinity level of treaty deliveries to almost 1,500 ppm, an increase from the pre-drainage average of nearly one hundred percent.[218] The Mexican government became concerned that such a high salinity level would adversely affect the agriculture of the Mexicali (Mexican Imperial) Valley.[219]

Initially, the United States contended that the salinity level of the Colorado River water delivered to Mexico was immaterial under the treaty, as Article 11(a) provides that the delivered water "shall be made up of the waters of the said river, whatever their origin, subject to the provisions [concerning water deliveries]."[220] Mexico claimed that "the delivery of water that is

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213. *See* Timm, *supra* note 26, at 291.

214. Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River, Aug. 30, 1973, U.S.-Mex., 24 U.S.T. 1968, *available at* http://www.ibwc.state.gov/html/foreign_affairs.html (last visited Nov. 12, 2003) [hereinafter Minute 242].

215. Brownell & Eaton, *supra* note 63, at 255.

216. *Id.*

217. *Id.* at 256.

218. *Id.*

219. *Id.*

220. 1944 Water Treaty, *supra* note 2, at 1238. In their article, Brownell and Eaton state that one of the secondary issues that proved an initial stumbling block in the negotiations leading up to Minute 242 was the question of whether Mexico was legally obligated to accept Wellton-Mohawk drainage as part of treaty deliveries. Brownell & Eaton, *supra* note 63, at 260. Minute 242 makes no definitive interpretation as to what either party is *legally* entitled to

do. Perhaps both sides let the issue drop to avoid recourse to the International Court of Justice.

The issue of salinity of the Colorado River water the United States was to provide Mexico proved ostensibly to be one of greatest obstacles to the 1944 Water Treaty's ratification by the Senate. When asked by Senator Downey of California (an ardent opponent of the treaty) whether any ambiguities in the treaty could be resolved by an exchange of notes between the two governments, Under Secretary of State Dean Acheson responded "I do not believe there are any ambiguities or that the committee would so claim." *Hearings*, *supra* note 15, at 1764. The following exchange between the two is illuminating:

> Senator Downey. . . . One of the interpretations given by the State Department is that to the full extent of the return flow Mexico must take that and credit it upon our 1,500,000 acre-feet, and she must take that water, even though it is unusable. . . ?
>
> Mr. Acheson. Senator, I do not think there is the slightest doubt about the matter you raise. . . . It seems to me that in three places, in articles 10 and 11 of the treaty, they have made that abundantly clear.
>
> . . . .
>
> So three times it has been made clear in the treaty that what Mexico gets is 1,500,000 acre-feet of water from any and all sources, for any purpose whatsoever, and whatever the origin.
>
> Senator Downey. Even though it comes from seepage and drainage, *and even though it becomes so saline that it is not usable by Mexico*?
>
> Mr. Acheson. Those are the plain words of the treaty, Senator.
>
> Senator Downey. And you are here stating, as a representative of the State Department, that is your understanding of the treaty, and you think it is the understanding of the Mexican Government; is that right?
>
> Mr. Acheson. I state that the plain language of the treaty means exactly what it says, and that there cannot be any question or doubt about it.

Id. at 1764-65 (emphasis added). Senator Millikin, a supporter of the treaty, subsequently asked Acheson whether he knew of any "international principle" that would require the United States to provide Mexico water of a certain salinity level. Acheson responded no. *Id.* at 1770. Acheson further clarified his position upon critical questioning by Senator Murdock of Utah:

> What I tried to make clear was that under the treaty, as stated very clearly in the treaty, the water which is allocated to Mexico is from any and all sources in the river, that the amount of 1,500,000 acre-feet is the limit of Mexico's demands on the river for any purpose whatever, and that such waters as Mexico gets shall be made up from the waters of such river, *whatever their origin*. My view is that the 1,500,000 acre-feet of water described *is from any and all sources, for any purpose whatever, and whatever its origin*. That is what the treaty calls for.

Id. at 1777 (emphasis added). Referring to the pertinent portions of the treaty, the State Department statement submitted to the Committee a few days after Acheson's appearance underscored his interpretation, arguing that the "purpose of these clauses, obviously, is to insure credit to the United States for all drainage, return flows, and other excess or surplus flows originating in the United States, and to obviate all questions as to the quality of the water." *Id.* at 1803.

How to account for the *volte-face* in the American position, and in fewer than thirty years? Brownell and Eaton make mention of the 1966 Helsinki Rules on the Uses of International Rivers as having provided guidance to the negotiators (even though the rules are not a treaty and have no binding force). Brownell & Eaton, *supra*, at 259. Article IX of the Helsinki Rules defines "water pollution" as "any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters of an international drainage basin." REPORT OF THE FIFTY-SECOND CONFERENCE OF THE INT'L L. ASS'N, HELSINKI RULES ON THE USES OF THE WATERS OF INTERNATIONAL RIVERS, 52 I.L.A. 477, 494 (1967). Subsection 1 of Article X requires that a State both prevent any new form of water pollution in the

harmful for the purposes stated in the Treaty constitutes a violation of the Treaty." [221] The bugaboo of recourse to the International Court of Justice was raised by both sides.[222] The matter was instead resolved in accord with Article 24(d) and Minute 242. Before the matter could be agreeably resolved, however, certain disputed issues relating to a final solution had first to be negotiated.[223]

In immediate response to the Mexican protest, the U.S. State Department reassembled the Committee of Fourteen (which had first been formed prior to final negotiation of the 1944 Water Treaty) and reduced the salinity of the river through "selective pumping" of the Wellton-Mohawk aquifer.[224] Mexico pushed for a definitive solution, to which the United States was amenable, but several ancillary issues were presented which threatened to derail the salinity-related negotiations.[225] Chief among these was Mexico's own groundwater pumping project on the San Luis Mesa immediately south of the border, which raised the issue of the treaty's silence as to groundwater exploitation by the signatories.[226] The Mexican project was especially offensive to American interests as it threatened to absorb U.S. groundwater and to impede U.S. treaty deliveries.[227] Of considerable importance was the Mexican claim to damages done to Mexicali farmers as a result of the excessively saline treaty deliveries.[228] The challenge thus posed to the IBWC and both countries by the salinity controversy was of a magnitude similar to that of the current water dispute; nonetheless, an agreement was reached.

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basin and take all reasonable measures to reduce existing pollution. *Id.* at 496-97. Article XI requires an offending State "to cease the wrongful conduct and compensate the injured co-basin state for the injury that has been caused to it." *Id.* at 501. Under the Helsinki framework, and contrary to the Acheson interpretation of the 1944 Water Treaty, the United States would have had to ameliorate the effects of the Wellton-Mohawk Project, as well as compensate Mexico for any damage done to its territory on account of increased salinity levels of treaty water.

It is at least arguable that, during the Colorado salinity dispute, the United States might have had a good argument that it could force Mexico to accept water from any source and use the IBWC as the means. On the other hand, even if the Acheson interpretation of the treaty was also the Mexican interpretation at the time of ratification, international law at the time of the dispute had moved much closer to the Mexican position that no downstream state should have to accept water harmful to its territory. Although the United States had never fully adopted the equitable use doctrine for the governing of international watercourses, it had since the 1906 Rio Grande Convention with Mexico acted as if it did, while officially claiming a motivation of international comity.

221. Brownell & Eaton, *supra* note 63, at 256.

222. *Id.* at 259.

223. *Id.* at 259-63.

224. *Id.* at 256. The stopgap measures undertaken by the United States were agreed to in IBWC Minute 218, *available at http://www.ibwc.state.gov/html/foreign_affairs.html* (last visited Nov. 12, 2003).

225. Brownell & Eaton, *supra* note 63, at 260-63.

226. *Id.* at 261.

227. *Id.*

228. *Id.* at 262.

Minute 242, the "permanent and definitive solution" to the controversy, authorized the construction of a desalting plant to treat the drainage brine created by the Wellton-Mohawk project and thereby reduce the salinity of Colorado River water delivered to Mexico to 115 ppm ± 30 ppm (a level the water would have had without the Wellton-Mohawk project).[229] The United States refused to reduce the salinity of its treaty deliveries through the addition of water derived up-river from Wellton-Mohawk, as this dilution would have cut into the available supplies of the Basin states, and of that the Committee of Fourteen would have none.[230] The United States also agreed to have constructed at its own expense through Mexican territory a cement drainage ditch to carry away excess brine to the Gulf of California.[231] Implicitly recognizing one of the omissions of the treaty, the Minute established a temporary limit on the pumping of groundwater to within five miles of the border.[232] Last of all, the United States promised to reimburse Mexicali farmers whose fields had been damaged by highly saline treaty water.[233]

Two important lessons can be learned from the negotiations leading to Minute 242 and the Minute itself. First, despite ambiguities, the treaty was equitably applied by the IBWC through its Article 24 interpretive power. Mexico had originally asked for a salinity level equal to that of water up-river from Wellton-Mohawk, whereas the United States had sought what was termed an "equivalent salt balance."[234] The final agreement settled upon a ppm level reflecting a rough median between the two extremes.[235] Such an attitude of compromise may well come in handy in negotiating a solution to the present Rio Grande controversy.

Second, the final agreement stands as a testament to the expediency of the IBWC in resolving disputes, just as Article 24 envisions. Both Mexico and the United States could have assuredly sought recourse to other interna-

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229. Minute 242, *supra* note 214, at 1972; Brownell & Eaton, *supra* note 63, at 269. An analogy can easily be drawn between the U.S. expenditures for the desalting plant and proposed measures today for Mexico to improve its water conservation programs and hydraulic infrastructure efficiency.

230. Brownell & Eaton, *supra* note 63, at 263 n.24, 265. One wonders if during a hypothetical treaty renegotiation today whether the Committee of Fourteen would be any more responsive to Mexican interests if an increase in Colorado treaty deliveries were proposed, especially in light of Basin development subsequent to Minute 242.

231. Minute 242, *supra* note 174, at 1974-75. The provision forbids the United States from discharging any "radioactive material or nuclear waste" in the channel. *Id* at 1975. That such is mentioned in the Minute gives a good insight into the strength and candor of the parties' mutual relationship.

232. *Id.* No comprehensive groundwater exploitation agreement has been reached. Mumme, *Reinventing the International Boundary and Water Commission*, *supra* note 46, at 4.

233. Minute 242, *supra* note 214, at 1976. Interestingly, Brownell and Eaton note that the extent of, or even the existence of, damage to the Mexicali farmers caused by excessively saline treaty deliveries was a matter of some dispute among the parties' experts. Brownell & Eaton, *supra* note 63, at 262.

234. Brownell & Eaton, *supra* note 63, at 268-69.

235. *Id.* at 269.

tional bodies, such as the International Court of Justice,[236] but to have done so would have just as assuredly reduced the role of the IBWC to that of a quaint and emasculated distraction. The decisions normally reserved to the Commission would forever have a haze of uncertainty about them, as a de facto road of appeal to a separate international tribunal could be used by one of the parties to overturn an IBWC directive, or at the very least to justify brazen noncompliance. Part of the genius of the treaty is that it established what amounts to a bilateral commission, thus assuring that it would be always in the field and "close to the action," but invests it with the responsibilities and privileges of an international body. Both sides' fears of its forced obsolescence might explain why the compromises of Minute 242, especially as to groundwater exploitation and the means for salinity reduction, were agreed to. [237] Lamentably, that very willingness to compromise in order to preserve the ordinary channels of dispute resolution mandated by the treaty is lacking from the present controversy.

B. Minute 308

Another excellent precedent for dispute resolution by the IBWC operating under its Article 24 authority exists in the guise of Minute 308. This agreement came after particularly intense criticism by Texas water stakeholders and politicians directed against Mexico's allegedly halfhearted attempts at meeting its growing water debt. [238] The Minute followed an earlier agreement for Mexico to begin partial transfers to be credited against its total water debt.[239] The U.S. Section of the IBWC was able to win from Mexico a

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236. Recall that Article 24(d) allows for "diplomatic channels" and extrinsic "general or special agreements" to be used to resolve disputes arising under the treaty when the IBWC is unable to find a solution. 1944 Water Treaty, *supra* note 2, at 1256.

237. This fear may also explain the desire to avoid recourse to the International Court of Justice or some other independent arbitral tribunal. *See* Brownell & Eaton, *supra* note 63, at 259.

238. *See, e.g.*, Althaus, *supra* note 2 ("Desperate Texas farmers in the Rio Grande Valley, as well as politicians from Gov. Rick Perry to U.S. Sen. Kay Bailey Hutchison, have insisted that Mexico has enough water to at least begin paying what it owes."); Rennie, *supra* note 110 ("Texas farmers and politicians accuse Mexico of hoarding water, producing satellite photographs of lush green fields and brimming reservoirs on the Mexican side of the border."); Weiner, *supra* note 61 (quoting a Texas water official, "Mexico has 'shorted us, and they shorted their own growers twice as much.'").

239. *See* Minute 307: Partial Coverage of Allocation of the Rio Grande Treaty Tributary Water Deficit from Fort Quitman to Falcon Dam, March 16, 2001, U.S.-Mex, *at* http://www.ibwc.state.gov/html/ foreign_affairs.html (last visited Nov. 12, 2003) [hereinafter Minute 307]. In response to a request by President Bush for Mexico to make a partial payment on its debt, Mexico agreed to transfer 600,000 acre-feet by July 31, 2001. *Id.* at 2. Point 3 of the Minute reaffirmed both Governments' commitment to cooperate on drought and growth management. *Id.* at 3. By February of 2002, more than six months after the deadline imposed by Minute 307 for the treaty deliveries, Mexico had made available only 426,544 acre-feet. UPDATE, *supra* note 65, at 6.

promise to make 90,000 acre-feet immediately available to the United States, subject to several conditions dealing with how Mexico's actual inflows into the international reservoirs between the date of the agreement and the conclusion of the then-current accounting cycle in October, 2002, would be credited against its present transfer.[240] Almost as important as Mexico's promise to transfer water was the recognition by the United States in observation point 5 of a critical supply of water (243,213 acre-feet) which Mexico required to meet the needs of its Rio Grande communities for the following ten months, and a promise by the United States to make available to Mexico from waters in the international reservoirs allotted to the United States sufficient amounts for Mexico to maintain its critical supply.[241] The Commissioners took note of Mexico's intention to modernize its hydraulic infrastructure and of a promised Mexican investment of $1.5 billion pesos in the next four years.[242] Both sides reaffirmed their commitment to assigning "the highest priority" toward meeting their treaty obligations.[243] The Commissioners also expressed the desires of their Governments to convene a bi-national summit to discuss the prudent management of the Rio Grande Basin.[244] Practically speaking, the Minute's most important provision is point 3, which states that the two Governments "will continue discussions . . . concerning the [water] deficit," i.e. the matter was put off until the conclusion of the then-current accounting cycle.[245]

In light of U.S. water stakeholders' vigorous attacks, the accommodating stance assumed by the United States in Minute 308 is striking. The 90,000 acre-feet transfer represents six percent of Mexico's total debt, an offer that was not well received by Texas growers.[246] The Mexican transfer is all the more amazing in that the United States guaranteed that it would *replenish* what was taken from Mexican holdings if the transfer proved to draw upon Mexico's critical supply. [247] This conciliatory stance is best understood as an

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240. Minute 308, *supra* note 67, at 2. The Minute observation (A)(a)(3) notes that if, by the end of the accounting cycle Mexican inflows have replaced the 90,000 acre-foot transfer, the United States will account in Mexico's favor the "losses attributed to conveyance of this volume to the international dams" of 28,845 acre-feet, *id.*, a tacit admission of the Mexican argument that releases from its dams are counterproductive given the high loss of water through evaporation and seepage. Nevertheless, it is remarkable that the United States should bear the cost of Mexican hydraulic inefficiency incurred by Mexico's late debt payments to the United States.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 4.

245. *Id.*

246. Dellios, supra note 9. *See* Boudreaux, *supra* note 3 (quoting a Texan water official: "What's so frustrating about this, they could have given us this water a month ago when it would have helped more."). Governor Perry of Texas called upon Mexico to commit to a "regular schedule" of debt payments. *Id.*

247. Minute 308, *supra* note 67, at 2.

attempt to prevent Mexican recourse to an international arbitral body independent of the treaty and the IBWC, not necessarily because Mexico has the better legal argument, but for the practical concerns regarding treaty interpretation and enforcement already discussed. At the very least, American stakeholders could take heart in the symbolic value of Mexico's payment as a tacit Mexican affirmation of its debt under the treaty and its discarding (for the moment) of any serious intention to renegotiate. Moreover, the Minute as a whole exemplified the IBWC using its Article 24 power to good effect: though the treaty is silent as to the manner of Mexican debt payment, the IBWC fairly implemented the framework established in Minute 234 to devise a stopgap measure keeping both sides at bay for the time being.

Despite the recent successes of the IBWC in stanching the wounds of irate Texas stakeholders and calming the pricked nationalism of northern Mexico farmers and politicians, tensions on both sides will overwhelm the Commission and the treaty unless a definitive and final solution is reached as to Mexico's water debt. The bargaining positions of both sides, their legal worth, and a likely compromise answer, are the subject of the following and concluding portion of this Comment.

VII. SOLUTIONS

A. Mexican Proposals

Mexico must first answer the threshold question: shall it ask for a renegotiation of the treaty? Certainly the United States wants to exact from Mexico a definitive answer one way or the other. Even if the treaty can be set aside and the same issues dealt with under a replacement, the crux of the matter is whether it would be in Mexico's best interest to do so. Those on the Mexican side who insist that the treaty is inequitable must offer some proof of the inequities contained in it and how they might be righted under a replacement. But if by inequity it is meant that the United States has won for itself the better part of the deal, there will be little international sympathy for Mexico's position. One cannot both reject the treaty because the United States won for itself a favorable legal regime and accept the nation-state system. In the balance of power, there are some nations that will weigh heavier than others, but no tribunal is willing to put a thumb on the scale merely because the balance is not even.

Mexico might choose to draw the attention of the United States to Mexico's Article 4(B) obligation, the root cause of the dispute. Recall that during the original treaty negotiations, Mexico had wanted no absolute baseline but instead the right for each country to exploit fully its own tributaries to the Rio Grande. The United States, seeing that Texas agriculture south of Fort Quitman was wholly dependent upon the Rio Grande flows, and that seventy percent of those flows came from Mexican tributaries, knew that a treaty without an absolute baseline would be an invitation for Mexico to

exploit its own tributaries, leaving Texas farmers in the lurch.[248] Nowadays, the United States could note that Mexico's construction of multiple dams along the Rio Conchos has done more than a little to reduce that tributary's natural flow into the Rio Grande.[249]

Mexico might claim that the current drought has exposed the weaknesses of the treaty and has made its provisions work an inequity. One can certainly fault both sides for inadequate drought planning, but the treaty makes explicit references to "extraordinary drought" and what is to be done when it occurs. Naturally, the treaty drafters would leave a good deal of gray when deciding how water allotments ought to be affected during drought, for it was and is an innately unsettling issue because it reminds both sides of how limited the resource is. If the treaty were to be abandoned, what would happen to those American stakeholders who have based their livelihood on the fulfillment of Mexico's treaty obligations? Without doubt Mexico's abrogation of its Article 4(B) debt would work just as great an inequity on South Texas as would the Article's fanatical and merciless application by the United States upon northern Mexico. Additionally, the question of what should be done when the Mexican debt extends over two consecutive accounting cycles poses a problem best resolved by interpretation of the treaty, not its renegotiation.

Lastly, Mexico might ask for a reduction in its water debt. Given the extreme toll the current drought has taken on water supplies, Mexico can argue forcefully that its debt ought to be reduced proportionately in accord with the reduction in consumptive use by its stakeholders, a option afforded the United States in its treaty obligation over the Colorado River. This position runs up against several difficulties:

> (1) Any change in the amount owed under Article 4(B) of the treaty could be interpreted as an act extending beyond the IBWC interpretive power granted to it by Article 24.
> (2) Unlike Mexico, where water is owned by the federal government, the United States must defer in part to the water compacts which the states have formed to regulate consumption among themselves.[250] For example, during the negotiations leading to Minute 242, the Committee of Fourteen made it clear that it did not want the United States resolving the

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248. Timm, *supra* note 26, at 285.

249. *See* Althaus, *supra* note 2 (detailing how much of the flow of the Rio Conchos, a major Mexican tributary of the Rio Grande, is caught by seven dams and diverted for agricultural or municipal use).

250. When asked by Senator Hayden whether the 1944 Water Treaty "if approved, [would] take precedence over all existing Federal and State statutes and all instruments relating to the Colorado River and its tributaries," Clayton of the IBC responded no. *Hearings*, *supra* note 15, at 129.

> salinity dispute by using any of the water allocated from the Colorado to the Basin states.[251] Understandably, then, some mechanism was required in the treaty to allow the United States to reduce its obligation, as it could not harness the full supply of water flowing through the river to fulfill its Article 10 duty. In contrast, for Mexico any concession it grants to use water from the Rio Conchos or any other river is revocable.[252]
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> (3) Given the history of water use in northern Mexico and the internal biases of the Mexican water legal regime, as long as there remains any debt, a controversy over its payment will ensue. This is so because of the Mexican system's anti-conservation dynamic: as there is little incentive to conserve water or to change irrigation techniques, and because more water means less need to renovate hydraulic infrastructure, the end result will always be Mexican over-consumption and subsequent debt, though a debt proportionately smaller than today's. Moreover, the symbolic onus of a continuing "Mexican water debt" would vitiate any dividends in Anglo-Mexican goodwill reaped from a debt reduction.

Despite the loud protests from certain Mexican commentators and politicians and calls for renegotiation, the line from Mexico City has been a consistent one: we will pay.[253] The reason behind Mexico's commitment to meeting its treaty obligations and its intention not to renegotiate is found in the Mexican annual 1.5 million acre-feet allotment from the Colorado River. Were the treaty to be renegotiated, the United States, prodded by Colorado Basin states, would push hard for a reduction in Mexico's allotment.[254] It would be exceptionally difficult for Mexico to demand a reduction or elimination of its debt and obligation under Article 4(B) while refusing to budge over its Article 10(a) allotment.[255] Indeed, the argument of obsolescence used

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251. Brownell & Eaton, *supra* note 63, at 263 n.24.

252. *See* Water Act, *supra* note 86, at art. 27 (IV).

253. *See* Kraul, *supra* note 4 (quoting Mexican President Vicente Fox promising "to comply completely with Mexico's international obligations, reducing the deficit of deliveries to the United States and guaranteeing at the same time supplies to border populations and attention to the interests of Mexican farmers").

254. California would be most anxious to have Mexico's entitlement decreased, in light of the Interior Secretary's recent decision drastically to reduce California's traditional surplus allotment from the Colorado River under the Colorado Compact. *See* Michael Gardner, *Last-Minute Water Deal Sinks*, SAN DIEGO UNION TRIB., Jan. 1, 2003, at A1; Michael Gardner, *Dampened Hopes*, SAN DIEGO UNION TRIB., Jan. 2, 2003, at A1.

255. Perhaps the reason for Mexico's dragging of its feet now is the hope of some future quid pro quo agreement should the United States fall behind in its Colorado River treaty obligations to Mexico, for which no provision is made in the 1944 Water Treaty.

against Article 4(B) can be used just as effectively against Article 10(a): who would not concede that the Colorado River Basin states have seen their water requirements increase steadily over the last sixty years?[256] For these reasons, Mexico ought to be chary about renegotiating. It should seek instead a solution worked out through the IBWC that preserves its existing Colorado River entitlements.

B. U.S. Proposals

It is in best interest of the United States to preserve the existing treaty and ensure that any solution to the current controversy be resolved within the framework established by it and the IBWC. The reasons why an extrinsic solution would be undesirable have already been discussed. From the U.S. point of view, the means for a resolution of the dispute already exist: Minute 234 provides what sources of water can be used by Mexico to pay its debt; Minute 242 established a strong precedent for seeking answers to disputes under the treaty through methods intrinsic to the treaty; Minutes 240 and 293 established American willingness to assure a critical supply of water for Mexican border communities irrespective of Mexico's current debt; and Minutes 307 and 308 began the tradition of the United States seeking irregular and partial goodwill payments by Mexico of its Article 4(B) debt. Moreover, the United States has urged the need and Mexico has responded to the calls for large capital investment in hydraulic infrastructure improvements. Both sides have also committed themselves to "smart-growth" and water conservation plans. The one thing remaining for the United States is to reach an agreement that extends beyond the ad hoc provisions of Minutes 307 and 308 and serves as a final solution to the current controversy, much the way Minute 242 ended the Colorado salinity dispute.

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256. One controversy lying in the background concerns the California Imperial Irrigation District's recent decision to reline the All-American Canal so as to prevent water loss through seepage. Chris Kraul & Tony Perry, *Rift Runs Deep in Water War*, L.A. TIMES, May 4, 2002, at A1. The seepage, amounting to two percent of the water transported through the canal, has served as lifeblood for Mexican agriculture located just across the border a few hundred yards from the leaking canal. *Id.* Mexico has built over 400 wells to capture the water and then to use it to irrigate 50,000 acres of farmland. *Id.* Mexico claims that the 1944 Water Treaty requires the United States to consult with Mexico before undertaking a project affecting water supplies. The relevant provision is found not in the 1944 Water Treaty but in Minute 242, which reads in part: "[T]he U.S. and Mexico shall consult with each other prior to undertaking any new development . . . that may adversely affect the other country." Minute 242, *supra* note 214, at 3. Mexico's position is precarious to say the least: (1) the natural interpretation of the provision deals with adverse effects upon the other nation's property or water, e.g. mining groundwater or flood damage, not water belonging to one country that by chance ends up in the other country; (2) the U.S. might concede the water to Mexico but demand that the water received be accounted in favor of the U.S. Colorado River obligation; (3) the U.S. might concede the water to Mexico but demand payment for it as in excess of treaty deliveries.

C. *A Possible Compromise Acceptable to Both Sides*

The time is ripe for both sides to reach a final and definitive solution to the current controversy.[257] Although it has been bandied about by some persons on the Mexican side, denunciation of the treaty appears not to be a viable option: there is no explicit provision for it in the 1944 Water Treaty, and it was the clear intention of the drafters that the treaty be perpetual.[258] Second, the United States, unlike Mexico, is not free to rewrite water concessions at whim, as it must defer to the arrangements made by the several states *inter sese*.[259] Third, any substantial change to the treaty would be considered an amendment, requiring the U.S. and Mexican Senates' approval, which cannot be counted upon. A permanent solution to the dispute must make note of the foregoing and incorporate the following elements.

1. *Affirmation of Mexico's water debt*

Mexico must make a solemn, definitive, and irrevocable affirmation of the treaty and of the debt it owes to the United States under Article 4(B), and an equally firm promise eventually to liquidate its debt. Such an avowal would eliminate the dichotomy that now exists between the Governments on the one hand, and the Mexican academy and politicians on the other. It would also serve to placate Texas farmers while putting the damper on the possibly greedy intentions of the Colorado Basin states for an increase in their own allotments at Mexico's expense.

This element of the solution is not, strictly speaking, a legal one, unless it be seen as a waiver on Mexico's part of the "diplomatic channels" and "general or special agreements" language found in Article 24(d) of the 1944

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257. On January 10, 2003, the U.S. Department of State announced that Mexico had made a "firm commitment" to transfer 350,000 acre-feet of water by September 30, 2003. Both Mexico and the United States agreed to hold a joint summit to address how "to ensure a reliable and predictable water supply during both periods of scarcity and of abundant rainfall." Press Release, U.S. Department of State, United States and Mexico Agree on Delivery of Rio Grande Water (Jan. 10, 2003), *at http://www.ibwc.state.gov/PAO/CURPRESS/CurPress2/*waterunder standingStateweb.htm (last visited Nov. 12, 2003).

The U.S. Section of the IBWC announced April 3, 2003, that Mexico has transferred just over 250,000 acre-feet since October of 2002; its debt currently totals 1.37 million acre-feet. USIBWC Press Release, *supra* note 68. These recent moves represent no departure from precedents established in Minutes 307 and 308.

258. "I might say that this treaty, like the 1906 treaty, is perpetual. It must be perpetual because the object of it is to define for all time the rights of the two nations in the waters of the international streams. On the Colorado, for instance, we would not want Mexico in 1980, when we have built up substantial uses in this country, to say 'Well, we do not want to abide by the treaty. Let us forget the thing and start over,' when they might be using 3,000,000 acre-feet from that river at that time." *Hearings*, *supra* note 15, at 123 (statement of Frank B. Clayton, IBC Counsel).

259. *See infra* note 267.

Water Treaty.[260] Frankly, Mexico would be unlikely to agree to a blanket waiver of that privilege, especially in light of the increasing likelihood that the United States might fail to meet its annual Colorado River treaty deliveries in the coming decade. If that were to happen, Mexico would be most desirous of using its option of adjudicating any dispute at the International Court of Justice to force the United States to a favorable settlement, as was the case in the Colorado River salinity dispute.

If the affirmation were to take the form of a waiver, it would most likely require the approval of the Mexican Senate as an amendment to the 1944 Water Treaty,[261] although the U.S. Senate's approval would not be necessary, given that the rights of the United States would remain unchanged. These complications could be avoided merely by the insertion in an IBWC Minute of a clause saying the same thing without making mention of "waiver."

2. Resolving the debt-cycle ambiguity

The ambiguity now existing in Article 4(B)(c) as to the course to be taken when Mexico's debt extends over two consecutive accounting cycles must be definitively resolved by the IBWC through the exercise of its Article 24 interpretive power. The treaty simply states that Mexico may carry over any debt incurred in a five-year accounting cycle to the following cycle; since no mention is made of what to do about a Mexican debt extending over two cycles, one can infer that the drafters thought the occurrence unlikely. Nevertheless, the ambiguity falls within the "interpretation or application" power of the IBWC under Article 24(d). As such, any decision made by the IBWC under that provision would not be considered a de jure amendment to the treaty.[262]

The ideal solution to the ambiguity would be to extend the five-year accounting cycles as far into the future as is necessary to allow Mexico to pay off its debt, with due allowance made to avoid any Mexican foot-dragging. This would be seen as a goodwill gesture to Mexico by the United States. It would also be a natural and just interpretation of the treaty as it now stands.

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260. 1944 Water Treaty, *supra* note 2, at 1256.

261. *See* MEX. CONST. art. 89, § 10 (stating that the powers and duties of the President of the Mexican Republic include "[c]onducting foreign policy and signing international treaties, submitting them to the Senate for approval").

262. It is conceivable that the IBWC and the two countries might manufacture a de facto amendment—meaning an "interpretation" of the treaty that radically alters the parties' rights formerly assumed thereunder—cloaked by the Article 24 interpretative power. This question raises the issue of the U.S. Supreme Court's role in treaty interpretation. *See supra* Part IV.A.3.c. It also presents a political issue beyond the scope of this Comment.

3. A schedule of water payments

A definite and long-term schedule of regular water payments by Mexico must be agreed to. The current pattern of no payments until an emergency arrives is unacceptable, as it serves only to shorten tempers on both sides and make the subsequent payments appear either woefully inadequate or wrought away like a pound of flesh. If payments are regularly scheduled, then both sides can properly plan for and anticipate them. The assembling of a debt-payment schedule can be done within Article 24(d): the treaty explicitly provides for the accounting of a Mexican water debt,[263] and there exists ample precedent in IBWC Minutes for arranging debt repayment.[264] These precedents are important from the U.S. standpoint, for even if Mexico were later to claim that such debt-repayment scheduling exceeds the IBWC interpretative power under Article 24(d), the United States could counter by claiming that, because of the passage of time and the absence of any Mexican protest to past IBWC actions, Mexico would now be estopped from arguing otherwise. Moreover, as a debt repayment would be authorized under Article 24(d), neither country would need to seek the approval of its Senate; therefore, both could bypass criticisms from particular states.

In practical terms, a simple schedule is not sufficient. Any plan must also be sensitive to changes in climate, especially to drought. If the drought worsens, a particular payment by Mexico ought to be reduced accordingly. If, on the contrary, inflows increase, the next payment ought to be increased. But the guiding principle to the payment plan must not be, as it is now, how most efficiently to placate critics on both sides and buy more time, but rather to make an optimal schedule for Mexico's complete liquidation of its debt.

4. Technical improvements, conservation, and planned growth

In addition to encouraging Mexican investment in hydraulic infrastructure improvements and fostering a universal culture of conservation, both sides must agree to implement as soon as possible water-saving measures. It is not enough for the United States to carp on Mexico; it too must abide by its sermon and support hydraulic efficiency in south Texas.[265] As long as both sides are actively engaged in capital outlays, the inevitable tax increases for stakeholders North and South will be more palatable.

In legal terms, any plans the IBWC might adopt that would require capital outlays on the part of the United States would have to be approved by

263. 1944 Water Treaty, *supra* note 2, at 1227.

264. *See, e.g.*, Minute 234, *supra* note 102; Minute 307, *supra* note 239; Minute 308, *supra* note 67.

265. A water survey submitted to the Texas legislature in 2000 found that, with certain efficiency improvements, as much as 354,000 acre-feet of water could be saved. Nitze, *supra* note 7, at 15.

the U.S. Congress, according to paragraph (a) of the supplementary protocol of the 1944 Water Treaty.[266] Furthermore, the U.S. federal government cannot dictate to the several states, regardless of its existing treaty obligations, how they will manage their water resources within their own territories.[267] Nevertheless, the groundwork for hydraulic infrastructure improvement, conservation measures, and planned growth programs can be laid by the IBWC; it has already made the first steps in this direction.[268] One way to circumvent the spending problem is to have a third party make loans to large stakeholders in the Rio Grande Basin for efficiency and conservation improvements.[269] The downside to this element of the comprehensive solution

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266. "That no commitment for works to be built by the United States in whole or in part at its expense, *or for expenditures by the United States*, other than those specifically provided for in the treaty, shall be made . . . without the prior approval of the Congress of the United States." 1944 Water Treaty, *supra* note 2, at 1263-64 (emphasis added).

267. See paragraph (c) of the treaty's supplementary protocol: "That nothing in the treaty or protocol shall be construed as authorizing the Secretary of State of the United States, the Commissioner of the United States Section on the International Boundary and Water Commission, or the United States Section of said Commission, directly or indirectly to alter or control the distribution of water to users within the territorial limits of any of the individual states." *Id.* at 1265.

268. Recommendation 3 of Minute 307 states that the United States and Mexico "will work jointly to identify measures of cooperation on drought management and sustainable management of [the Rio Grande] basin." Minute 307, *supra* note 239, at 3. Observation (B) of Minute 308 noted that Mexico "intended to finance the modernization and technical enhancement for sustainability in irrigated areas." Minute 308, *supra* note 67, at 3. Observation (C) of the same noted that Mexico planned to make a capital investment of 1.5 billion pesos in the next four years for improved hydraulic efficiency. *Id.*

269. "The Government of the United States and the Government of Mexico will urge the appropriate international funding institutions, to which they are a party, to ensure analyses and consideration of the Commission's observations concerning the water conservation projects" cited earlier. Minute 308, *supra* note 67, at 4. One of these institutions is the North American Development Bank (NADBANK), to which the United States and Mexico have made capital investments of over $300 million. Nitze, *supra* note 7, at 10. Recently, NADBANK has begun financing water conservation projects in the border region and is considering assisting Texas irrigators in funding improvements in irrigation efficiency, while also planning to do the same on the Mexican side of the border. *Id.* at 12.

Most recently, the two sides have begun in earnest to implement water-saving technology. Minute 309 is the IBWC response to its own mandate of Minute 308 to find ways to conserve water through hydraulic infrastructure improvements and modernization. *See* Minute 309: Volumes of Water Saved with the Modernization and Improved Technology Projects for the Irrigation Districts in the Rio Conchos Basin and Measures for their Conveyance to the Rio Grande, July 7, 2003, U.S.-Mex., *at* http://www.ibwc.state.gov/ html/body_ minutes.HTM (last visited Nov. 12, 2003). According to the terms of the new Minute, Mexico agrees to complete the infrastructure improvements (in the Rio Conchos Basin's three irrigation districts) by 2006. Mexico estimates an eventual water savings of 321,043af (based on a pre-modernization average release of 846,385af). These improvements are predicated upon Mexico's obtaining the $1.5 billion pesos necessary for construction and related costs. Once the improvements have been put into effect, the saved amounts of water will be transferred every January to the Rio Grande, where they will be used to meet Mexico's article 4 obligation, including any accrued debt. *Id.* at 5-6.

is that positive results will not be seen for some years to come; therefore, a debt payment schedule sedulously followed by Mexico would do much to keep Texas users satisfied until the contemplated projects bear fruit.

VIII. CONCLUSION

In his statement before the U.S. Senate Foreign Relations Committee, Oscar C. Dancy, County Judge of Cameron County, Texas, urged the ratification of the water treaty in words that riveted his listeners:

> We ask—we pray, that you approve this treaty and remove this sword of Damocles which is dangling over our heads. Pass this treaty, and let us make this Rio Grande become, not a dividing line but a uniting bond and channel of friendship and cooperation between our two great nations, that will be an example for all other nations, and be the first step in making the good-neighbor policy the national policy for every nation on this globe. Let us adopt that righteousness that exalteth a nation. Then, and not till then, will the vision of the Prophet Isaiah be realized . . . 'And he shall judge among the nations, and shall rebuke many people; and they shall beat their swords into plowshares, and their spears into

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The 321,043af of savings will come from canal lining, low-pressure water supply systems, land-leveling to reduce gravity flow irrigation losses, and improved pumping stations. *Id.* at 3.

What appears to be a substantial advance in Anglo-Mexican water diplomacy may really be a mere baby step, as Mexico has reserved several legal "outs" from its newly-crafted water savings obligation. First, Mexico's obligation is dependent upon the accumulation of the necessary funds—if it cannot find the money, it need do nothing. *Id.* at 5-6. Second, when the volume of water released to the irrigation districts is less than the base amount of 846,385af, the required savings obligation will be proportionately reduced. *Id.* at 6 (analogous to the American escape clause in article 10). Third, Mexico will retain legal authority over all the saved water until it is delivered to the Rio Grande. *Id.*

It is not clear, however, whether Mexico is still obligated to transfer the "saved" amount if consumptive uses in the Mexican irrigation districts increase; for then the "saved" water will have been consumed. Were this to occur, the United States would likely have little recourse besides that which it has already pursued with respect to Mexico's article 4 debt. The United States' options are limited simply because the saved water, by the Minute's express terms, remains under Mexican ownership until it reaches the Rio Grande. Therefore, the United States can have no claim of conversion against Mexico; instead it may seek specific performance of this particular savings obligation.

These criticisms are not meant to disparage what is an essential first attempt toward aggressive modernization and concomitant water savings in the Rio Grande Basin to fulfill Mexico's article 4 obligation. Indeed, conservation is the ultimate and best answer to the Mexican debt problem.

> pruning hooks: nation shall not lift sword against nation, neither shall they learn war any more.'[270]

In that spirit, both sides must now consider their options for resolving the controversy over Mexico's water debt to the United States. One option is treaty renegotiation, a possibility that becomes less enchanting to either side the closer it is scrutinized. Another option is for the United States to wrestle another partial payment from Mexico to placate south Texas, and then put off further action until conservation and efficiency improvement measures in Mexico yield results. But the best answer is for both sides to arrive at a final and definitive solution, under the aegis of the IBWC, which adopts the elements listed above. Barring that, there remains one further option: in the words of a Chihuahuense farmer, "Pray to San Isidro" to make it rain.[271]

270. *Hearings*, *supra* note 15, at 1619 (quoting *Isaiah* 2:4).

271. Weiner, *supra* note 61 (San Isidro is the patron saint of farmers).

THE RIGHT TO ASSISTANCE OF COUNSEL IN MILITARY AND WAR CRIMES TRIBUNALS: AN INTERNATIONAL AND DOMESTIC LAW ANALYSIS

Major Joshua E. Kastenberg*

Much recent international and criminal law scholarship deals with topics such as universal jurisdiction, evolving definitions of international crimes, and the application of accountability principles developed during international tribunals such as the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY), and the *ad hoc* International Criminal Tribunal for Rwanda (ICTR). However, few have devoted to the right to a fair trial.[1] In particular, international standards of effective defense counsel representation for accused persons appear to be ignored by mainstream international law scholarship. In United States jurisprudence, there are a multitude of federal and state cases dealing with the Constitution's Sixth Amendment right to counsel provision. Additionally, there is a substantial amount of legal scholarship regarding a defendant's rights to a fair trial in the United States. Despite this, little attention has been paid to competency of counsel issues in a United States military commission. The United States has not prosecuted

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1. Black's Law Dictionary defines a fair and impartial trial as "[a] hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration or evidence and facts as a whole." BLACKS LAW DICTIONARY, 596 6th ed. 1990. The dictionary cites *Raney v. Commonwealth* for the proposition that a fair trial is "one where the accuser's legal rights are safeguarded and respected." *See, e.g.,* Sara Stapleton, Note*: Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. INT'L & POL. 535, 553 (1999) (quoting BLACKS LAW DICTIONARY, 596 6th ed. 1990). *See also* Irwin v. Dowd, 366 U.S. 717, 729 (1961). In his concurrence, Frankfurter wrote:

> More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of the evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.

Id. at 729 (Frankfurter, J., concurring).

a defendant in a military commission since World War II. In the aftermath of 11 September 2001, such prosecution is inevitable.[2] Although the rules of the military commission have yet to be tested, it is clear through the grant of defense counsel to accused persons, a right to zealous representation exists.[3] Additionally, little scholarship has been devoted to the rights of defendants before various international tribunals.

This article serves two purposes. The first is to explore, and if possible, determine, what "international standards" exist regarding minimum levels of defense representation in international and war crimes tribunals. Military commissions are included in this latter category. The second purpose is to determine whether, in the current United States military commission scheme, defense counsel are expected to provide "adequate representation" within the requirements of both domestic and international law. In light of the second purpose, this paper will analyze proposed military defense counsel representation of persons accused of committing war crimes against the United States, as well as to suggest a framework that meets both international and domestic standards. Discussion of the right to effective defense counsel should be of growing importance for two reasons. First, there has been an international push toward accepting universal jurisdiction for the most heinous criminal offenses.[4] Second, of domestic importance, proposed military commissions will place the tribunal system under both the potential review of the United

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2. This proposal is found under the executive order and subsequent Department of Defense Directive (DoDD) which was created in response to the 11 September 2001 attack on the United States.

3. See DoD, Military Commission Order No. 1, section 4(b)(C)(2), which reads in pertinent part:

The Chief defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission (Detailed Defense Counsel). The duties of the detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by the Order.

4. *See, e.g.*, Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV. 399, 400-02 (2001). *See also* Benard H. Oxman & Luc Reydams, *International Decision: Niyonteze v. Public Prosecutor*, 96 AM. J. INT'L L. 231 (2002). As an example of a recent exercise of universal jurisdiction, Switzerland prosecuted a former Rwandan mayor facing similar allegations as Akayesu. Niyonteze was found in Switzerland, and the Swiss government refused extradition to the ICTY and Rwandan national courts. Niyonteze was prosecuted under Swiss Military Law and sentenced to life in prison. However, on appeal, the Court d'Cassation dismissed some charges based on jurisdictional flaws and reassessed the sentence to fourteen years. *Id.*

States Supreme Court, as well as "under the eye" of international organizations.[5]

This paper does not discuss the merits of military commissions versus civilian international or domestic courts. Nor does this paper directly address a variety of criticisms and questions regarding the composition, rules of evidence, or jurisdictional issues surrounding military tribunals. Where an issue regarding evidentiary rules, jurisdictional principles, appellate review, and tribunal composition arise in this paper, it only does so in the context of the role of the defense counsel. Finally, in many articles, writers fail to note the interplay between domestic and international law. This paper recognizes that United States constitutional law and common law tradition have great effect on international law. However, where the term international law is discussed and analyzed, the term is narrowly construed to apply only to current practice of international tribunals and agreements, as well as the development of a customary international law.

Finally, the courts of comparison in this paper, the ICTY and ICTR, are courts exercising universal jurisdiction.[6] The contemplated military commissions are not an exercise in universal jurisdiction because the United States can be considered an injured party in some, if not all, cases.[7] Yet, there are similar elements between courts exercising universal jurisdiction and the military commissions. For instance, the defendants in all cases can be reasonably said to have committed crimes against humanity.[8] Likewise, there is an international interest in the procedure and outcome of each trial. Moreover, the use of comparative law is helpful in determining the fairness of any proceeding. To a degree, determinations of effectiveness of counsel are conducted by comparing a questionable case to established case law.

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5. *See, e.g.*, Amnesty International Press Release, 22 Mar. 2002. *See also* Article, "*Taliban Prisoners Could Be Held for Decades*," Yahoo News 13 Sept. 2002; Article, "*Military Commissions Can't Compare to International Courts Due Process Standards Much Lower for Proposed U.S. Trials*," Human Rights Watch release, Dec. 4, 2001.

6. Universal jurisdiction, defined in greater detail below, occurs where a state exercises jurisdiction over offenses to which it has no geographic, *in-personam*, or other nexus. *See, e.g.*, James v. Illinois, 493 U.S. 307, 320 (1989) (Stevens, J., concurring); United States v. Smith, 680 F.2d 255, 257 (1st Cir. 1982) (citing United States v. Pizzarusso, 388 F.2d 8, 10-11 (2nd Cir. 1968), *cert denied* 392 U.S. 936 (1968)). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S.: JURISDICTION TO ADJUDICATE § 421 (1986); S. Kobrick, *The ex post facto Prohibition and the Exercise of Universal Jurisdiction Over International Crimes*, 87 COLUMB. L. REV 1515 (1987).

7. The military commissions are basically operating under the internationally recognized theories of passive personal jurisdiction and territorial jurisdiction. *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th ed. 1998). *See also* Wade Esty, Note, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extratoriality*, 21 HASTINGS INT'L & COMP. L. REV 177, 182 (1997).

8. Crimes against humanity have been defined in a number of different instruments including the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forcess in the Field, 75 U.N.T.S. 31 (Oct. 21, 1950); and Rome Sttue of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/9 [hereinafter ICC].

Few scholars of international law or criminal law dispute that a primary interest of a state is to prosecute criminals. Further, a primary purpose of a criminal court is its "truth-seeking function."[9] However, this function does not occur without the constraints of a fair trial. Such constraints include, *inter alia*, a presumption of innocence,[10] notice of criminality,[11] formal evidentiary rules,[12] a "beyond a reasonable doubt" burden of proof,[13] the accused's right to an impartial judiciary,[14] competent counsel,[15] the right to face his or her

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9. *See, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399 (1998). *See also* James v. Illinois, 493 U.S. 307, 311 (1990).

10. *See, e.g.*, ICTY Statute, art. 87(a); ICTR Statute, art. 87(a). Under Swiss Military Criminal Law, proof beyond a reasonable doubt is the lawful requisite to prove guilt. *See, e.g.*, CPM, art. 5.

11. *See, e.g.*, ICC Statute, art. 22, reiterating the customary international law principle of nullem crimen sine lege (no criminal responsibility unless the conduct was criminal at the time it took place). *See also* Smith v. Golden, 415 U.S. 566 (1974).

12. *See, e.g.*, David Leonard, *Perspectives on Proposed Federal Rules of Evidence 413-415: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM L. J. 305, 310 (1995). Formal evidentiary rules exist to ensure the ordered flow of justice, free of surprise, and as a buffer against unreliable evidence. Rules also exist to protect areas of privacy customarily protected in common law. *See, e.g.*, Robert J. Arujo, *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the "Priest-Penitent" Privilege Under International Law*, 15 AM. U. INT'L L. REV. 639 (2000). To date, the ICC, ICTR, and ICTY do not *per se* recognize such privileges.

13. Under customary international law, the burden of proof for guilt in trial appears to be the "beyond a reasonable doubt" standard enunciated in United States courts. *See, e.g.*, ICTY, art. 87; ICTR, art. 87; and ICC, art. 66(3). Article 66 reads as follows:

> Presumption if Innocence:
>
> (3) In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Id.

14. For instance, the ICCPR provides:

> In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

ICCPR, art 14(1).

See, e.g., Tumey v. Ohio, 273 U.S. 510; 47 S. Ct. 437; 71 L. Ed. 749 (1927). *See also, e.g.*, Piersack v. Belgium, 53 Eur. Ct. H.R. (ser. A) at 30 (1982) (European Court of Human Rights decreeing impartial judges as essential to justice). *See also* European Convention on Human Rights, art. 6 (1); art. 8(1) of the American Convention on Human Rights which provides:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.

ACHR, art 8(1)

See also, e.g., Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 DAYTON L. REV. 565, 568 (1996); Sam Ervin Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEM. PROBS. 108, 121 (1970). Cox writes that the concept of an independent, impartial judiciary dates at least to Lord Coke's defense of common law judges against King James I in 1603, followed by the 1701 Act of Settlement protecting judges against undue influences from the crown. *Id.* at 568-70; Allen N. Sultan, *Autonomy under International*

accusers,[16] and the right to present a complete defense.[17] This article focuses on the right to effective counsel because, in theory, such counsel will ensure the presence of these other rights.

Part I of this article explores the evolution of legal rights accorded to enemy combatants under both treaty and customary international law.[18] Additionally, this paper examines trials of international significance, such as the post World War II International Military Tribunals (IMT), for their impact on the right to counsel. These trials form part of the basis for current customary international law of such a right. Part II of this article addresses the meaning of "effective representation" as defined under international law. The ICTY and ICTR are compared and particular attention is paid to the ICTY case of *Prosecutor v. Dusko Tadic*,[19] and the ICTR case of *Prosecutor v. Jean Paul Akayesu*.[20] Both involve issues of attorney representation. Finally, Part II analyzes codes of defense counsel ethics and privileges between attorney and accused in each *ad hoc* tribunal. Part III of this article examines the Constitutional and common law right to effective assistance of counsel. While both the United States Constitution and common law principles bear significant impact on international understanding, this paper conducts a separate analysis is to ascertain whether the application of United States law as a guideline

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Law, 21 DAYTON L. REV. 585, 590 (1996). Professor Sultan surveys the Roman, Greek, Hebrew, Islamic, and Christian legal traditions and concludes that the failure to provide an impartial judiciary rises to a *jus cogens* violation. *Id.* at 659.

15. *See, e.g.*,Convention III Relative to the Treatment of Prisoners of War, signed at Geneva 12 Aug. 1949, Art. 99, in DIETRICH SCHNIDLER AND JIRI TOMAN, THE LAWS OF ARMED CONFLICTS (1981), 355. See also, *e.g.*, ICTR 96-4-T, ¶ 66.

16. *See, e.g.*, U.S. CONST. amend. VI. *See also* Lilly v. Virginia, 527 U.S. 116 (1999) (holding: In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him." U.S. CONST. amend. VI). *See also* Pointer v. Texas, 380 U.S. 400 (1965) (applying Sixth Amendment to the States).

The Court has also held, "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Maryland v. Craig, 497 U.S. 836, 845 (1990).

It should be noted, that United States law places a higher threshold on the government than most other jurisdictions to show the right to confront witnesses as non absolute. Exceptions have been carved out for cases involving national security and child witnesses. *See, e.g., id.*; United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989). The ICTR, ICTY, and ICC permit adult witnesses to testify anonymously or via affidavit. *See, e.g.*, The Prosecution v. Jean-Paul Akayesu, case no. ICTR-96-4-T, appeal of Akayesu.

17. For a discussion on the right to present a complete defense, see, e.g., United States v. Scheffer, 523 U.S. 303 (1998) (holding the right is not without limits and subject to rules of evidence).

18. Customary International Law is defined as "the unwritten body of rules or norms derived from the practice and opinion of states." Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401, 410 (2002).

19. Prosecutor v. Tadic, IT-94-1-T (1994).

20. Prosecutor v. Akayesu, ICTR 96-4-T (1998).

meets international minimum standards. In this arena, this article considers the uniqueness of military representation is covered in regard to the meaning of effective representation of counsel. It should be noted that throughout this article, particularly in the sections involving United States law, the terms effective assistance and zealous representation are nearly synonymous. Part IV reviews the existing codes of ethics for military defense counsel as a guideline for ensuring effective and zealous representation. These codes are important because they establish expectations and parameters of representation. Finally, the article concludes with an assessment that, in terms of military defense counsel representation, the current military commission scheme meets or surpasses both international understandings and domestic legal standards.

I. RIGHT TO COMPETENT COUNSEL UNDER INTERNATIONAL LAW

A. Recognition of right to assistance of counsel in prisoner of war and war crimes cases, from 1863 to 1949: Creating the Customary International Law Basis.

Customary International law evolved from the common practices of states.[21] One area of long term interest in customary international law concerns the treatment and rights of prisoners of war. Traditionally, the legal rights of enemy combatants were governed by principles affecting the treatment of prisoners of war. The concept of a military tribunal dates back roughly five hundred years.[22] Prior to the United States Civil War, treatment accorded prisoners of war in Europe varied from conflict to conflict and from

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21. BURNS WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER, 107 (3rd ed. 1997). Customary international law has also been described as, "uniformities in state behavior rather than formal writings." *Id.*

22. The first known attempt at establishing an international tribunal actually occurred in 1474. A trial of representative judges convicted Peter von Hagenbusch (also spelled Hagenbach), the Governor of Breisach, Austria for committing crimes against "God and man." *See, e.g.*, Joel Cavicchia, The *Prospects for an International Criminal Court in the 1990's*, 10 DICK. J. INT'L L. 223, 224 (1992). *See also* Timothy H.L. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681 (1997); Daniel P. Pickard, *Comment: Security Council Resolution 808, A Step Toward a Permanent International Court For the Prosecution of International Crimes and Human Rights Violators*, 25 GOLDEN GATE U. L. REV. 435, 462 (1995).

Von Hagenbusch was tried before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire. While he was not tried for crimes committed during wars, this trial is significant in that he was stripped of his knighthood by an international tribunal which found him guilty of murder, rape, perjury, and other crimes against the law of God and man in the execution of a military occupation. *Id.* at 465.

warring state to warring state.[23] However, there were expectations placed on both prisoners of war as well as states holding them. Interestingly, the first codified rules dealing with rights of prisoners of war arose during the United States Civil War. In 1863, the Union Army was issued General Order 100, also known as the "Lieber Code," after its author, Professor Francis Lieber of Columbia University.[24] In all, the code contained 157 articles covering conduct norms for the Union Army.[25] Articles 48 through 135 of this code dealt with the treatment and rights of prisoners of war. However, no specific article within this code guaranteed prisoners the right to assistance of counsel. Nonetheless, one article may be considered the basis for assuming the right to counsel at legal proceedings. Article 59 conferred jurisdiction over a prisoner for "crimes committed against the captor's army or people, committed before he was captured, and for which he had not been punished by his own authorities."[26] Based on several military tribunals held during and immediately after the Civil War, it might also be the case that the right to counsel before such tribunals was assumed in the United States.[27]

Continental European laws, prior to 1865, probably did not suppose a right to counsel inherent in prisoner of war cases. This is because the right to counsel did not exist in several of the central European legal systems during

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23. *See, e.g.*, Ralph M. Stein, *Artillery Lends Dignity to What Otherwise Would Be a Common Brawl: An Essay on Post Modern Warfare and the Classification of Captured Adversaries*, 14 PACE INT'L L. REV 133, 141-42 (2002). Stein analyzes treatment of prisoners of war based on the type of conflict. For instance, during the American War of Independence, treatment of captured Continental Army personnel was exceedingly harsh because British Army officers viewed the enemy as committing treason. In pre-Industrial Europe, prisoners were often given parole with the promise to not take up arms again in the conflict. *Id. See also* Alan Watson, *Seventeenth Century Jurists, Roman Law, and the Law of Slavery*, 68 CHI. KENT L. REV. 1343, 1350 (1993). Watson writes that Grotius accepted that prisoners of war and their descendants could become slaves. However, this was an arbitrary practice.

24. Prepared by Francis Lieber, promulgated as General Order No. 100 by President Lincoln, 24 Apr. 1863.

25. The Lieber Code gave recognition to the universality of certain offenses such as rape, robbery, fraud, burglary, forgery, and murder. *See also* L.C. Greene, *Enforcement of Law in International and Non-International Conflicts, the Way Ahead*, 24 DENV J. INT'L L. & POL'Y 285, 296 (1995).

26. General Order No. 100, *supra* note 24, art. 59.

27. *See, e.g.*, WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 832-42 (1920). Winthrop writes:

> But as a general rule, and as the only quite safe and satisfactory course for rendering of justice to both parties, a military commission will—like a court martial—permit and pass upon objections interposed to members, as indicated in the 88th Article of war, will formally arraign the prisoner, allow attendance of counsel, entertain special pleas if any are offered.

Id. at 841.

However, the quality of defense counsel during these early military commissions is not without reasoned criticism. *See, e.g.*, Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990).

the middle of the 19th century.[28] Yet, European governments in the latter half of that century expressed increasing concern over the rights of prisoners held by combatant states.[29] This concern was partly a product of demographic changes in military service. With the dual advent of industrialism and the growth of empires, a dramatic increase in the size of "citizen armies" occurred.[30] Additionally, the Third Republic in France was a driving force in expanding the right to representation in criminal courts.[31]

In 1874, on the initiative of Czar Alexander II of Russia, delegates from fifteen European states met in conference in Brussels to discuss codifying rules of warfare.[32] During this conference, a text was finalized which again dealt, in part, with prisoners' rights.[33] The text was composed of fifty-six Articles. Article 28 read, in part, "Prisoners of war are subject to the laws and regulations in force in the army whose power they are." While Article 28 did not confer a right to counsel before a disciplinary or judicial hearing, it suggested that an accused facing such a hearing would be accorded some legal or statutory rights based on the captor state's laws. Furthermore, as a result of political changes, by 1878, several states in Western Europe recognized a right to counsel.[34] In 1880, the Institute of International Law, a British-based association, published a text titled, "The Laws of War on Land."[35] The text itself was comprised of eighty-six articles and provisions dealing with legal rights of prisoners of war. For example, Article 62 stated "prisoners are subject to the laws and regulations in force in the army of the enemy."[36] As with the Brussels Conference, this article did not confer a right to counsel but suggested a prisoner suspected of criminal misconduct should be accorded the principal rights conferred under captor state law. The importance of this text,

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28. *See, e.g.*, The hon. Robert W. Sweet, *Civil Gideon & Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 504 (1998) (citing Earl Johnson, Jr. *Toward Equal Justice: Where the United States Lands Two Decades After*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 205 (1994)); Justice Sweet writes that France and Germany provided a right to counsel in the 1870's. *See also* John Leubsdorf, *On the History of French Legal Ethics*, 8 UNIV. CHI. SCHL. ROUNDTABLE 341(2001). Leubsdorf writes that independence from the government was an important feature of French defense counsel (avocats) as early as the Napoleonic era. However, the right to counsel for all persons accused of crimes did not appear under law until the Third republic after 1870. *See also* W.E. Butler, *Civil Rights in Russia*, 1, 7, *in* CIVIL RIGHTS IN IMPERIAL RUSSIA (Olga Crisp & Linda Edmondson eds., 1989). Butler notes that trial by jury did not exist until granted by statute in 1864. However, it was not until the provisional government of Kerensky in 1917 that right to counsel appears. *Id.*

29. DIETRICH SCHNIDLER & JIRI TOMAN, THE LAWS OF ARMED CONFLICTS 27 (1981).

30. S.E. FINER, HISTORY OF GOVERNMENT, VOL III 1625-30 (1997).

31. Sweet, *supra* note 28, at 504.

32. SCHINDLER & TOMAN, *supra* note 29, at 27.

33. *Id.* The Final Protocol was signed on 27 August 1874 by the following states: Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Greece, Italy, Netherlands, Portugal, Russia, Spain, Sweden and Norway, Switzerland, Turkey. *Id.*

34. *See, e.g.*, Sweet, *supra* note 28, at 504.

35. SCHINDLER & TOMAN, *supra* note 29, at 35.

36. *Id.*

along with the 1874 Brussels Conference was that both were incorporated into the Hague Conventions of 1899[37] and 1907.[38] However, neither of those Conventions provided specific rights to counsel for prisoners before judicial or disciplinary proceedings.

The watershed years of World War I (1914-1918) showed deficiencies in prior conventions and codes regarding conduct of war in general. Post-war concepts of international law changed dramatically as a result of the gross bloodshed in that conflict.[39] Views toward treatment of prisoners of war, in particular, underwent significant changes. This change was partly due to heavily propagandized and celebrated cases such as the German execution of a British Nurse accused for spying.[40] Moreover, there were significant instances of trials in prisoner of war camps where an accused's legal rights were non-existent, even by contemporary standards.[41] Credible accounts of life in German prisoner of war camps reveal that enlisted men often received brutal treatment while incarcerated.[42] As a result of these events, national leaders and private humanitarian organizations attempted to provide an international code of rights for prisoner of war treatment. These attempts reached fruition in 1929 in Geneva, Switzerland.[43]

The 1929 Geneva Convention first codified the right of prisoners of war to defense representation in judicial proceedings. This Convention occurred as a result of pressure applied by the International Red Cross beginning in 1921.[44] The 1929 Convention consisted of ninety-seven articles concerning the treatment of prisoners of war. It reiterated a recurring theme of combatant state jurisdiction over prisoners.[45] It also provided for the establishment of military tribunals modeled on the same basis as the combatant state's

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37. *See* International Convention With Respect to the Laws and Customs of War by Land (Hague I), signed at the Hague July 29, 1899.

38. *See* International Convention Concerning the Laws and Customs of War on Land (Hague II), signed at the Hague, Oct. 18, 1907.

39. *See, e.g.*, FINER, *supra* note 30, at 1630-32. *See also* B.H. LIDDELL-HART, A HISTORY OF THE FIRST WORLD WAR (1972).

40. At the outbreak of World War I, the German Government established a military bureau of investigation to "determine violations of the laws and customs of war which enemy military and civilian persons have committed against the Prussian troops. Nurse Edith Cavell, a British citizen, had been trapped behind German lines in Belgium after that country's invasion. While working as a nurse she assisted stranded allied troops in making their way back to France "to fight again." She was captured and, after nine weeks in solitary confinement, confessed to this activity. After a short trial, and despite a protest from the United States legation in Brussels, she was executed by firing squad. *See, e.g.*, Greene, *supra* note 25, at 305.

41. *Id. See also* NEIL M. HEYMAN, DAILY LIFE DURING WORLD WAR I 141 (2002).

42. *Id.*

43. *Convention Relative to the Treatment of Prisoners of War*, 27 July 1929, *in* SCHINDLER & TOMAN, *supra* note 29, at 271.

44. *Id.*

45. *Id.* art. 45. This Article states in part: "prisoners of war shall be subject to the laws, regulations, and orders in force in the armed forces of the detaining Power . . . ."

tribunals.[46] However, the Convention went further than any predecessor when it stated, "no prisoner of war shall be sentenced without the opportunity to first defend himself."[47] Most important for the purposes of this paper is Article 62 which read, "The prisoner of war shall have the right to be assisted by a qualified advocate of his own choice . . . ." That article further established a right for the "protecting power" to procure an advocate for the prisoner.[48] Moreover it placed an obligation on the "detaining power" if requested by the "protecting power," to provide a list of persons qualified to conduct the defense.[49] Article 63 provided a basic guarantee to prisoners of war, that any prisoner prosecution would mirror the existing procedure applicable to persons in the armed force of the detaining power.[50] Article 64 further guaranteed this right through an additional right of appeal, presumably before the captor state's appellate courts.[51]

Just as World War I provided a watershed in the evolution of international law, so too did World War II (1939-1945). That war proved equal in its devastation to all prior wars and ill-treatment accorded both prisoners and civilians, particularly by the Axis powers, caused the issue of prisoner rights to be renewed once more.[52] From the conclusion of hostilities until 1949 a series of discussions concerning treatment of prisoners of war culminated in what became known as the Third Geneva Convention of 1949 (Geneva III).[53] Geneva III supplemented the 1929 Geneva Convention by expanding, rather than abrogating, prisoner of war legal rights before judicial and tribunal hearings. These rights are found in Article 82 through Article 108. One significant clarification from the 1929 Convention dealt with trial forum. For instance, in the 1929 Convention, there was no specific rule enumerating forum. In Geneva III, Article 84 permitted a prisoner of war "to be tried before a military court, unless the detaining power's laws permit a prisoner to be tried before a civil court."[54] Likewise, in Geneva III, clarification was provided regarding the quality of defense counsel. Article 99 of Geneva III states, "[N]o prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel."[55] While it may seem that this language is

46. *Id.* art. 46.
47. *Id.* art. 61.
48. *Id.* art. 62.
49. *Id.* art. 62.
50. *Id.* art. 63.
51. *Id.* art. 64.
52. SCHINDLER & TOMAN, *supra* note 29, at 195.
53. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *in* SCHINDLER & TOMAN, *supra* note 29, at 355.
54. *Id.* art. 84.
55. *Id.* art. 99.

taken directly from the 1929 Convention, discussion at Geneva III helped define what "qualified advocate or counsel meant."[56]

Equally important in setting international standards for rights to counsel were the post-war "Nuremberg trials" of German war criminals. As the war ended, allied representatives met in London to conclude a charter detailing the "constitution, jurisdiction and functions of the International Military Tribunal (IMT), which conducted the Nuremberg trials.[57] At these trials, all accused persons were afforded defense counsel.[58] As a counterpart to the IMT in Europe, an International Military Tribunal was created in Asia to address war crimes by Japanese military officers and political leaders.[59] Again, all accused persons were afforded defense counsel. One difference between the IMT for Asia and the Nuremburg trials had to do with selection of counsel. Most of the Japanese defendants were provided military officers with legal billets (JAGS).[60] In the most salient of these cases, *In re Yamashita*, military defense counsel vigorously pursued General Yamashita's appeal to the Supreme Court.[61] While, *Yamashita* does not formally create any new parameters for defense counsel in war crimes tribunals, it does create a standard for defense counsel representation. This standard, as discussed below, is one of zealous representation through all legitimate and ethical means.

In one respect, primarily because of concerns from the lead American Prosecutor, Supreme Court Justice Robert Jackson, the concept of fairness

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56. *See, e.g.*, Ruth Wedgwood, *Agora, Military Commissions: Al-Qaeda, Terrorism, and Military Commissions*, 96 A.J.I.L. 328, 337 (2002).

57. *See* Charter of the International Military Tribunal (IMT). Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 5, 1945, 58 Stat. 1544, 82 U.N.T.S. 280. In the course of World War II, the Allied Governments issued several declarations concerning the punishment of war criminals. On 7 October 1942, it was announced that a United Nations War Crimes Commission would be set up for the investigation of war crimes. It was not, however, until 20 October 1943, that the actual establishment of the Commission took place. In the Moscow Declaration of 30 October 1943, the United States, United Kingdom, and Soviet Union issued a joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that, "the major criminals whose offenses have no particular geographic localization," would be punished "by the joint decision of the Governments of the Allies." *See* SCHNINDLER & TOMAN, *supra* note 29, at 881.

58. IMT, sect. IV provides the right to counsel.

59. The International Military Tribunal for the Far East was established by a special proclamation of General Douglas MacArthur as the Supreme Commander in the Far East for the Allied Powers. *See* SCHNINDLER & TOMAN, *supra* note 29, at 881.

60. *See, e.g.*, George F. Guy, *The Defense of Yamashita*, 6 USAFA J. LEG. STUD. 215, 216-17 (1996).

61. *See, e.g.*, *Yamashita*, 327 U.S. 1, 5 (1946). The court held, "Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged." *Id.*

came to the forefront of the IMT.[62] However, even before Justice Jackson became involved in the case, rules concerning the rights of accused persons before the tribunal were promulgated.[63] By 1945 standards, the rules reflected more of Constitutional and common law rights than those practiced in the Soviet Union.[64] In establishing procedural rules of law that involved the right to competent counsel as part of the right to a fair trial, the IMT formed a standard from which later international trials could not deviate.

The history of prisoner of war rights reveals a customary international law basis for requiring effective representation at war crimes tribunals. While there is a large corpus of domestic law from criminal trials, the addition of a customary international law analysis is important to war crimes trials and military commissions in that it provides guidance for minimum standards of representation. That some scholars may argue Sixth Amendment protections may not apply to military commissions makes the customary international law

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62. Jackson's opening statement highlighted the importance of fairness before the IMT:

> Before I discuss the particulars of the evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter in even minor matters . . . . We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspiration to do justice.

Stapleton, *supra* note 1, at 545.

63. The IMT Rules regarding Fair Trial are found in Section IV of the London Charter. This section reads as follows:

> Section IV: Fair Trial for Defendants
>
> Article 16. In order to ensure a fair trial for the Defendants, the following procedure shall be followed:
>
> (a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the trial.
>
> (b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.
>
> (c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
>
> (d) A Defendant shall have the right to conduct his own defense before the Tribunal or shall have the assistance of Counsel.
>
> (e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross examine any witness called by the Prosecution. (828).

Id.

64. *See, e.g.*, JOSEPH E. PERSICO, INFAMY ON TRIAL 397-405 (1994).

study all the more important. This is because the Geneva Convention III regarding prisoners of war is a partially self-executing document.[65]

B. Current Views of an Accused's Basic Right to Competent Counsel Under International Law and Universal Jurisdiction: Other General Sources

While the right to competent counsel and universal jurisdiction are two different areas of study, the two are related. As noted above, courts exercising universal jurisdiction are adjudicating the most heinous offenses. Under contemporary legal standards, defendants facing trial are entitled to competent counsel.

1. Right to Competent Counsel

The right to competent counsel under international law is essentially a subset of the right to a fair trial. While the Constitutional right to competent counsel governs in any U.S. criminal court, international tribunals represent a special area for review of international standards. Such a review is partly an exercise in reading the plain language of conventions and agreements. In part, a review of standards is also a study in comparative jurisprudence. This is because most tribunals consist of a prosecution of foreign defendants for offenses committed outside the territory of the prosecuting state or body. Offenses constituting war crimes, crimes against humanity, genocide, and offenses violating "the law of nations" often do not have a geographic nexus to the prosecuting state or body. However, jurisdiction is obtained because such crimes are viewed as victimizing humanity.[66] Yet, there is almost global

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65. *See, e.g.*, United States v. Noriega, 808 F. Supp 791, 798 (S.D. Fla. 1992). In *Noriega*, the District Court acknowledged the difficulty in determining the elements of a self-executing treaty. However, it held:

> In the case of Geneva III, however, it is inconsistent with both the language and spirit of the treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs—not to create some amorphous, unenforceable code of honor among the signatory nations. It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.

Id. at 1532-35.

Also of importance, the District Court earlier viewed Article 22 as providing a right of access to defense counsel. *Id. See also, e.g.*, Michael McKenzie, *Recent Development, Treaty Enforcement in U.S. Courts*, 34 HARV. INT'L L.J. 596 (1993).

66. *See, e.g.*, Susan Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307 (2000).

recognition that even the most heinous actors are accorded the right of a competent counsel.[67]

International also law recognizes the authority of a nation to try war criminals by military commission.[68] As noted earlier, military courts have been used to trying violators of laws of war since before the Civil War. However, other than Geneva III, little discussion exists regarding either the right to a fair trial and effective assistance of counsel before military tribunals. There are, however, two international understandings that bear on the general concept of a fair trial for all persons, the Universal Declaration of Human Rights (UDHR)[69] and the ICCPR.[70] Additionally, there are regional agreements which recognize the right to counsel, such as The American Convention on Human Rights,[71] The European Charter on Human Rights,[72]

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67. Stapleton, *supra* note 1, at 539.

68. *See, e.g.*, Major Timothy MacDonald, *Military Commissions and Courts Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, Army Law 19 (2002). *See also* Oxman & Reydams, *supra* note 4, at 235.

69. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

70. ICCPR, *supra* note 14. The preamble of the ICCPR states the purpose of the Covenant, including the statement that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and that "these rights derive from the inherent dignity of the human person." Id. For a brief summary of the history of the ICCPR, see David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

71. ACHR, *supra* note 14. *See, e.g.*, ACHR art. 8(2)(d); art. 8(2)(e), which reads in full:

> (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
>
> (e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.

Id.

72. *See, e.g.*, Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1, art. 47 [hereinafter Charter of Fundamental Rights]. Article 47 reads, in part:

> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Id.

This Charter is different than the earlier 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, codified at Nov. 4, 1950, 312 UNTS 221. In the European Convention, art. 6 provides the right to a fair trial. The right to counsel is enumerated at Article 6(3)(c) which reads:

> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Id.

and the African Charter on Human and People's Rights,[73] all of which recognize a right to counsel as part of the right to a fair trial.[74] Of course, while these regional agreements may reflect customary international law, like the ICCPR, they have no legal effect on American courts.[75] Additionally, while neither the ICCPR, UDHR, nor the regional agreements specifically address fair trials for military prisoners, all are influential in their universality.

As noted above, the UDHR envisions a fair trial for all accused persons. While the UDHR is an aspirational document, rather than binding law, it is central to the goal of achieving universal justice.[76] There are two articles within the UDHR that directly bear on the right to a fair trial. Article 10 enumerates the right to a "fair and public hearing by an independent and impartial tribunal . . . of any criminal charge against him."[77] Likewise, Article 11 enumerates the right to a presumption of innocence, a prohibition against false imprisonment, as well as a protection from unjust punishment.[78]

The ICCPR, on the other hand, is the primary international law guarantor of the international right to a fair trial.[79] Initially opened for state signature in 1966, it is composed of fifty-one articles and covers a wide array of basic individual rights such as freedom of religion, liberty of movement, privacy rights, and the right to a fair trial.[80] The United States signed the ICCPR on September 8, 1992.[81] Under Article 14, an accused is provided the "minimum guarantee" of the right to be tried in his own presence.[82] Additionally the same article guarantees an accused person both the right to legal assistance

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73. African [Banjul] Charter on Human Peoples Rights, June 27, 1981, 21 I.L.M. 58 (1982) [hereinafter African Charter]. *See, e.g.*, art. 7(1)(c) which reads in full:

> (c) the right to defence, including the right to be defended by counsel of his choice.

Id.

74. *Id.* art. 47. Article 47, in part, reads: Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. *Id.*

75. *See, e.g.*, United States v. Duarte-Acero, 296 F.3d 1277 (11th Cir. 2002). *See also* Hain v. Gibson, 287 F.3d 1224 (10th Cir. 2002).

76. *See, e.g.*, A Eide et al. eds., The Universal Declaration of Human Rights: A Commentary (1992). The UDHR is not a treaty. It was adopted by the United Nations General Assembly as a resolution having no force of law. Its purpose, according to its preamble is to provide a "common understanding" of human rights and fundamental freedoms.

77. Universal Declaration of Human Rights, art. 10.

78. *Id.* art. 11.

79. *See, e.g.*, Stewart, *supra* note 70, at 1.

80. *Id.*

81. *Id.* Stewart notes that generally existing United States law complies with the ICCPR. Most of the individual rights and freedoms guaranteed by the United States Constitution and state constitutions are embodied in the ICCPR. *Id.*

82. Art. 14(3)(d).

and to be informed of this right.[83] Moreover, an accused is entitled to have legal assistance without payment where the accused is indigent.[84]

2. *Universal Jurisdiction*

It is important to note that much of war crimes and crimes against humanity prosecution that relies on customary international law is conducted in courts exercising universal jurisdiction. Therefore, it is incumbent to gain an understanding of universal jurisdiction and defense practice in these courts. However, as noted in the introduction, United States military commissions are not courts of universal jurisdiction. The commissions do share similar features, to courts exercising universal jurisdiction.

Universal jurisdiction occurs where a state exercises jurisdiction over offenses to which it has no geographic, *in-personam*, or other nexus.[85] Offenses targeted for universal jurisdiction typically involve war crimes, crimes against humanity, or other *jus cogens offenses*.[86] Courts exercising universal jurisdiction are rare. Most national courts deny jurisdiction over crimes that have no geographic or personal nexus to them. However, where a court exercises universal jurisdiction, greater scrutiny should be given to its employment of due process (or the right to a fair trial).

Some scholars conclude universal jurisdiction fills a gap where other, more basic doctrines of jurisdiction, provide no basis for national proceedings.[87] Universal jurisdiction occurs where a state exercises jurisdiction over criminal offenses regardless of whether any party to the offense, or the offense itself, has a geographic nexus to the state. Often universal jurisdiction is confused with a state's exercise of its "long arm" jurisdiction over offenders.[88]

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83. *Id.*

84. *Id.*

85. *See, e.g.*, James v. Illinois, 493 U.S. 307, 320 (1989) (Stevens, J., concurring).

86. *Jus cogens* has been defined as "peremptory norms of general international law." Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679, 699. The Vienna Convention describes these norms as ones "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* The Restatement (Third) of International Law provides that a state violates *jus cogens* if it "practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." THE RESTATEMENT (THIRD) OF INTERNATIONAL LAW § 702.

87. *See, e.g.*, Bruce Broomhall, *Symposium: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV 339, 400 (2001).

88. *Id.*

However, universal jurisdiction may be seen as an evolutionary growth of the "long-arm" jurisdictional exercise over crimes.

As World War II ended, allied representatives met in London to conclude a charter detailing the "constitution, jurisdiction and functions of the International Military Tribunal (IMT), which conducted the Nuremberg trials."[89] The concept of universal jurisdiction for certain offenses gained initial acceptance through the IMT, and the International Military Tribunals for Asia,[90] as well as the 1968 Israeli trial of Adolph Eichmann.[91] Indeed, universal jurisdiction concepts developed in the *Eichmann* trial have been accepted by other national or state courts. For example, in the 1989 Ontario High Court of Justice case, *Regina v. Finta,*[92] a Canadian court accepted the principle that state courts can exercise criminal law jurisdiction "with respect

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89. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. In the course of World War II, the Allied Governments issued several declarations concerning the punishment of war criminals. On 7 October 1942, it was announced that a United Nations War Crimes Commission would be set up for the investigation of war crimes. It was not, however, until 20 October 1943, that the actual establishment of the Commission took place. In the Moscow Declaration of 30 October 1943, the United States, United Kingdom, and Soviet Union issued a joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that, "the major criminals whose offenses have no particular geographic localization," would be punished "by the joint decision of the Governments of the Allies." *See* SCHINDLER & TOMAN, *supra* note 29, at 881.

90. *Id.* at 881. The International Military Tribunal for the Far East was established by a special proclamation of General Douglas MacArthur as the Supreme Commander in the Far East for the Allied Powers. *Id. See also* Henry T. King, Jr., Universal Jurisdiction: *Myths, Realities, War Crimes and Crimes Against Humanity: The Nuremberg Precedent,* 35 NEW ENG. L. REV. 281, 283 (2001). Professor King writes:

> In today's world, universal jurisdiction is a vital legacy of Nuremberg. We should never forget that until Nuremberg it was only national courts that could prosecute criminals for crimes committed in that particular country. This concept was bypassed by Nuremberg when it obliterated traditional aspects of national sovereignty in its approach towards crimes against peace and war crimes and when it articulated for the first time the concept of crimes against humanity.

Id.

91. State of Israel v. Eichmann, Criminal case No. 46/61 (36 I.L.R. 5 (J.M.DC 1968)). In *Eichmann*, the court recognized universal jurisdiction to prosecute an offense against the Jewish people that occurred prior to the formation of the State of Israel. The court specifically held:

> The State of Israel's "right to punish," the Accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific or national source which gives the victim nation the right to try any who assault its existence.

Id. ¶ 30.

92. *See, e.g.,* Regina v. Finta, 1 S.C.R 701 (1994).

to acts which occurred outside its territory."[93] In the field of tort law, the United States exercises universal jurisdiction for some claims through the Alien Tort Statute.[94] These trials also added to the growing acceptance that some offenses, such as genocide, constitute crimes against humanity that can be prosecuted at any location by any recognized court complying with basic procedural rights.

Additionally, international instruments exist which recognize the efficacy of universal jurisdiction. For instance, the 1949 Geneva Conventions grant universal jurisdiction on the part of all nations to prosecute alleged perpetrators of "grave breeches of those conventions."[95] The *Ge*neva Convention obliges a state that is not prepared to prosecute a *bona fide* crime against humanity to hand over the suspect to another state prepared to prosecute.[96] Likewise, International Covenant on Civil and Political Rights (ICCPR)[97] appears to give some recognition of universal jurisdiction in Article 15(b).[98]

Jurisdiction for *jus cogens* offenses such as war crimes has been established for the *ad hoc* international tribunals involving Yugoslavia and Rwanda, as well as the International Criminal Court. National courts, however, have increasingly taken the lead in prosecuting foreigners for

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93. *Id.* (quoting the Permanent Court of International Justice in the Steamship Lotus (1927)).

> It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a rule would only be tenable if international law contained a general prohibition in states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory.

Id.

94. 28 U.S.C. 1350 *et seq.* *See also* Doe v. Unocal, 2002 WL 31063976 (9th Cir 2002); Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995); Filartega v. Pena Irala, 630 F.2d 876 (2d Cir 1980).

95. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 28, *entered into force* Oct. 21, 1950. *See also* King, *supra* note 90, at 283.

96. *Id.*

97. ICCPR, *supra* note 14.

98. ICCPR, *supra* note 14, art. 15(b), § 2 reads as follows:

> Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which at the time it was committed, was criminal according to the general principles of the law recognized by the community of nations.

Id.

international crimes committed outside of their borders.[99] Prior to 1999, several other countries exercised jurisdiction over crimes for which there was no geographic or nationality nexus. For instance, in 1991, Australia prosecuted a Ukranian immigrant for crimes he committed against specific Jews during World War II.[100] Likewise, Belgium has asserted universal jurisdiction over war crimes and crimes against humanity.[101] Spain has argued before the British courts for jurisdiction over General Augusto Pinochet based on atrocities committed during his tenure as president of Argentina.[102] And, the Netherlands has attempted to obtain jurisdiction over persons accused of crimes against humanity in its former colony, Suriname.[103] Each of these states possess advanced legal systems considered to embody the procedural and substantive rights contemplated in international law, as discussed below. However, none of these states utilized a military court in their prosecution attempts.

In one instance, however, a state has utilized a military court to prosecute a civilian for war crimes. In 1999, Switzerland prosecuted a former Rwandan mayor for his role in the 1994 genocide.[104] In *Prosecutor v. Niyonteze*,[105] the accused was prosecuted before a court consisting of five military officers, the president sitting as both judge and jury member.[106]

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99. Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW. ENG. L. REV. 241, 243 (2001) (quoting Theodore Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 18 (1988)).

100. Polyukhovich v. The Commonwealth (1991), 172 C.L.R. 501 (Austl.).

101. *See, e.g.*, Luc Reydams, *International Decisions: Belgian Tribunal of First Instance of Brussels (Investigating Magistrate)*, 93 AM. J. INT'L L. 700, 703 (1999) (finding universal jurisdiction over crimes against humanity, under customary international law and *jus cogens*, in case involving criminal complaints against Chile's General Pinochet).

102. National Tribunal, Criminal Chamber in Plenary, Appellate no. 173/98 first section, sumario 1/98, Order, Madrid, 5 Nov. 1998 (confirming Spanish jurisdiction to try former Chilean head of state Augusto Pinochet for genocide, including torture, and terrorism committed against Spanish nationals in Chile). *See, e.g.*, Ex Parte Pinochet, Appeal, 24 Mar. 1999.

103. *See, e.g.*, Douglass Cassel, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 NEW. ENG. LAW REV. 421, 426 f.n. 19 (2001) (citing Court Amsterdam, Order of Nov. 20, 2000 (Bouterse case), *available at* <http://www.rechtspraak.nl/gerechtshof/amsterdam> (last visited Feb. 17, 2001)); Marlise Simons, *Dutch Court Orders an Investigation of '82 Killings in Suriname*, N.Y. TIMES, Nov. 26, 2000, at A12. The Dutch Court found jurisdiction to investigate torture leading to death, allegedly committed by former Surinamese military leader Desi Bouterse against Surinamese citizens in Suriname, based on a retrospective application of the 1989 Dutch statute implementing the Convention Against Torture.

104. *See, e.g.*, Oxman & Reydams, *supra* note 4, at 235.

105. *See, e.g.*, Niyonteze v. Public Prosecutor (Trib. militaire de cassation Apr. 27, 2001).

106. *Id. See also* Oxman & Reydams, *supra* note 4, at 233-34. (Niyonteze was convicted of murder, incitement to commit murder, genocide, and incitement to commit genocide. He was sentenced to life in prison. However, on appeal his conviction for murder was overturned for jurisdictional reasons. After reassessment for the war crimes conviction, he was sentenced to fourteen years followed by a ten year expulsion from Switzerland.) *Id.*

Switzerland's military code, developed in 1927, provided jurisdiction over any defendant for war crimes.[107] Thus, in Switzerland, a foreign civilian can be prosecuted before a military court for heinous war crimes offenses.

II: RIGHT TO A FAIR TRIAL AND COMPETENT COUNSEL IN INTERNATIONAL PRACTICE

Having established that a right to counsel exists in treaties, customary international law, and historic precedent, it becomes important to analyze how this right has been recognized and implemented by judicial bodies. The international *ad hoc* tribunals are perhaps the best examples because of their universality. This is not to suggest either tribunal has unlimited jurisdiction. To the contrary, the jurisdiction is limited to subject matter, time period, and geographic region.

A. Basic Review on Implementation of Tribunals, ICTY & ICTR:

The Charter of the United Nations (U.N. Charter) governs the implementation of universal international criminal law jurisdiction.[108] Chapter VII of the Charter defines what applicable response or action the United Nations will pursue in regard to "threats against, or breaches of, the peace, as well as acts of aggression."[109] Article 39 of the U.N. Charter places the onus of determining whether a threat to peace and security exists.[110] Additionally, the Security Council is charged with the role of deciding what measures "shall be taken in accordance . . . to maintain or restore international peace and security." Since 1990, the Security Council has exercised criminal law jurisdiction in establishing two ad hoc tribunals, the ICTY and ICTR. To date, neither tribunal has run its course of prosecuting accused persons deemed to have committed crimes against humanity or other heinous offenses.

The tribunals are similar in their construction. However, there are slight differences in the jurisdictional reach of each *ad hoc* tribunal.[111] Each has a

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107. *See, e.g.*, CODE PENAL MILITAIRE, SUISSE (1927) art. 2. Article 2 provides: "Those subject to military law are . . . (9.) Civilians who, in the event of armed conflict, commit violations of international law. Jurisdiction extends whether a declared war or other armed conflict is in existence." *Id.* art. 108. Moreover, jurisdiction is conferred wherever a violation of the laws or customs of war occurs. *Id.* art. 109.

108. *See, e.g.*, Stewart, *supra* note 81, at 1.

109. U.N. Charter, Ch. VII, titled, 'Action With Respect To Threats To The Peace, Breaches Of The Peace, And Acts Of Aggression.'

110. U.N. Charter art. 39.

111. The jurisdiction of the ICTY and ICTR is limited to crimes in the former Yugoslavia, Rwanda, and its neighboring states. ICTY Statute, *supra* note 10, art. 8 ("The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia . . . ."); ICTR Statute, *supra* note 10, art. 7 ("The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda . . . as well as to the territory of neighbouring States in respect of serious violations of international

trial chamber, a chief prosecutor, an appeals chamber, and a registry. In each, the registry is, in part, de facto responsible for ensuring the procedural rights of the accused. This is because each registry is tasked with maintaining a list of available defense counsel and assigning such counsel when the need arises. Although neither tribunal constitutes a "military commission," the international nature of the tribunal, coupled with its jurisdiction arising from acts of war, presents a standard to compare the proposed military commissions. Likewise, it is important to note the severity of the offenses as well as the historic background of each jurisdiction. The background history highlights the severity of the offenses against the individuals accused as well as presents the right to effective counsel in a proper context.

B. International Tribunal for Rwanda (ICTR)

Between April and July 1994 somewhere between 500,000 and over one million persons belonging to a distinct ethnic group were executed by Rwandan government forces, their intermediaries, and supporters.[112] Individuals considered by the United Nations (U.N.) Security Council to be the perpetrators or main participants of this genocide were ultimately indicted and, in an ongoing process, brought to trial before an *ad hoc* tribunal specifically created to punish those offenders under international law.[113] Understanding the historic background to the Rwandan genocide is also imperative to analyzing Akayesu's trial, both from a perspective of universal jurisdiction and due process.

Prior to 1994, Rwanda was the most densely populated country in Africa.[114] From 1897 until 1917 most of its territory was ruled by Germany through a colonial administration.[115] From 1917 through its eventual independence, Rwanda was governed by Belgium through a mandate granted by the League of Nations.[116] The Belgian colonial administration in its African territories such as Rwanda promoted a descending superiority of white

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humanitarian law committed by Rwandan citizens."). The ICTR's temporal jurisdiction extends only to crimes committed during 1994. *Id. But see* ICTY Statute, *supra* note 10, art. 8 (temporal jurisdiction commences January 1, 1991, but no ending date given).

112. ICTR-96-4-T, ¶ 111.

113. *Id.*

114. *Id.*

115. *See, e.g.*, Robert F. Van Lierop, *Report on the International Criminal Tribunal for Rwanda*, 3 HOFSTRA L. & POL'Y SYMPOSIUM 203, 207-08 (1999). Van Leirop argues that German and later Belgian colonial authorities drove the distinction between Hutu and Tutsi to even further prominence. *Id.* This argument appears to have been adopted by the ICTR in several trial chamber decisions. *See also* RICHARD F. NYROP ET AL., RWANDA, A COUNTRY STUDY 11-13 (1982).

116. NYROP ET AL., *supra* note 115.

Europeans and then stratified other classes accordingly.[117] This stratification formed the basis for decades of post-colonial upheaval.[118] The colonial administration was also responsible for repression and other human rights violations.[119] Belgian colonial authorities vested a minority indigenous ethnic group, the Tutsi, with substantial benefits which were deprived to the majority ethnicity, the Hutu.[120] Indeed the authorities recognized a Tutsi monarchy, subservient to Belgian authority, but above that of any Hutu form of government.[121] In 1956, the United Nations Trusteeship Council directed Belgium to organize elections on the basis of universal suffrage.[122] Essentially four political parties were largely formed on ethnic lines.[123] As a result of these elections, the Hutu gained a political majority.[124] From November 1959 until 18 October 1960, a series of ethnic-based attacks, reprisals, and counter-reprisals occurred between the Hutu's majority party and the Tutsi minority.[125] On that later date, Belgian authorities established an autonomous provisional government headed by Gregoire Kayibanda, the Hutu head of the majority Hutu party (MDR).[126] In turn, a large population of Tutsi, including the monarchy, fled to neighboring countries.[127] Accordingly, these groups became known as "exiles."[128]

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117. *See, e.g.*, Peter Uvin, *On counting, categorizing, and violence in Burundi and Rwanda*, 148, 149-50, *in* CENSUS AND IDENTITY: THE POLITICS OF RACE, ETHNICITY, AND LANGUAGE IN NATIONAL CENSUS (Kertzer & Arel eds., 2002). The five categories of race from descending order were: Europeans, "Mulattos" referring to children of white males and African females, Asians, Tutsi (labeled as "blacks not submitted to customary chiefs"), and Hutu (labeled as "indigenous"). *Id.*

118. *Id.*

119. *Id.*

120. ICTR -96-4-T, ¶ 82-84. According to evidence from a prosecution expert, Dr. Alison De Forges, the population percentages in 1930 were composed as follows: 84% Hutu, 15% Tutsi, and 1% Twa. As of 1930, every Rwandan was required to carry an identification certificate and be identified as a member of either ethnic group. Apparently this practice continued after Rwandan independence and lasted until 1994. *Id.*

121. *Id.*

122. *Id.* ¶ 87.

123. *Id.* ¶ 88. The four parties were the Parmehutu (MDR); the Union Nationale Rwandaise (UNAR), a party comprised of Tutsi "monarchists"; the Aprosoma, a predominately Hutu group; and the Rassemblement Democratique Rwandais (RADER), a combination of Hutu and Tutsi moderates. *Id.*

124. *Id.*

125. *Id. See also* Jose Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 389 (1999); Uvin, *supra* note 117, at 153. Professor Uvin writes that in early 1962 more than 2000 Tutsi were killed, and the following year, more than 10,000. Over 40,000 fled Rwanda in 1963. *Id.*

126. ICTR 96-4-T, ¶ 88.

127. *Id. See also* NYROP ET AL., *supra* note 115, at 17.

128. ICTR 96-4-T, ¶ 88. *See also* Ogenga Otunnu, *Rwandese Refugees and Immigrants in Uganda*, 3, 5-7, *in* THE PATH OF A GENOCIDE: THE RWANDA CRISIS FROM UGANDA TO ZAIRE (Howard Adelman & Astri Suhrke eds., 1999). Some of the Tutsi exiles were employed by Idi Amin's regime in the Ugandan military and death squads. Amin actively supported the exile's incursions into Rwanda. *Id.* at 14-15.

After Rwandan independence was declared on July 1, 1962, the MDR became the sole governing party under Kayibanda.[129] While large numbers of Tutsi fled Rwanda, some of the population remained behind.[130] Moreover, some groups that had fled launched armed incursions into Rwanda, destabilizing its economy.[131] By 1973, Rwanda was wracked by internal unrest. This unrest, coupled with the Tutsi incursions, caused Kayibanda's government's collapse.[132] His successor, General Juvenal Habyarimana, achieved power by armed force and had several opposition and political leaders imprisoned and executed, including the former president.[133]

In 1975 Habyarimana instituted a one-party system under his party the Mouvement revolutionanaire national pour le developpement (MRND).[134] At first, Habyarimana's government did not present itself as anti-Tutsi, but by 1980, with a continually weakening economy and internal dissension, the government became anti-Tutsi.[135] On 1 October 1990 Tutsi exiles in Uganda launched a failed attack in Rwanda.[136] The MNRD government's response to this attack included the arrest of thousands of opposition members, mainly Tutsi, in Rwanda.[137] However, some internal and international pressure remained so that Habyarimana was pressured into political multi-party recognition.[138] Furthermore, his government agreed to accept political reforms.[139] This action did not stop Tutsi incursions into Rwanda because the government remained unwilling to accept the free return of all exiles.[140]

As a result of the government's intransigence toward the Tutsi exiles (RPF), their political organization's military wing, the Rwandan Patriotic Army (RPA), launched a large-scale attack on Rwanda on 1 October 1991.[141] From that time, until a cease-fire agreement in July 1992, Tutsi exile forces and the Hutu dominated Rwandan military engaged in open warfare.[142] That cease-fire accepted the RPF into Rwandan politics, but ultimately this

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129. ICTR 96-4-T, ¶ 88.

130. *Id.*

131. *Id.* at 89.

132. *Id.*

133. *Id.*

134. *Id.* ¶ 92.

135. ICTR 96-4-T, ¶ 93. The government began systematically discriminating against Tutsi by establishing quotas in universities, government employment, and services. Additionally, Hutu from Habyiramana's native regions, Gisenyi, and Ruhengeri were given preference.

136. *Id.*

137. *Id.* The Tutsi forces were joined under the aegis of a new political group, the Rwandan Patriotic Front (RPF), composed mainly of Tutsi exiles in Uganda.

138. *Id.*

139. *Id. See also* Alvarez, *supra* note 125, at 389

140. ICTR 96-4-T, ¶ 95.

141. *Id.*

142. *Id.*

acceptance did not stem the RPA from continuing to attack Hutu targets.[143] As a result, Hutu political groups grew increasingly anti-Tutsi and drew a harder-line toward the Tutsi than Habyarimana.[144] Radio stations, for example, transmitted anti-Tutsi propaganda.[145] However, a break in the fighting appeared when both parties agreed to settle disputes by signing parts of peace accords created in Arusha.[146] Yet, during this time, Tutsi soldiers in neighboring Burundi, executed the Hutu president of that country resulting in Habyarimana making contradictory public statements both about the peace-accords and the Tutsi in general.[147] However, he agreed publicly to implement the Arusha peace accords.[148] Then, on April 6, 1994, while returning from a trip in Dar-es-Salaam, Tanzania, he and the new Burundi president were killed when their aircraft crashed in Rwanda.[149] Although the cause of the crash was not immediately determined, blame was quickly placed on the RPA.

On April 7, 1994, throughout parts of the country, the Presidential Guard and Hutu militia (called interhamwe) began killing Tutsi as well as moderate Hutu.[150] Some of these victims, such as the president of the Rwandan Supreme Court, represented the best chance to avert genocide.[151] Additionally, the Rwandan Armed Forces executed ten United Nations troops.[152] In quickly erected detention centers and in the open, a wholesale slaughter of civilians occurred on a scale unprecedented since 1945. Unlike the highly systematized "final solution" of the Nazi genocide program, the Rwandan genocide stemmed from a largely unplanned popular uprising.[153] In

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143. *Id.*

144. *Id.*

145. See, e.g., Prosecutor v. Ruggiu, No. ICTR-97-32-I (Judgment and Sentence; June 1, 2000)

146. ICTR 96-4-T, ¶ 95.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id. See also* Alvarez, *supra* note 125, at 389. Interhamwe stands for "those who stand together." *Id.* (citing PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 93 (1989)). According to Alvarez, the Interhamwe were armed by French agents. Additionally, these French agents were in control of Rwandan counter-insurgency operations.

151. ICTR 96-4-T, ¶ 95.

152. *Id. See* Alvarez, *supra* note 125, at 390. Alvarez writes that after the execution of the ten Belgian soldiers, the U.N. peacekeeping forces abandoned Rwanda. The Security Council eventually permitted French troops into the area. However, the French were accused, with some evidence, of defending the genocide's perpetrators. *Id.*

153. Although persecutions and murders of Jews occurred in Germany prior to its invasion of Poland in 1939, the "final solution" was designed at the Wansee conference held on January 20, 1942 at a villa in the Berlin suburb of Wansee to coordinate the activities of German government agencies in developing Zyklon-B gas, crematoria, and dedicated death camps for the "final solution." The Wansee Conference was convened by Gestapo chief and SS Commander Reinhard Heydrich, the head of the Reich Security Main Office (RHSA), who indicated to the conference that "in the course of this Final Solution of the European Jewish problem approximately eleven million Jews are involved" - to be worked to death or killed

several cases, political leaders of prefectures and towns (communes) became the local "movers and shakers" of the genocide.[154]

1. Governing Statutes relevant to the ICTR selection of defense counsel:

The ICTR was established by the United Nations Security Council in Resolution 955 on 08 November 1994.[155] In Resolution 955, the Security Council concluded the situation in Rwanda "constituted a threat to international peace and security within the meaning of Chapter VII of the U.N. Charter."[156] As a result, it established an *ad-hoc* tribunal for prosecuting persons committing genocide, crimes against humanity, and violations of Article 3 common to the Geneva Convention and of Additional Protocol II.[157]

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outright. XIII Trials of War Criminals before the Nuremberg Military Tribunals 210-19 (Nuremberg Document No. NG-2586-G), *in* WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY (Simon & Shcuster, Inc., 1960) (1959).

154. *See,* e.g., Cecile E.M. Meijer, *The War Crimes Research Office Presents: News from the International Criminal Tribunals*, 9 Hum. Rts. Br. 30, 33-34 (2002). In addition to Akayesu, the ICTR charged Ignace Baglishema for war crimes. He was the bourgmestre of the Mabanza commune. *See* Case No. ICTR 95-1A-T.

155. *See, e.g.,* S.C. res. 955, U.N. SCOR. 3453rd mtg., U.N. Doc. S/RES/955 (1994). [hereinafter Resolution 955].

156. *Id.*

157. *See* Resolution 955, *supra* note 155, art. 1. Articles 1 through 4 read as follows:

> Article 1: Competence of the International Tribunal for Rwanda. The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the neighboring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.
>
> Article 2: Genocide
>
> 1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
>
> a) Killing members of the group;
> b) Causing bodily or mental harm to members of the group;
> c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> d) Imposing measures intended to prevent births within the group;
> e) Forcibly transferring children of the group to another group.
>
> 3. The following acts shall be punishable:
>
> a) Genocide;
> b) Conspiracy to commit genocide;
> c) Direct and public incitement to commit genocide;
> d) Attempt to commit genocide;
> e) Complicity in genocide.
>
> Article 3: Crimes against Humanity: The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds:

Rules governing the ICTR were promulgated on October 1, 1994 by the Security Council. These rules are found in the Annex to Resolution 955.[158] The ICTR rules govern jurisdiction, trial and appellate procedure, selection and qualification of judges, recognized defenses, prosecution, organization of the ICTR, rules of evidence and procedure, and other important matters outside the scope of this paper.

For the purpose of defense counsel selection, two Articles within the Rules play a direct role. First, Article 16 establishes a Registry.[159] This Registry provides and determines available defense counsel.[160] Second,

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a) Murder;
b) Extermination
c) Enslavement;
d) Deportation;
e) Imprisonment;
f) Torture;
g) Rape;
h) Persecutions on political, racial and religious grounds;
i) Other inhumane acts.

Article 4: Violations of Article 3 common to the Geneva Convention and of Additional Protocol II: The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
b) Collective punishments;
c) Taking of hostages;
d) Acts of terrorism;
e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault;
f) Pillage;
g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
h) Threats to commit any of the foregoing acts.

158. *Id.*

159. Article 16 reads as follows:

The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

1. The Registry shall consist of a Registrar and other such staff as may be required.
2. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve a four year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
3. The staff of the Registry shall be appointed by the Secretary General on the recommendation of the Registrar.

160. *See* Directive on the Assignment of Defence Counsel, Jan. 9 1996.

Article 20 lists the accused's rights. These rights include a presumption of innocence,[161] equality of all persons at the tribunal,[162] and the right against forced testimony.[163] In terms of defense counsel, the accused is entitled "to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing."[164] The accused is further guaranteed this right through the language, "to be tried in his or her presence, and defend himself or herself in person or through legal assistance of his or her own choosing . . . and to have legal assistance assigned to him or her in any such case if he or she does not have sufficient means to pay for it."[165]

Moreover, other articles such as Article 2 of the Registry confers the right to counsel on any person suspected of crimes within ICTR or national court jurisdiction. Article 4 provides counsel to indigent persons, while Articles 6 though 12 provide procedural steps for defining and declaring indigence, as well as appealing an adverse finding. Article 13 governs pre-requisites for assignment of counsel. Under Article 13 any person may be assigned as counsel if the Registrar concludes: the attorney has been admitted to practice law in a State, or is a professor of law at a university or similar institution and has at least ten years of relevant experience.[166] Further, the attorney must speak either French of English.[167] These qualifications, not found in the ICTY, provide a greater, albeit still minimum, guarantee not found in the ICTY.

Finally, ethics guidance to defense counsel is found in the ICTR Code of Professional Conduct for Defence Counsel (ICTR ethics code).[168] The ICTR ethics code was promulgated on 8 June 1998. The ICTR code is premised on the belief that counsel "must maintain high standards of professional conduct."[169] It also requires counsel to "act honestly, fairly, skillfully, diligently and courageously."[170] The ICTR rules further acknowledge the defense counsel's "overriding duty to defend their client's interests, to the extent that they can do so without acting dishonestly or by improperly prejudicing the administration of justice."[171]

The ICTR ethics code is directly relevant to the dual concepts of the right to counsel and the right to a fair trial. It enumerates the scope and termination

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161. *See* Resolution 955, *supra* note 155, art. 20(3).
162. *Id.* art. 20(1).
163. *Id.* art. 20(4)(g).
164. *Id.* art. 20(4)(b).
165. *Id.* art. 20(4)(d).
166. *See* Resolution 955, *supra* note 155, art. 20(4)(5).
167. *Id.*
168. ICTR Code of Professional Conduct For Defence Counsel (1998) [hereinafter ICTR ethics code].
169. ICTR Code Annex, (1) ICTR ethics code, annex. ¶ 1.
170. *Id.* ¶ (2).
171. *Id.* ¶ (3).

of representation,[172] the competence and independence of defense counsel,[173] expectations of diligence,[174] client communication,[175] and confi-dentiality.[176] Furthermore, the ICTR ethics code enumerates prohibited conflicts of interest,[177] candor toward the tribunal,[178] and duties to other witnesses.[179] Finally, the ICTR code cautions defense counsel against misconduct.[180] How the ICTR rules and codes governing defense counsel works in practice is best seen through one of the completed trials, where significant representation issues were raised on appeal.

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172. *Id.* at Article 4: Article 4 reads:

(1) Counsel must advise and represent their client until the client duly terminates Counsel's position, or Counsel is otherwise withdrawn with the consent of the Tribunal.

(2) When representing a client, Counsel must:

(a) Abide by a client's decisions concerning the objectives of representation if not inconsistent with Counsel's ethical duties; and,

(b) Consult with the client about the means by which those objectives are to be pursued.

(3) Counsel must not advise or assist a client to engage in conduct which Counsel knows is in breach of the Statute, the Rules, or this Code, and, where Counsel has been assigned to the client, the Directive.

Id.

173. *Id.* art. 5. Article 5 reads:

In providing representation to a client, Counsel must:

(a) Act with competence, dignity, skill, care, honesty, and loyalty;

(b) Exercise independent professional judgment and render open and honest advice.

(c) Never be influenced by improper or patently dishonest behavior on the part of a client.

(d) Preserve their own integrity and that of the legal profession as a whole;

(e) Never permit their independence, integrity and standards to be compromised by external pressures.

ICTR Ethics Code, annex, art. 6.

174. *Id.* art. 6: Article 6 reads:

Counsel must represent a client diligently in order to protect the client's best interests. Unless the representation is terminated, Counsel must carry through to conclusion all matters undertaken for a client within the scope of his legal profession. *Id.*

175. *Id.* art. 7.

176. *Id* art. 8. A client confidence may be revealed under limited circumstances. These circumstances include client consent, voluntary disclosure to a third party, to establish a defense against a specific charge by the client against the Counsel, and to prevent further criminal activity. *Id.*

177. *Id.*

178. *Id.* art. 9.

179. *Id.* art. 13.

180. *Id.* art. 17-18.

2. Case Example: Prosecutor v. Jean-Paul Akayesu[181]

A. Background Charges and Underlying Offenses:

During the Rwandan Genocide, Jean-Paul Akayesu served as the bourgmestre (mayor) of the Taba Commune.[182] This was an appointed, rather than elected, position.[183] In this capacity, he was responsible for maintaining law and public order.[184] The trial court found that at least 2000 Tutsi's were killed between 7 April and June 1994. The trial court characterized the killings in Taba, as "openly committed and so widespread that, as bourgmestre, [Akayesu] must have known about them."[185] The court further held, "although he had the authority and responsibility to do so, [Akayesu] never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence."[186]

Akayesu's role in the charged offenses was not merely passive acquiescence. Several beatings, murders, and sexual degradations occurred at and near his place of work.[187] Moreover, on at least one occasion he participated in ferreting out Tutsis and suspected Tutsi sympathizers in house to house searches.[188] He further ordered the beatings of Tutsis to obtain intelligence and ordered the local militia to kill several others.[189] On April 19, 1994, Akayesu ordered the Hutu residents of Taba to kill intellectual and influential people.[190] Based on these instructions, five secondary school teachers were hacked to death by locals wielding machetes and agricultural implements.[191] On several other occasions, he personally used threats of death and torture to obtain information on the whereabouts of Tutsi intellectuals.[192]

Akayesu was originally charged under several specifications of genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol 2.[193] With

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181. Case No. ICTR-96-4-T.
182. *Id.* ¶ 10.
183. *Id.*
184. *Id.* ¶ 12.
185. *Id.*
186. *Id.* The court further listed specific offenses which Akayesu took part in or encouraged. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. Case No. ICTR-96-4-T ¶ 20.
191. *Id.*
192. *Id.*
193. ICTR 96-4-T (Sentencing): Akayesu was specifically charged as follows:
Count 1: Genocide, punishable by Article 2(3)(a);
Count 2: Complicity in Genocide, punishable by Article 2(3)(e);
Count 3: Crimes Against Humanity (extermination), punishable by Article 3(b);
Count 4: Direct and Public Incitement to Commit Genocide, punishable by

in the ambit of each, he was specifically charged with murder, torture, rape, incitement to commit genocide, cruel treatment, and other inhumane acts. During trial, the prosecution was permitted to amend its indictment and add the crime of rape under the aegis of genocide and crimes against humanity.[194] The tribunal convicted him of genocide, direct and public incitement to commit genocide, and crimes against humanity.[195] At several occasions during the trial and subsequent appeals, Akayesu expressed dissatisfaction with his defense counsel.[196]

B. The Trial and Appellate Chamber's Decisions Regarding the Right to Competent Counsel

Akayesu raised several "fair trial" issues both during trial and on appeal. Important to the analysis in this paper was Akyesu's dual claim of the tribunal denying him his choice of counsel, as well as ineffective assistance of counsel.[197] Initially, Akayesu argued his inability to afford a counsel. The

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Article 2(3)(c);
Count 5: Crimes Against Humanity, punishable by Article 3(a);
Count 6: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a);
Count 7: Crimes Against Humanity, punishable by Article 3(a) of the Statute of the Tribunal;
Count 8: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a);
Count 9: Crimes Against Humanity (murder) punishable by Article 3(a) of the Statute of the Tribunal;
Count 10: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a);
Count 11: Crimes Against Humanity (torture) punishable by Article 3(f);
Count 12: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a);
Count 13: Crimes Against Humanity (rape), punishable by Article 3(g);
Count 14: Crimes Against Humanity (other inhumane acts), punishable by Article 3(i);
Count 15: Violations of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol 2 (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).

Id.

194. *Id.*

195. *Id.*

196. *Id.*

197. *See* ICTR-96-4-T, Decision Concerning a Replacement of an Assigned Defense Counsel and Postponement of the Trial, 31 October 1996 [hereinafter Replacement of Defense Council]. *See also* Annex B, Akayesu's Grounds of Appeal. In his second notice of appeal, Akayesu charged:

> The Court and the registrar deprived the Appellant of [his] right to choose his Defence Counsel. He could not have his first choice, Johan Scheers because . . . the Registrar's Office. On 31 October 1996, Michael Karnavas, Mr. Scheers' assistant who had contacted Scheers in Belgium, illegally coerced the Appellant to "choose" him as defence Counsel in replacement of Mr. Scheers. The Appel-

Tribunal found Akayesu indigent, and in accordance with the Directive on Assignment of Defense Counsel, the Registrar of the Tribunal assigned a Western European attorney, Mr. Johan Scheers, as his defense counsel.[198] However, Mr. Scheers absented himself from the tribunal due to financial disagreements with the tribunal and the Tribunal then found Scheers' unavailable.[199] Akayesu was then appointed Michael Karnavas as his new defense counsel.[200] This substitution occurred on October 31, 1996 and it resulted in a scheduled delay of trial until January 9, 1997.[201] However, on November 20, 1996 Akayesu requested a further change in defense counsel.[202] He specifically requested a Canadian attorney named Mr. Michael Marchand.[203] The Tribunal denied this request and on January 9, 1997 the Registrar appointed, over Akayesu's objection, Mr. Nicolas Tinagaye and Mr. Patrice Monthe to defend Akayesu.[204] Akayesu then attempted to represent himself.[205] However, the Tribunal did not permit this, and kept Tiangaye and Monthe in their capacity as his defense counsel.[206]

On appeal, Akayesu contended that in denying him his choice of counsel, the Tribunal denied him the right to a fair trial.[207] He further com-

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> lant dropped Michael Karnavas because of his deceitful maneuvers. Moreover, it has been discovered that Karnavas had been a candidate to work as Prosecutor and that he has already written and stated that he could never defend a "genocider."

Id. art. (2d)(a).

198. *See* Replacement of Defense Counsel, *supra* note 197.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. Annex B, Akayesu's Grounds of Appeal. In his second notice of appeal, Akayesu complained:

> Appellant's second choice was Mr. Marchand from Montreal, Canada, who was present at the opening of his trial on 9 January 1997. The prosecutor knew he was present as recognized . . . in the New York Times on 8 September 1998. The Court and the Registrar illegally refused requests by Mr. Marchand to address the Court and meet his client.

Id. art. (2d)(a).

It appears, however, that Akayesu's arguments were contrary to the Tribunal's understanding. The Tribunal asserted it denied Mr. Marchand because Akayesu was already represented. Therefore, if Akayesu desired Marchand, he would have to be represented by Marchand *pro bono*. Marchand found this requirement untenable. Moreover, at the time of Akayesu's request, Mr. Marchand's credentials could not be verified by the trial chamber. *See, e.g.*, Appellate Chamber Judgment, Akayesu's Ground of Appeal ¶ 51.

204. Annex B, Akayesu's Grounds of Appeal A(2d)(a); Appellate Chamber Judgment, Akayesu's Ground of Appeal, ¶ 45-48.

205. *See* Appellate Chamber Judgment, Akayesu's Grant of Appeal, ¶ 49.

206. *Id.* ¶ 50.

207. *See id.*

plained of ineffective assistance of counsel.[208] In response to these claims, the Appeals Chamber held that an indigent person's right to counsel of his own choosing raised an issue of balancing that right against ensuring "proper use of the Tribunal's resources."[209] Moreover, the Appellate Chamber held "in principle, the right to free legal assistance of counsel does not confer the right to counsel of ones own choosing."[210] To the Appeals Chamber, the right to choose a specific counsel applies only to an accused who can afford to pay for counsel.[211] That Chamber found it compelling that Akayesu was permitted to release counsel on two separate occasions.[212] In terms of not permitting Akayesu the right to defend himself, the Appeals Chamber noted that at several occasions "his attitude toward the [Trial] Chamber suggested otherwise."[213]

In determining whether Tiangaye and Monthe were competent counsel, the Appeals Chamber noted that the ICTR standard of review is "gross incompetence."[214] As a starting point, the Appeals Chamber presumes counsel is competent.[215] This presumption places a burden of proof on the defendant. In order to establish "gross incompetence," an accused would have to demonstrate, there is "reasonable doubt as to whether a miscarriage of justice resulted."[216] In establishing this standard, the Appeals Chamber considered

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208. *See, e.g.*, Annex B, Akayesu's Grounds of Appeal. The underlying basis for this complaint involved several factors. First, neither defense counsel contacted Mr. Scheers for his prior case-work and advice, despite the fact Akayesu gave both counsel permission. Second, the defense counsel called as an expert witness General Romeo Dallaire, the United Nations commander who testified that a genocide had taken place. Third, Akayesu alleged his defense counsel disclosed privileged statements. Fourth, Akayesu charged that his attorneys made no effort to secure expert assistance to rebut the Prosecution's main expert, Dr. Alison DeForges. Fifth, Akayesu averred his defense counsel failed to probe for bias against any of the Prosecution's witnesses. Finally, Akayesu argues that in not advising Akayesu of his right to testify, or encouraging testifying, his defense counsel were ineffective. *Id.*

209. Appellate Chamber Judgment, Akayesu's Ground of Appeal ¶ 60.

210. *Id.* ¶ 61.

211. *Id.* ¶ 61. The Appeals Chamber relied on a past decision, Prosecutor v. Kambanda, in holding:

> [I]n the light of textual and systematic interpretation of the provisions . . . from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel.

Id. (citing ICTR 97-23).

212. *Id.*

213. *Id.* ¶ 65-66.

214. *Id.* ¶ 76-77. The Appeals Chamber noted the right to competent counsel is guaranteed under Article 14 of the ICCPR, Article 6 of the European Convention on Human Rights, and Article 8 of the American Convention on Human Rights. *Id.*

215. *Id.* ¶ 78.

216. *Id.* ¶ 77.

adopting the ICTY case, *Prosecutor v. Dusko Tadic.*[217] The standard of determining effectiveness is then a fact based determination where the Appeals Chamber appears unwilling to "second-guess" the decisions of trial defense counsel.[218] On a final note, it should appear troubling that so little due process analysis was conducted regarding Akayesu's complaints. While his appeal may be novel from the ICTR perspective, such complaints are routinely addressed, as is shown below, in United States courts. The Akayesu decision additionally gains relevance because it created a minimum standard for later trials before international tribunals; military defense counsel practicing before military commissions will have formal professional responsibility rules and Sixth Amendment case-law which will likely result in a far-higher quality of representation.

c. International Tribunal for former Yugoslavia (ICTY)

1. Background Facts in Brief:

The history of the Balkan landmass in Southeast Europe has been characterized by successive invasions.[219] These invasions, coupled with the region's mountainous geography, created ethnic and religious enclaves. Christians, including both Orthodox and Catholic, as well as Muslims reside in the Balkans.[220] Within the region formerly called Yugoslavia, ethnicities such as Serb, Croat, Bosnian, Slovene, Montenegrin, Kosovar, and Albanian resided.[221] Added to this makeup was the fact that from the fourteenth century, until the early twentieth century, Ottoman Turkey ruled much of the landmass as part of its empire. [222] Additionally, the territory not held by the

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217. *Id.* (citing Prosecutor v. Tadic, Case No. IT-94-1-A, App. Ch., July 15 1999). In that case, the ICTY Appeals Chamber held:

> [W]hen evidence was not called because of the advice of defence counsel in charge at the time, it cannot be right for the Appeals Chamber to admit additional evidence in such a case, even if it were to disagree with the advice given by counsel. The unity of identity between client and counsel is indispensable to the workings of the International Criminal Tribunal. If counsel acted despite the wishes of Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced.

Id.

218. *Id.*

219. *See* Deborah L. Ungar, Comment, *The Tadic War Crimes Trial: The First Criminal Conviction Since Nuremburg Exposes the Need for a Permanent War Crimes Tribunal*, 20 WHITTIER L. REV. 677-83 (1999).

220. *See, e.g.*, Kellye L. Fabian, *Proof & Consequences: An Analysis of the Tadic & Akayesu Trials*, 49 DEPAUL L. REV. 981, 984 (2000).

221. *Id.* (citing BRANIMIR ANZULOVIC, HEAVENLY SERBIA: FROM MYTH TO GENOCIDE 1-2 (1999)).

222. Fabian, *supra* note 220, at 984.

Ottomans was frequently under the control of neighboring European states.[223] In 1919, Yugoslavia was formed from these ethnic enclaves into a single country.[224] Serbs constituted the most numerous, but not the majority, ethnicity.[225] Prior to 1945 civil strife between ethnic groups based on territorial claims, religious differences, and nation rights claims permeated the area. During the period of Nazi occupation (1940-1945), German troops relied on Croat leaders to suppress the Serb population.[226] However, after the war, pro-communist forces, under Joseph Broz Tito, gained control over Yugoslavia and prevented the country from splitting into separate ethnic-based states.[227] With Tito's death in 1980, the collapse of the Soviet Union, and a rise in Serb nationalist movements, Yugoslavia began to split apart. On 25 June 1991, Croatia and Slovenia declared independence.[228] The leader of Yugoslavia, Slobodan Milosevic, a Serb, ordered the army to invade Slovenia.[229] After European intervention, Milosevic then turned the Serbian army toward Croatia.[230] In January 1992, the United Nations brokered a cease-fire between Croatia and Serbia.[231] During this time ethnically diverse Bosnia-Herzegovina (Bosnia), another Yugoslav province, declared its independence.[232] Within that province Muslims and Croats found themselves fighting Serbs.[233] From 1992 until 1995, Serbian military and paramilitary groups engaged in a pattern of human rights abuses that came to be known under the umbrella label "ethnic cleansing."[234]

2. Statute:

The ICTY was established in 1993 to prosecute war crimes committed during the conflict which began with the dissolution of that country in 1991.[235] Specifically, on 23 May 1993, the Security Council adopted Resolution 827

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223. *Id.*

224. *Id.* at 985.

225. *Id.*

226. *See, e.g.*, MICHAEL P. SHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBURG 22 (1997) (citing *Serbia's Ghosts: Why the Serbs See Themselves as the Victims, Not the Aggressors*, NEWSWEEK, Apr. 19, 1993, at 30. According to Sharf, over 500,000 Serbs were killed by the Croat Ustasha (pro-Nazi) movement in concentration camps.) *Id.* at 23.

227. Fabian, *supra* note 220, at 987.

228. *Id.*

229. *Id.*

230. Ungar, *supra* note 219, at 683.

231. *Id.*

232. *Id.*

233. *Id.*

234. Fabian, *supra* note 220, at 987 (citing BOGDAN DENITCH, ETHNIC NATIONALISM: THE TRAGIC DEATH OF YUGOSLAVIA 7 (rev. ed. 1994)). Ethnic cleansing is described as "the forcible expulsion of nondominant ethnic groups in a given canton.". *Id.*

235. U.N. Doc. S/RES/25704, Annex (1993), *reprinted in* 32 ILM 1192 (1993).

creating the ICTY.[236] As in the later case of the ICTR, the *ad hoc* Yugoslavia Tribunal possessed jurisdiction over specific crimes including genocide, crimes against humanity, and offenses under common article 3 of the Geneva Convention.[237] Accompanying Resolution 827 was a directive on the appointment of defense counsel.[238] The ICTY directive also recognized an accused's right to counsel.[239] This right exists whether or not the accused can afford to remunerate counsel.[240]

There are basic qualifications for the assignment of defense counsel. Unlike in the later ICTR directive discussed above, however, there is no minimum experience requirement for defendants in the ICTY.[241] Additionally, within the directive, there is no specific guarantee of the right to competent

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236. U.N. Doc. S/RES/25704, Annex (1993), *reprinted in* 32 ILM 1192 (1993).

237. *Id.*

238. *Id.*

239. *Id.* art. 5. This article reads: Without prejudice to the right of an accused to conduct his own defence:

i. a suspect who is to be questioned by the Prosecutor during an investigation;
ii. an accused upon whom personal service of the indictment has been effected; and,
iii. any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90

bis shall have the right to counsel.

240. *Id.* art. 6. This article reads: Right to assigned counsel:

A. Suspects or accused who lack the means to remunerate counsel shall be entitled to assignment of counsel paid for by the Tribunal.

B. A suspect or accused lacks the means to remunerate counsel if he does not dispose of means, which would allow him to remunerate counsel at the rates provided for by the Directive. For the purposes of Section III of this Directive, the remuneration of counsel also includes counsel's expenses.

C. For suspects or accused who dispose of means to partially remunerate counsel, the Tribunal shall pay that portion, which the suspect or accused does not have sufficient means to pay for.

Id.

241. *Id.* art. 14. Article 14 states in part:

(A) Any person may be assigned as counsel if the registrar is satisfied that he is admitted to the list of counsel envisaged in Rule 45(B) of the Rules. A person is eligible for admission to the list if:

i. he is admitted to the practice of law in a State, or is a university professor of law.
ii. he has not been found guilty in relevant disciplinary proceedings against him where he is admitted to the practice of law or a university professor, and has not been found guilty in relevant criminal proceedings against him;
iii. he speaks one of the two working languages of the Tribunal, except if the interests of justice do not require this.
iv. he possesses reasonable experience in criminal and/or international law;
v. he agrees to be assigned as counsel by the Tribunal to represent any indigent suspect or accused;
vi. he is, or is about to become, a member of an association of counsel practicing at the Tribunal.

counsel. However, discussion of this right appeared during later case proceedings.

3. Case Example: Prosecutor v. Dusko Tadic

A. Tadic's Role in the Ethnic Cleansing Program

Dusko Tadic is an interesting case study for several academic reasons, be these psychological or historic.[242] In the legal context, his case represents the first real post World War II analysis of due process in an international tribunal. Tadic's actual role occurred in the Prijedor region of Bosnia. Serbian forces were responsible for expelling or killing over 52,000 non-Serbs during the Serb occupation of the region. It was during this time that three prison camps were established: Omarska, Keraterm, and Trnopolje. At each of these camps human rights were routinely ignored as prisoners were beaten, killed, and in the case of females, raped.[243] During this time Tadic "employed" himself at Omarska where he took part in beating and killing prisoners.[244] In 1992, he immigrated with his family to Germany where he was later recognized.[245]

Most of Tadic's appeal complaints dealt with the conduct of the trial. Namely, Tadic argued an "inequity of arms" between the resources of the prosecution and defense denied him a fair trial.[246] In reviewing Tadic's appeal, the Appeals Chamber relied on the plain language of regional agreements as well as the ICCPR. It concluded that the right to a fair trial is "central to the rule of law."[247] However, the Appeals chamber did not agree Tadic had been denied a fair trial.[248] This later point is interesting because it ignored that while Tadic's Appeal was being decided, contempt proceeding were initiated against his former lead trial defense counsel.

B. Contempt Allegations Against Tadic's Defense Counsel:

Milan Vujin represented Tadic throughout the proceedings in differing capacities. During the pretrial stages, he served Tadic as a "non-assigned co-

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242. *See, e.g.*, Ungar, *Tadic War Crimes Trial*, *supra* note 219, at 688. Tadic is of Bosnian ethnicity. He grew up in the chiefly Muslim town of Kozarac. Prior to the advent of Serb nationalism during the breakup of Yugoslavia, Tadic owned a pub that was financed by Muslim friends. His best friend, who he later killed at Omarska, was Muslim. When the Serbian paramilitary attacked Kozarac, Tadic identified prominent Muslims. *Id.*

243. Ungar, *supra* note 219, at 684.

244. *See* Tadic, Appeal, ¶ 30.

245. Fabian, *supra* note 219, at 999.

246. *See* Prosecuter v. Pusico Tadic, Appeal ¶ 30.

247. *Id.* ¶ 43.

248. *Id.*

counsel," without formal pay.[249] Vujin also represented Tadic as formal assigned counsel during the latter's appeal process.[250] The appeal process included further witness interviews in the RS. These interviews occurred, with Tadic present, in a Prijedor police station on March 14, 1998.[251] In October 1998, the prosecution filed a motion with the ICTY Appeals Chamber alleging that Vujin and Tadic intimidated witnesses.[252] However, on November 4, 1998, the Appeals Chamber dismissed the prosecution's complaint for lack of evidence.[253] After the dismissal, the prosecution received further witness complaints of intimidation. The prosecution renewed its complaint of intimidation to the Appeals Chamber who agreed to revisit its earlier determination.[254] On November 11, 1999, the Chamber held Vujin in contempt under Rule 77 of the ICTY Rules of Evidence and Procedure.[255]

The Appeals Chamber first concluded it possessed an "inherent power" to adjudicate contempt proceedings.[256] However, it also recognized that standards of contempt are found neither in codified or customary international law.[257] Instead, the Appeals Chamber relied on the IMT Charter of 1945 which gave that tribunal the power to deal with "any contumacy [by] imposing appropriate punishment, including exclusion of any Defendant or his Counsel

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249. Prosecutor v. Tadic, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan. 2000, Pg 1 [hereafter Contempt Proceeding].

250. *Id.*

251. *Id.* ¶ 7.

252. *Id.* ¶ 8.

253. *Id.*

254. *Id.* ¶ 11.

255. *Id.* Rule 77 reads as follows:

(A) Any person who

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question,

(ii) discloses information relating to those proceedings in knowing violation of an order or a

Chamber; or

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber,

Commits a contempt of the Tribunal.

(B) Any person who threatens, intimidates, causes injury, or offers a bribe to, or other wise interferes with, a witness who is giving, has given, or is about to give evidence in proceeding before a Chamber, or a potential witness, commits a contempt of the Tribunal.

(C) Any person who threatens, intimidates, causes injury, or offers a bribe to, or other wise seeks to coerce any other person with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber, commits a contempt of the Tribunal.

(D) Incitement to commit, and attempts to commit, any of the acts punishable under this Rule are punishable as contempts of the Tribunal with the same penalties . . . .

Id.

256. *Id.* ¶¶ 12-13.

257. *Id.* ¶ 14.

from some or all further proceedings, but without determination of the charges."[258] The Appeals Chamber also recognized that under common law, courts have the inherent authority to adjudicate and determine contempt. Based on a finding of contempt against Vujin, the Appeals Chamber fined him DfL 15,000 and directed the registrar to consider striking him from the list of acceptable defense counsel.[259]

On appeal, Tadic challenged the competency of Vujin as his defense counsel as part of his overall right to a fair trial.[260] In doing so, he asked the Appeals Chamber for leave to amend his appeal.[261] The Appeals Chamber, in turn, denied Tadic leave to do so, ignoring due process considerations, such as the right to conflict-free counsel.[262] However, on October 5, 2001, Tadic further motioned the Appeals Chamber for reconsideration of its decision regarding the competency of Vujin.[263] He specifically argued Vujin's behavior leading to contempt, were contrary to his interest in securing a fair trial.[264] One of Tadic's stronger arguments basically centered Vujin *de facto* freezing witness testimony to the detriment of his defense.[265]

On July 30, 2002, the Appeals Chamber ruled against Tadic.[266] The Appeals Chamber analyzed his arguments under the ICTY new evidence rule, instead of the right to conflict free counsel.[267] The Appeals Chamber noted in the contempt proceeding that Vujin had acted against the interests of his client.[268] However, it did not apply Vujin's conduct to the whole of the Tadic trial.[269] Instead, the Appeals Chamber held Tadic was aware of Vujin's activities during the period he was represented by Vujin.[270] Additionally, Tadic was

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258. *Id.* (citing IMT Charter).
259. Vujin, ¶ 174.
260. Tadic Appeal ¶ 21.
261. *Id.*
262. *Id.*
263. IT-94-1-R, Decision on Motion for Review 30 July 2002, ¶ 5.
264. DMR, ¶¶ 8-9.
265. *Id.* ¶¶ 6-7.
266. DMR, ¶ 43.
267. Id. ¶ 19. ICTY Rule 119 governs requests for review and states:

> Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgment has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgment. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

Id.
268. IT-94-1-R, ¶ 54.
269. *Id.*
270. *Id.*

represented at times by four other lawyers.[271] In this vein, the Appeals Chamber held, "it may be reasonably inferred that the four lawyers who assisted Tadic during trial could adequately protect his interests and conduct further investigations counter-balancing the initial conduct of Vujin."[272] Thus the Appeals Chamber sidestepped a basic due process rights analysis. The Appeals Chamber did not, in detail, investigate how deeply Vujin contaminated Tadic's defense. Nor did the Appeals Chamber address the fundamental right of conflict free counsel. The Chamber barely conducted a "harmless error" analysis prevalent in United States trials. In essence, the Appeals Chamber had the opportunity to further define due process under international law and failed to do so.

III: THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN UNITED STATES AND COMMON LAW: REEXAMINATION OF THE RIGHT TO A FAIR TRIAL

Any analysis of due process applications to military commissions must first begin with a recognition that defense counsel are guided, in part, within the evolving framework of domestic law. While rules for professional responsibility are discussed in another section, the framework of the effective assistance of counsel is rooted in the Sixth Amendment right to counsel as well as a part of the overall concept of a fair trial. To understand the legal expectations on defense counsel before the tribunal, it is essential to review these expectations through the federal and military domestic legal system. In large part, these two systems coexist as a mirror of each other.[273] This is particularly true where effective assistance of counsel is reviewed. Unlike in the international system, however, the federal and then later, military courts came to guarantee effective assistance of counsel through a lengthy historic process.

a. Brief Note on the History of the Right to Counsel in the United States and Common Law:

In the 17th Century, criminal trials did not constitute a case in the modern sense. Rather, as one legal historian notes, a criminal trial was akin to "a race between the King and the prisoner with the King having a long start

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271. *Id.* ¶ 55. The four other lawyers were Mr. Wladmiroff, Mr. Orie, Mr. Kay, and Mr. De Bertodano. *Id.*

272. *Id.*

273. Over time, the court-martial has come to substantively mirror the federal criminal court system. *See, e.g.*, United States v. Smith, 27 M.J. 242 (CMA 1988). There are, however, specific rights of military members not found in state and federal courts, such as the legal protection against unlawful command influence. *See, e.g.*, Weiss v. United States, 510 U.S. 163(1994); Curry v. Secretary of the Army, 595 F.2d 873, 879 (1979); United States v. Stoneyman, 57 M.J. 35, 41 (2002), *reaffirming* unlawful command influence as "the mortal enemy of military justice."

and the prisoner heavily weighted."[274] Prosecutors were not employees of the crown, but instead representatives of a private party, usually the victim.[275] Both the defendant and the jurors were able to cross-examine prosecution witnesses.[276] However, a defendant faced impediments to receiving a fair trial. For instance, the defendant was not informed of the specific charges.[277] Additionally, there existed no right to obtain witnesses or other evidence.[278] In misdemeanor and trespass cases, an accused was entitled to counsel provided he or she could pay for one.[279] For the most serious offenses, such as murder and treason, a defendant was prohibited from employing a lawyer to assist in his defense.[280] This common-law rule remained until the middle of the Eighteenth Century.[281]

During the early part of the Eighteenth Century, the position of prosecutor evolved from private entity to crown employee.[282] Thus it might be seen that the ability to retain defense counsel for all persons accused, regardless of the severity of crime, became a matter of fairness. Additionally, William Blackstone (1723-1780), one of the most prominent jurists in western legal history, criticized the prohibition against defense counsel for heinous offenses.[283] The evolution of the prosecutor from private representative to public office and Blackstone's view resulted in the English courts departing from the common-law prohibition against defense counsel. In such a system, the development of custom led to the development of new law.[284] However,

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274. JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 2 (quoting 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 397).

275. *Id.* at 3 (quoting John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM J. LEGAL HIST. 313, 316-17 (1973)).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* Tomkovicz notes that "[s]elf preservation was the core reason that the [crown] denied counsel to those accused of the most serious crimes.... Serious crimes and treason were prominent among the perils that jeopardized the very existence of the state." *Id.* He also notes that legal jurists argued the common law prohibition represented a view that felony trials were "sufficiently simple for an accused - at least an innocent accused - to cope with by himself." *Id.* (quoting THEODOE F. PLUKNETT, A CONCISE HISTORY OF THE COMMON LAW (London: Butterworth & Co., 4th ed. 1948)).

281. TOMKOVICZ, *supra* note 274, at 3. However, note the Treason Act of 1695 stated in part:

> nothing is more just and reasonable, than that persons prosecuted for high treason and misprision of treason, whereby their liberties, lives, honour, estates, blood, and posterity of the subjects, may be lost and destroyed, should be justly and equally tried, and . . . should not be debarred of all just and equal means for defence of their innocencies in such cases.

Id. at 6.

282. *See, e.g.*, TOMKOVICZ, *supra* note 274, at 5.

283. *Id.* at 6.

284. *Id.*

no uniform rules for the role of defense counsel or expectations of zealous representation emerged during this period. Yet, it may be the case that the attorney client relationship was already cemented into common law, and criminal trials adopted this practice.[285] The most significant feature of defense counsel representation occurred in the 1747 Act of Parliament which provided the right to defense counsel representation for high treason cases.[286]

When the thirteen colonies gained independence, there was, on both sides of the Atlantic, movement toward permitting defense counsel in all criminal cases.[287] Moreover, even prior to independence, there appeared a greater use of defense counsel in criminal trials.[288] Thus, by the time the Sixth Amendment was drafted into the Constitution, the former colonies fully departed from the older common law based prohibition. Yet, it was not until the twentieth century that the right to counsel was given to mean an absolute right extending to indigents at both state and federal trials.

b. Trials in United States Civilian and Military Courts: A Basic Overview of the Right to Counsel and Effective Assistance of Counsel:

The right of an accused to a fair trial is rooted in the Sixth Amendment.[289] Likewise domestic United States Law recognizes a constitutional right to counsel at all federal criminal trials.[290] Currently, it is debatable whether the Sixth Amendment directly applies to military commissions. However, the Sixth Amendment's shadow will influence the defense counsel's conduct of representation before the commissions.

In a landmark 1963 case, *Gideon v. Wainwright*,[291] the Court extended the right to defense counsel to all state felony trials.[292] In 1972, the Court

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285. *See, e.g.*, Norman K. Thompson & Joshua E. Kastenberg, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F. L. REV. 1, 3 (2000).

286. TOMKOVICZ, *supra* note 274, at 8 (citing 20 George II, c. 30 (1747)).

287. *See id.*

288. *Id.* at 12. Noting that the colonial legislatures of both Rhode Island and South Carolina acknowledged the right of defense counsel as early as 1731.

289. Johnson v. Zerbst, 304 U.S. 458 (1938). In *Johnson*, the Supreme Court held:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experience and learned counsel.

Id. at 462-63.

290. *Id.*

291. 372 U.S. 335 (1963).

292. *Id.* at 344. The Court specifically held, "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

extended the right to counsel in all criminal trials.[293] The right to counsel is recognized under military law as well.[294] In part, this right is recognized because military trials have evolved into a "mirror" of federal criminal trials.[295] In all trials, a knowing and intelligent waiver of this right may permit an accused to proceed under pro se representation. The standard of "knowing and intelligent" is primarily designed to protect an ill-informed or mentally deficient accused—albeit not to the point of inability to stand trial—from waiving what is now accepted as a fundamental right.[296] However, the right to counsel is generally a courtroom right and does not extend into the pretrial investigation stages.[297] The chief exception to this general rule involves interrogations and other occasionally, questioning.[298]

The right to counsel does not confer a right to "choice of counsel." The court in *Powell v. Alabama*[299] held an accused, has the right to "a fair opportunity to secure counsel of his own choice."[300] However, this right may recede if the scheduling of cases becomes unduly disrupted.[301] A common exception to the choice of counsel rule occurs as a result of conflict of interest issues.[302] Additionally, the right to choice of counsel is significantly less when the counsel is court appointed for reasons of the accused's indigence. In *Caplin & Dysdale v. United States*,[303] the Court held, "those who do not have the means to hire their own lawyers have no cognizable complaint so long as they

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293. *See* Argersinger v. Hamlin, 407 U.S. 25, 66 (1972).

294. *See, e.g.*, United States v. Wattenbarger, 21 M.J. 41, 45 (CMA 1985) (citing United States v. Adams, 45 CMR 175 (CMA 1972)); United States v. More, 16 CMR 56, 60 (CMA 1954); Thompson & Kastenberg, *supra* note 285, at 1-6.

295. *Id.*

296. *See, e.g.*, Zerbst, 304 U.S. at 464. *See also* Rastrom v. Robbins, 319 F. Supp 1090 (D. Me. 1970), *aff'd* 440 F.2d 1251; United States ex. rel. Pugach v. Mancusi, 310 F. Supp. 691 (S.D.N.Y. 1970), *aff'd* 441 F.2d 1073 (2d Cir. 1971).

297. *See, e.g.*, Schnecklolth v. Bustamonte, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973). In Schneckloth, the Court held police were not required to apprise a suspect of his Fourth Amendment rights prior to conducting a lawful search. *Id. See also* Gilbert v. California, 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951 (1967). In *Gilbert*, the Court held an accused does not have the right to have counsel present during the taking of handwriting exemplars. *Id. See also* Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966). In *Schmerber*, the Court held that a police extraction of an accused's blood sample does not require the presence of counsel. *Id.* Likewise, the federal appellate and district courts are replete with cases indicating s suspect does not enjoy the right to counsel during fingerprinting. *See, e.g.*, United States v. Terry, 702 F.2d. 299 (2d Cir. 1983). *See also* Woods v. United States, 397 F.2d 156 (9th Cir. 1968); Pearson v. United States, 389 F.2d 684 (5th Cir. 1968); and United States v. Whitfield, 378 F. Supp. 184 (E.D. Pa. 1974)

298. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 472 (1966); Rhode Island v. Innis, 446 U.S. 291, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980).

299. 287 U.S. 45 (1932).

300. *Id.* at 53.

301. *See, e.g.*, Downing v. Le Britton, 550 F.2d 689 (1st Cir. 1977).

302. *See, e.g.*, United States v. Moscony, 927 F.2d 742 (3d Cir. 1991).

303. 491 U.S. 617, 105 L. Ed. 2d 528, 109 S. Ct. 2646 (1989).

are adequately represented by attorneys appointed by the courts."[304] This ruling does not mean an accused is completely barred from requesting termination of one court-appointed counsel for another.[305] However, the accused must point to a specific reason for dissatisfaction such as ineffective representation.

The right to counsel includes the right to effective assistance of counsel.[306] In the case of international law, determining the ineffectiveness of counsel is problematic because such a determination usually occurs after trial at some level of appeal. However, the court in *Strickland v. Washington*[307] articulated the Sixth Amendment standard for effective assistance of counsel. To establish reversible error based on ineffective assistance of counsel, an accused must prove:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[308]

On the same day *Strickland* was decided, the Court also held in *United States v. Cronic*[309] that while factors relevant to determining effectiveness are important, effectiveness can only be determined on a case-by-case basis.[310] Common arguments for ineffective representation include a lack of preparation time, no opportunity for client-counsel interaction, deficient performance of counsel, and unqualified defense counsel.[311]

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304. 491 U.S. at 624.

305. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475 (1979). *See also* Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978); and United States v. Montoya, 13 M.J. 268 (CMA 1982).

306. *See, e.g.*, McMann v. Richardson, 379 U.S. 694 (1970).

307. 466 U.S. 668 (1984).

308. *Id.* at 688.

309. 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984). For a good analytic discussion of both *Strickland* and *Cronic*, see, e.g., Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex-Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 1, 276-78.

310. *Cronic*, 466 U.S. at 668. The government charged Cronic with a mail fraud. His court appointed attorney was a young real-estate lawyer who had no criminal law experience. Additionally, the attorney had only twenty-five days to prepare for trial. The prosecution, on the other hand, had over four years of investigation against Cronic. On appeal, the Tenth Circuit Court of Appeals reversed Cronic's conviction. However, the Supreme Court unanimously reversed the lower court. *Id.*

311. *See generally* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF AN ACCUSED THIRD ED. Sec. pp 8-67, 8-114.

c. Military defense counsel in contemplated military commissions

Just as the United States Constitution vests the authority to create military commissions in the President, the rules for defense representation are also promulgated by his office.[312] To date, the executive office has not created special regulations governing zealous representation, but the commission order envisions effective representation. It has, however, formed the office of a Chief Defense Counsel.[313] While it may be the case specialized ethics rules are drawn for this order, the current system appears, from a due process standpoint, better suited to protect the rights of accused Taliban and al-Qaeida defendants than either the ICTR or ICTY. Indeed, military case law alone has a rich trove of parameters. So to, do the ethic's rules appear to surpass the ICTY and ICTR.

Military attorneys are fully qualified attorneys who are members of a civilian bar.[314] They are also officers in the armed forces.[315] There are specific provisions, upheld in case law, to ensure the quality of defense counsel.[316] For instance, "attorneys" admitted to a bar other than the fifty states or Puerto Rico are unlikely to be permitted to practice before a military court.[317] One

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312. MacDonald, *supra* note 68, at 19.

313. *See, e.g.*, Department of Defense, Military Commission Instruction, No 4 (30 April 2003). On 30 April 2003, the Department of Defense created the Office of the Chief Defense Counsel. *Id.* While this office does not create any specialized ethics rules, it does enforce the requirement of zealous representation. *Id.* For instance, Section C. Detailed Defense Counsel reads:

> C. Detailed Defense Counsel
> 2) Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) and (b). In this regard, Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without personal opinion as to guilt; represent the interests of the Accused in any review process. . . .

Id.

314. Uniform Code of Military Justice (UCMJ) Article 27(b). This article reads:

> Trial or defense counsel detailed for a general court-martial-
> (1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court, or of the highest court of a State; . . . and
> (2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

Id.

315. *Id.*

316. UCMJ art. 38(b) governs the practice of civilian counsel before military courts. Upon request, an accused may seek civilian representation at his own expense. *Id.*

317. *See, e.g., In re* Application of Skewes, 52 M.J. 562 (AFCCA). In *Skewes*, the Air Force Court of Criminal Appeals upheld a trial judge's ruling to prohibit representation by an attorney whose qualifications included attending a non-accredited school and being admitted to the Hoopa Indian Tribal Bar. The Court specifically held:

> This Court, like all courts, has a legitimate interest in assuring the competency

of the salient features as to the extent of military representation rests in Colonel Winthrop's book, Military Rules and Precedents, where he appears to state that persons accused before a military commission will have the same counsel rights as those before a court-martial.[318] While some scholars will undoubtedly argue that Winthrop is of limited value, it should be noted his work continues to be quoted as guidance in court cases today.[319] Thus, it may be fairly argued that persons before a military commission are entitled to the same guaranteed legal representation as a service member facing court-martial.

There is a constitutional duty to provide effective assistance of counsel in both civilian and military case law.[320] A number of cases detail failures constituting ineffective assistance of counsel. For example, in *United States v. Zuis*,[321] the Army Court of Military Appeals found that a failure to communicate with an accused constituted ineffective assistance of counsel.[322] Likewise, failures to research the law[323] and raise timely suppression motions have been held to constitute ineffective assistance.[324] The failure to call witnesses has, for a long while, been a source of ineffective assistance of counsel.[325] Moreover, flawed trial tactics on the part of the defense, have resulted in cases being overturned.[326] Finally, providing inadequate advice to an accused has constituted ineffective assistance of counsel.[327] The require-

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> of those who practice before it. We may require "high standards of qualification" before admitting an applicant to the bar, provided the qualification has "a rational connection with the applicant's fitness or capacity to practice law."

Id. (citing Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957)).

318. WINTHROP, *supra* note 27, at 841.

319. *See, e.g.*, Weiss v. United States, 510 U.S. 163 (1994) (holding that the appointment of military judges does not violate due process). *See also* Solorio v. United States, 483 U.S. 435 (1987) (upholding court-martial jurisdiction based on service membership); Parker v. Levy, 417 U.S. 733 (1974) (upholding the constitutionality of conduct unbecoming an officer as a criminal offense).

320. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932). *See also* United States v. Scott, 24 M.J. 186, 187 (CMA 1987). In *Scott*, the Court of Military Appeals adopted the effectiveness test in *Strickland*. *Id.*

321. 49 CMR 150 (ACMR 1974).

322. *Id.*

323. *See, e.g.*, United States v. Rivas, 3 M.J. 282, 287 (CMA 1997)

324. *See, e.g.*, United States v. Travels, 47 M.J. 596 (A.A. Court. Crim. App. 1997). *See also* United States v. King, 30 M.J. 59 (1986).

325. *See, e.g.*, United States v. Saintaude, 56 M.J. 888 (Army Court. Crim. App. 2002). *See also* United States v. Sadler, 16 M.J. 982 (ACMR 1983).

326. Rivas, 3 M.J. at 287.

327. *See, e.g.*, United States v. Hancock, 49 CMR 830 (ACMR 1975); United States v. Kelly, 32 M.J. 813 (NMCMR 1991). The Kelly case presents an interesting issue because the court found defense counsel inadequate for permitting his client to enter into a guilty plea where the only evidence was an uncorroborated confession. *Id. But see* United States v. Lee, 52 M.J. 51, 53 (CAAF 1999) (holding the key to effective advocacy need be determined on a case by case basis). U.S. Armed Forces, 1999.

ment of zealous and effective representation exists in the appellate process as well.[328]

IV: FORMAL RULES OF PROFESSIONAL RESPONSIBILITY

As noted in the introduction, a study and analysis of the rules for professional responsibility are important to the concept of a fair trial. Just as United States and common law issues of counsel effectiveness help define representation of accused persons before military commissions, so too do the rules for professional responsibility. These rules establish a corpus of guidance, beyond that found for individual defense counsel before the ICTY and ICTR.

The right to effective assistance of counsel is problematic in that ineffective counsel issues are usually discovered after conviction and the imposition of sentence. Determinations of effectiveness are conducted on a case by case basis.[329] However, rules of professional responsibility provide guidance for ensuring compliance with fair trial standards. This is because the requirement of zealous representation is largely rooted in the Sixth Amendment right to counsel.

Military defense counsel have a unique role.[330] Unlike their civilian counterparts, they are subject not only to the ethical rules applicable to all attorneys, but also to military law and regulations.[331] They are ultimately supervised by the very same agency responsible for the prosecution of military crimes.[332] In addition, they represent clients around the world and are routinely deployed to remote locations such as Bosnia, Kosovo, and Afghanistan.[333] Thus, in addition to litigation experience before courts-martial and other forum, some military counsel are familiar with topics of international law and war crimes.

Each service branch promulgates ethics rules. These rules are largely based on the American Bar Association's (ABA) Model Rules.[334] The Army ethics rules are found in the Department of the Army, regulation 27-26 (Army rules).[335] The Air Force Rules for professional responsibility are found in a document titled, "The Judge Advocate General, Letter No. 92-26" (TJAG

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328. United States v. Grostefon, 12 M.J. 431 (CMA 1982).

329. United States v. Lee, 52 M.J. at 53 (1999).

330. Lt. Col. R. Peter Masterson, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW 1(2001).

331. *Id.*

332. *Id.*

333. *Id.*

334. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983). In August 1983, the ABA adopted the MODEL RULES to replace the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) as the official code of ethics for the ABA.

335. *See* DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (May 1992).

Policy Letter 26).[336] Finally, the Department of the Navy, covering both Naval and Marine Corps attorneys, has its ethics rules in a document titled, "Navy Judge Advocate General Instruction 5803.1A, Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General," (Navy Rules).[337] On rare occasion a service rule of professional responsibility conflicts with a state bar rule. Where this occurs, the service rule takes precedence.[338] These rules not only apply to active duty military defense counsel, but also reservists and civilian defense counsel practicing before a military court.[339]

Each service branch requires defense counsel to zealously represent a client before courts-martial or administrative proceedings.[340] Within the scope of representation, there is a further requirement of diligence.[341] Diligence includes fully investigating the case.[342] Investigation envisions client communication,[343] avoiding conflicts of interest,[344] and prompt action to preserve rights afforded to the accused.[345] This later category may mean informing law enforcement representatives that all further communication regarding investigative and other trial matters may be addressed only to the defense counsel.[346]

There are ethical parameters to investigating and preparing for a case. For instance, defense counsel may not knowingly use illegal means to obtain evidence or encourage others to do so. Likewise, defense counsel are not permitted to discourage perspective witnesses from communicating with trial counsel.[347] Because of the possibility that a witness may alter testimony from what the defense counsel recollects occurred in an interview, the ethics rules encourage the presence of a third party. [348] This is to prevent a defense counsel from becoming a witness during trial.[349] Where expert witnesses are employed, the service branch rules contemplate respect for the independence

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336. *See* OFFICE OF THE JUDGE ADVOCATE GENERAL LETTER NO. 92-26, AIR FORCE RULES OF PROFESSIONAL RESPONSIBILITY (Oct. 1992).

337. *See* NAVY JUDGE ADVOCATE GENERAL INSTRUCTION 5803.1A, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE SUPERVISION OF THE JUDGE ADVOCATE GENERAL (1992).

338. *See, e.g.,* TJAG Policy Letter 26, Rule 8.5. See also AFI 51-201, Administration of Military Justice, P1.3 (3 Oct. 1997) (making the Air Force Rules and Standards applicable to all Air Force attorneys).

339. *See* TJAG Policy Letter 26, *introduction.*

340. *See* TJAG Policy Letter 26, Standard 4-4.1; Navy Rule 1.3; and Army Rule 1.3.

341. *See* TJAG Policy Letter 26, Standard 4-4.1; Navy Rule 1.3; and Army Rule 1.3.

342. *See* TJAG Policy Letter 26, Standard 4-4.1; Navy Rule 1.3; and Army Rule 1.3.

343. *See* TJAG Policy Letter 26, Standard 4-3.1; Navy Rule 1.4; and Army Rule 1.4.

344. *See* TJAG Policy Letter 26, Standard 4-3.5, United States v. Breese, 11 M.J. 17 (CMA 1981); Navy Rule 1.7; and, Army Rule1.6.

345. *See* TJAG Policy Letter, Standard 4-3.6; Navy Rule 1.2; and Army Rule 1.2.

346. *See* TJAG Policy Letter, Standard 4-3.6; Navy Rule 3.4; and Army Rule 1.6.

347. *See* TJAG Policy Letter 26, Standard 4-4.3; Navy Rule 3.7; and Army Rule 3.4.

348. *See* TJAG Policy Letter 26, Standard 4-4.4; Navy Rule 3.7; and Army Rule 3.4.

349. *See* TJAG Policy Letter 26, Standard 4-4.5; Navy Rule 3.4; and Army Rule 4.4.

of the expert.[350] The ethics rules mandate compliance with discovery requirements.[351] Moreover, defense counsel are required to present all matters to opposing counsel and the tribunal with truth and candor.[352]

In terms of representing the client, the various service ethics rules recognize that a defense counsel's foremost loyalty is to his or her client. This includes forthrightly advising the client of all matters of relevant law and possible courses for the trial.[353] While the accused has the right to decide whether to testify, which pleas to enter, and which forum to proceed, the defense counsel, after consultation with the accused, determines which witnesses to call, how to conduct cross-examination, and what pretrial motions should be argued.[354] It is considered unprofessional conduct to intentionally overstate or understate risks or case prospects to a client in an effort to exert undue influence on the client's plea decisions.[355] Moreover, defense counsel must advise the client to avoid making extrajudicial statements or communicate with prospective witnesses.[356] Additionally, defense counsel should advise the client to avoid contact with prospective court-members.[357] It is often the case that clients will make inconsistent statements, or their efforts to self-investigate the case will be viewed as motivated by a desire to obstruct justice. For this reason, the defense counsel must diligently listen to the client's input and investigate all leads.[358]

Often defense counsel discuss with prosecutors or law enforcement personnel the status of discovery, witnesses, or scheduling matters. Because the perception of an accused is important, it is essential that defense counsel keep their client apprised of these discussions.[359]

At trial, defense counsel are subject to the same basic rules of ethics that bind prosecutors. For instance, an opening statement should only refer to known evidence.[360] Counsel is not permitted to make misrepresentations of fact to the tribunal.[361] Also, counsel is forbidden from knowingly presenting

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350. *See* TJAG Policy Letter 26, Standard 4-4.4; Navy Rule 3.3; and Army Rule 3.3.

351. *See* TJAG Policy Letter 26, Standard 4-4.5; Navy Rule 3.4; and Army Rule 3.4.

352. *See* TJAG Policy Letter 26, Standard 4-4.5; Navy Rule 3.3; and Army Rule 3.4.

353. *See* TJAG Policy Letter 26, Standard 4-5.1(a); Navy Rule 1.4; and Army Rule 1.4.

354. *See* TJAG Policy Letter 26, Standard 4-5.2; Navy Rule 1.4; and Army Rule 1.4.

355. *See* TJAG Policy Letter, Standard 4-5.1(b); Navy Rule 1.2; and Army Rule 1.2.

356. *See* TJAG Policy Letter, Standard 4-5.1(c); Navy Rule 3.6; and Army Rule 3.6.

357. *See* TJAG Policy Letter, Standard 4-5.1(c); Navy Rule 3.5; and Army Rule 3.5.

358. See, *e.g.*, United States v. Polk, 32 M.J. 150, 152 (CMA 1991). In *Polk*, the accused alleged his defense counsel failed to interview prospective exculpatory witnesses. The Court of Military Appeals remanded the case for further fact-finding on this issue. *But see* United States v. Grigoruk, 56 M.J. 304, 307 (CAAF 2002). In *Grigoruk*, the Court of Appeals for the Armed Forces held it was not deficient performance to avoid having an expert testify. *Id.*

359. See TJAG Policy Letter, Standard 4-6.2(a); Navy Rule 3.3; and Army Rule 3.3.

360. See TJAG Policy Letter, standard 4-7.4; Navy Rule 3.4; and Army Rule 3.4.

361. See TJAG Policy Letter, standard 4-7.4 (opening statement); also, TJAG Policy Letter, Standard 4-7.8. (closing argument); also Navy Rule 3.4; and, Army Rule 3.4.

false evidence or making frivolous objections.[362] Witnesses are to be accorded a measure of respect without seeking to humiliate or intimidate the witness.[363] Moreover, it is often unprofessional conduct to call a witness when counsel knows the witness will assert a testimonial privilege.[364]

One of the perceived difficulties in client representation occurs when a large quantum of facts clearly indicates an accused's guilt and the accused states his or her intention to testify.[365] This situation does not only happen where an accused notifies defense counsel of his or her intent to lie on the stand.[366] There are times where a defense counsel is aware of potential client perjury without the client's outright disclosure.[367] In such situations, the defense counsel is required to dissuade the client from testifying.[368] Where dissuasion fails, the counsel should not take part in questioning the client on direct examination.[369] However, a mere suspicion of potential perjury does not preclude participation in direct examination.[370] Moreover, a defense counsel may seek to withdraw from the representation.[371] Where withdrawal is not feasible, defense counsel are advised to place in the record of trial evidence of their effort to dissuade their client from testifying.[372] It should be noted that there are no set means by which to place a record of dissuasion in the record of trial. The best practice is to place as an *in camera* appellate exhibit, evidence of attempts to dissuade the client from testifying. This is because where a defense counsel learns of the client committing perjury, there is a duty to *ex parte* disclose to the military judge.[373]

In cases where the accused and the defense counsel cannot cooperate in the construction and presentation of the accused's defense, there are remedies for withdrawal. For instance, in *United States v. Brownfield*,[374] the Court of Appeals for the Armed Forces recognized, "many times, defense counsel are called upon to represent clients with whom they have a personality conflict.

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362. *See, e.g.*, United States v. Pattin, 50 M.J. 637 (ACCA 1999).

363. *See* TJAG Policy Letter, Standard 4-6.6; and Army Rule 3.4.

364. *See* TJAG Policy Standard 4-7.6(c); and Army Rule 3.4.

365. *See, e.g.*, Lt Col. R. Peter Masterson, *supra* note 330, at 1, 6; Lt. Col. Thomas G. Bowe, *Limiting the Defense Counsel's Obligation to Disclose Client Perjury After Revealed Adjournment, When Should the Conclusion of Proceedings Occur*, 1993 ARMY LAW 27, 29.

366. *See, e.g., USALSA Reports: The Advocate for Military Defense Counsel*: DAD Notes, 1987 ARMY LAW 34, 35. *See also United States v. Roberts*, 20 M.J. 689, 691 (ACMR 1989) [hereinafter *USALSA Reports*]. For additional reading generally, see, e.g., Terrence F. McCarthy & Kathy Morris Mehjia, *The Perjurious Client Question, Putting Criminal Defense Lawyers Between a Rock and a Hard Place*, 75 J. L. & CRIMINOLOGY 1197 (1984).

367. *See, e.g., USALSA Reports, supra* note366, at 35.

368. *See* TJAG Policy Standard 4-7.7(a); and Army Rule 3.3.

369. *See USALSA Reports, supra* note 366, at 35.

370. *See, e.g.*, Nix v. Whiteside, 475 U.S. 157, 191, 106 S. Ct. 988, 1006 (1986) (the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked).

371. *See* TJAG Policy Letter, Standard 4-7.7(b); Navy Rule 3.3; and Army Rule 3.3.

372. *See* TJAG Policy Letter, Standard 4-7.7(c); Navy Rule 3.3; and Army Rule 3.3.

373. *See* TJAG Policy Letter, Standard 4-7-7(d); Navy Rule 3.3; and Army Rule 3.3.

374. 52 M.J. 40 (CAAF 1999).

In these cases, there are two choices: (1) try to resolve the conflict and press forward with full and zealous representation, or (2) seek relief from the obligation to represent the client."[375]

Defense counsel have an ongoing duty to represent their client's interests after conviction. This includes all matters in sentencing, as well as in advising the client as to appeal rights.[376] Counsel representing an accused on appeal have an obligation to investigate and present all meritorious arguments.[377] This includes researching and arguing ineffective counsel issues related to the defense counsel's performance at trial.[378]

The professional responsibility rules governing defense counsel conduct are comprehensive. These rules provide two guarantees. The first guarantee is to the client, in that persons charged with criminal offenses will receive a defense counsel's zealous and diligent best efforts. The second guarantee is to the integrity and fairness of the proceedings. The rules ensure that accused persons will be represented diligently and ethically within the parameters of professional conduct.

CONCLUSION

While no military commission has yet commenced, it is likely one will begin in the near future. It is proper to understand the uniqueness of defense representation before a commission. Part of this understanding can be accomplished by a review of developing customary international law and treaty agreements. Likewise, a comparative study and analysis of the closest international law counterparts, the *ad hoc* tribunals, are important to define fair trial guarantees. These courts of universal jurisdiction present a basis by which to judge fair trial standards of military commissions. Should *Akayesu* or *Tadic* have been reviewed before a service appellate court, it is likely both cases would have been reversed on the basis of ineffective assistance of counsel. In the case of *Akayesu*, it is apparent counsel were occasionally absent from the proceedings and were likely not permitted adequate time to prepare for so large a case. Additionally, Akayesu's counsel employed the questionable tactic of calling an adverse witness as an expert. *Tadic* is actually an easier case to argue for reversal. Clearly his counsel failed to act in his best interests. Additionally, at some point, his counsel, Vujin, became a conflicted counsel in the most literal sense. It is a basic premise in both federal and military law that an accused is entitled to conflict-free counsel.[379]

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375. *Id.* at 44.

376. *See* TJAG Policy Letter, Standard 4-8.1 (sentencing); TJAG Policy Letter, Standard 4-8.2 (advice on appeal).

377. *See* TJAG Policy Letter, Standard 4-8.4; Navy Rule 1.2; and Army Rule 1.2.

378. *See* TJAG Policy Letter, Standard 4-8.6; Navy Rule 1.2; and Army Rule 1.2.

379. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 340, 345 (1980). *See also* United States v. Murphy, 50 M.J. 4, 10 (C.A.A.F. 1998).

While it is true the jurisdictional basis of the ICTR and ICTY are different from military commission, these forum are the closest existing counterpart to the commission process for comparison.

In the absence of special rules for defense counsel before tribunals, the prudent course is to incorporate tenets of effective representation from United States and military law. These tenets are rooted in Sixth Amendment case law, and the rules for professional responsibility each service branch promulgated, based on the ABA model rules. Indeed, no new rules are required. Within federal and military case law, and the rules for professional responsibility, there is a far more developed and tested set of parameters than found in the international tribunals. While this article touched on only a few cases, a myriad of guidance in case law exists not only at the federal, but also the state courts. Therefore, the suggested framework for representation is to, following the guidance of Colonel Winthrop, adopt no new special measures. Military representation and its attendant standards of effective assistance of counsel surpass any current international tribunal counterpart for courts-martial. Indeed, the former category, in its infancy, appears to constitute a lessoning of standards for zealous representation. However, the ICTR and ICTY should, at a minimum, set a standard by which to judge military defense counsel. The mechanisms for assuring military defense counsel provide not only competent, but also diligent and zealous representation for accused persons before military commissions which comports with international fair trial standards. There should be no reason to alter these rules. It only remains to be seen whether military defense counsel, and indeed all parties before the commissions, individually uphold and enforce these standards.

THE REFORM OF CORPORATE GOVERNANCE IN THE UNITED STATES AND THE NEW CHALLENGE OF THE EUROPEAN UNION: THE ITALIAN CASE

Valentina Barbanti*

INTRODUCTION

The scandals of the recent past involving Enron Corp. and other major companies have raised serious concerns about the effectiveness of the governance rules applicable to public companies in the United States. Not surprisingly, corporate governance is one of the main items of the reform outlined by the Sarbanes-Oxley Act of 2002 (Act),[1] which is the most significant securities legislation affecting public companies to be enacted in the United States since the adoption of the Securities Act of 1933 and the Securities Exchange Act of 1934.

The Act also manifests the new focus of the Securities and Exchange Commission (SEC) on foreign private issuers.[2] Under the Act, foreign private issuers must now comply with U.S. corporate governance rules; previously, regulation in this area was left to the discretion of home country regulators. The corporate governance listing standards proposed and adopted by the New York Stock Exchange (NYSE) and the Nasdaq Stock Exchange (Nasdaq) which were approved by the SEC on November 4, 2003 (the New Corporate Governance Standards), will also have a significant impact on non-U.S. companies that are listed on the NYSE or trade through Nasdaq.[3]

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1. *See* 15 U.S.C. §§ 7201-7266 (2002).

2. *See infra* note 8 , for the definition of "foreign private issuer."

3. *See* U.S. Securities and Exchange Commission Release No. 34-48745, *available at* http://www.sec.gov/rules/sro/34-48745.htm (last visited Dec. 2, 2003) [hereinafter Release No. 34-48745]. On August 16, 2002, the NYSE filed with the SEC amendments to its Listed Company Manual to implement significant changes to its listing standards aimed at helping to restore investor confidence by empowering and ensuring the independence of directors and strengthening corporate governance practices. *Id.* On March 12, 2003, the NYSE filed with the SEC a revised proposal on director independence for U.S. companies. *Id.* On April 4, 2003, the NYSE's Board of Directors approved amendments to the NYSE Corporate Governance Listing Standards, and the SEC published those standards for public comment. In response to the comments received, as well as to comments made by the SEC, the NYSE further revised the proposals in an amendment filed with the SEC on October 8, 2003 and October 17, 2003. The NYSE Final Corporate Governance Rules, which were approved by the SEC on November 4, 2003, will be codified in Section 303A of the NYSE Listed Company Manual.

This new focus in the United States on corporate governance has fed concerns about similar issues in the European Union (E.U.), including, in particular, the extraterritorial application of U.S. law and potential inconsistencies between U.S. and non-U.S. requirements affecting foreign private issuers. Those concerns have led many E.U. Member States—including Italy —to reexamine their existing oversight and governance systems and to consider regulatory reforms patterned after the U.S. model.

The purpose of this Article is to summarize the likely impact that the reform of corporate governance rules in the United States will have on non-U.S. companies, in particular with respect to Italian companies.[4]

Section I highlights the key features of the U.S. reform concerning corporate governance and accountability, including the relevant provisions of the Act (as implemented by the SEC) and the New Corporate Governance Standards. This Section also addresses the recommendations that were issued on January 9, 2003 by the Commission on Public Trust and Private Enterprise (the Conference Board Commission), a U.S. commission investigating issues of corporate governance.[5] The analysis in Section I focuses on the impact that the new corporate governance rules in the United States may have on E.U. reporting companies. To this purpose, Section I includes a brief overview of the corporate governance system in the E.U. Member States, as it is at present and as it may likely change as a result of the reform of corporate governance in the E.U., which the European Commission is currently considering.

Section II focuses on the Italian legal system of corporate governance, as compared to the U.S. model. The analysis in Section II takes into account

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See Corporate Governance Listing Standards (Section 303A Final Rules), *at* http://www.nyse.com/pdfs/finalcorpgovrules.pdf (last visited Dec. 2, 2003) [hereinafter NYSE Corporate Governance Listing Standards]. In early October 2002, the Nasdaq submitted its own set of corporate governance rules proposals and later updated those changes. *See* Nasdaq, Summary of Nasdaq Corporate Governance Proposals, *at* http://www.nasdaq.com/about/Web_Corp_Gov_Summary%20Feb-revised.pdf (last updated Feb. 26, 2003). Based on the comments received during the rule-making process, Nasdaq has made a number of changes to the above-mentioned proposals, which were approved by the SEC on November 4, 2003. The text of the approval order, as well as Nasdaq's various rule filings, can be found on the Nasdaq's Recent Rule Changes page, *at* http://www.nasdaq.com/about/RecentRuleChanges.stm (last visited Dec. 2, 2003) [hereinafter Nasdaq's Recent Rule Changes].

4. A thorough outline of the provisions of the Act (and of any relevant rule and recommendation) is beyond the scope of this Comment.

5. *See* The Conference Board Commission on Public Trust and Private Enterprise, *available at* http://www.fei.org/download/TCB_PublicTrust2-3.pdf (last visited Dec. 3, 2003). The Conference Board Commission was set up by the Conference Board, a business lobby group formed to address the circumstances that led to the recent corporate scandals in the United States. *Id.* The president of the Conference Board also announced that the Board has formed a Director's Institute to educate corporate directors throughout the United States. *Id.*

the current legal and regulatory framework and the recent suggestions to reform the Italian system to better ensure compliance with the Act.[6]

I. THE REFORM OF CORPORATE GOVERNANCE IN THE UNITED STATES AND THE E.U. MEMBER STATES

A. The Extraterritorial Application of the U.S. Reform

The Act applies to any company or other legal entity that has securities listed on a U.S. exchange or is registered with the SEC, is otherwise required to "file" reports with the SEC, or has filed a registration statement with the SEC and not withdrawn it.[7] In particular, issuers organized outside the United States, known as "foreign private issuers,"[8] are subject to the Act, unless they "furnish" rather than "file" material with the SEC pursuant to the so-called Rule 12g3-2(b) exemption from the registration and ongoing reporting requirements of the U.S. securities laws.[9]

Some provisions of the Act have required implementing regulations by the SEC to become enforceable. Although the SEC historically has afforded a great deal of deference to the corporate governance standards of home country jurisdictions, the implementing rules that have been issued to date have provided only a few exceptions for non-U.S. reporting companies. In one of its final rules, the SEC has made it clear that the denial of general exemptions for foreign private issuers complies with the plain language of these rules, which apply broadly to all "issuers." According to the SEC,

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6. The analysis in Section II also takes into account the expected reform of corporate rules in the Italian jurisdiction. See Legislative Decree No. 6 of January 17, 2003, G.U. No. 17, Suppl. Ord. (Jan. 22, 2003), which will enter into force in 2004 and will materially change the Italian company law.

7. See 15 U.S.C. § 7201(7) (2002), for definition of "Issuer."

8. 17 C.F.R. § 240.3b-4 (2002). "Foreign private issuer" is defined as any issuer organized outside the United States other than the issuer with (1) more than 50% of its outstanding voting securities owned of record directly or indirectly by U.S. residents and (2) any of the following: (A) majority of its executive officers or directors being U.S. residents or citizens and (B) more than 50% of its assets located in the United States or (C) its business administered principally in the United States.

9. 17 C.F.R. § 240.12g3-2(b). As a general rule, a foreign private issuer is required under Section 12(g) of the Exchange Act to register any class of its securities if the issuer has $10 million or more in assets on the last day of its most recent fiscal year and the security is held of record by 500 or more persons worldwide, including 300 or more persons resident in the U.S. *Id.* Rule 12g3-2(b) provides an exemption from this registration requirement if the foreign private issuer has not obtained a U.S. exchange listing or Nasdaq quotation and applies for the exemption within 120 days of the end of the year in which the thresholds are exceeded. *Id.* To this purpose, a foreign private issuer must furnish to the SEC, in its initial submission and on a continuing basis thereafter, any material information that it: (i) makes public in its home jurisdiction pursuant to the law of that country; (ii) files with any stock exchange on which its securities are listed; or (iii) distributes to its securities holder. *Id.*

imposing the Act's requirements for foreign private issuers also fulfills "the overarching purpose of the Act, which is to restore investor confidence in U.S. financial markets, regardless of the origin of the market participants."[10] This comment, which should explain the position of the SEC with respect to the inclusion of foreign private issuers within the scope of Sections 406 and 407 of the Act, more generally demonstrates the new attitude of the U.S. regulator to broadly apply a number of the corporate governance requirements provided for by the Act.

The new approach could result in U.S. oversight of European companies, which already are subject to their own nation's regulators. Furthermore, some provisions that do not appear to apply to non-U.S. companies may affect local market practice and U.S. courts may be less sympathetic to non-U.S. companies that do not meet the same standards as U.S. companies.[11]

In addition to actions by the U.S. federal government, the New Corporate Governance Standards will have both immediate and long-ranging effects on the organization and operation of non-U.S. listed companies. The NYSE has clarified that, as applied to foreign private issuers, its corporate governance listing requirements continue generally to defer to home-country practices. With respect to Section 303A (11) of the NYSE Corporate Governance Rules, the NYSE noted that, "both SEC rules and NYSE policies have long recognized that foreign private issuers differ from domestic companies in the regulatory and disclosure regimes and customs they follow, and that it is appropriate to accommodate those differences."[12] Nonetheless, foreign private issuers that are listed on the NYSE would be required to disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies.[13] Similarly, foreign private issuers will need to disclose any exemptions to Nasdaq's corporate governance requirements, as well as any alternative measures taken in lieu of the waived requirements.[14]

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10. *See* Final Rules Release, U.S. Securities and Exchange Commission, Final rule: Disclosure required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 17 C.F.R. 228, 229 and 249, Release Nos. 33-8177; 34-47235 (Jan. 24, 2003), *available at* http//www.sec.gov/rules/final/33-8177.htm (last visited Oct. 4, 2003).

11. In particular, it is possible that courts in the United States will be presented with actions challenging the applicability of the Act to foreign issuers. Whether the Act will withstand any such judicial scrutiny in relation to foreign issuers is uncertain.

12. *See* NYSE, Corporate Governance Rule Proposals Reflecting Recommendations from NYSE Corporate Accountability and Listing Standards Committee, at 16, *available at* http://www.nyse.com/pdfs/corp_gov_pro_b.pdf (last visited Dec. 2, 2003).

13. *See* NYSE Corporate Governance Listing Standards, *supra* note 3, at 16. Foreign private issuers are allowed to follow home country practice in lieu of the provisions of the new rules, except that such issuers are required to comply with the requirements relating to audit committees and notification of non-compliance mandated by Rule 10A-3. *Id.* at 2.

14. *See* Release No. 34-48745, *supra* note 3; Nasdaq's Recent Rule Changes, *supra* note 3.

B. The U.S. model and the European Union

The concerns raised by the extraterritorial application of the Act, namely the risks of duplication and excessive red tape for E.U. companies, have prompted the European Commission to carefully reconsider the existing corporate governance framework in the E.U.

In September 2001, the European Commission established a Group of High Level Company Law Experts with the purpose of initiating a discussion on the need for a modernization of company law in E.U. Member States.[15] In the wake of the Enron scandal, the European Commission extended the mandate of these experts to review a number of issues related to best practices in corporate governance, such as the role of non-executive and supervisory directors, the remuneration of management, and the responsibility of management for financial statements.[16] On November 4, 2002, the experts presented a wide array of recommendations in the "Final Report of the Group on a Modern Regulatory Framework for Company Law in Europe."[17] These recommendations take into account the provisions of the Act concerning corporate governance, while accommodating the particular situations of individual E.U. Member States.

On May 21, 2003, in light of the suggestions made by the experts, the European Commission presented its action plan on "Modernizing Company Law and Enhancing Corporate Governance in the European Union."[18] This action plan outlines the approach that the European Commission intends to follow, specifically in the area of company law and corporate governance in the short term (2003-2005), medium term (2006-2008), and long-term (2009 onwards).

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15. *See* The European Commission, Financial Reporting and Company Law, *A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts, at* http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/1_en.htm (last visited Oct. 31, 2003).

16. *See id.* In particular, the discussion was focused on the concerns regarding better information for shareholders and creditors (including a better disclosure of corporate governance structures and practices), the strengthening of the duties of the board and of shareholders' rights, and minority protection. *Id.*

17. *See* The European Commission, *Financial Reporting and Company Law, A Modern Regulatory Framework for Company Law in Europe: Final Report of the High Level Group of Company Law Experts, at* http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm (last updated Nov. 4, 2002) [hereinafter *Financial Reporting and Company Law, Final Report*].

18. *See* Communication from the Commission to the Council and the European Parliament-Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to move forward, *at* http://europa.eu.int/eur-lex/pri/en/dpi/cnc/doc/2003/com2003_0284en01.doc (last visited Dec. 3, 2003) [hereinafter Action Plan]. On September 22, 2003, the Council of the European Union welcomed the presentation of such Action Plan, which has been open to public consultation for three months. Simultaneously with the Action Plan, the European Commission has published ten priorities for improving and harmonising the quality of statutory audit throughout the E.U. *Id.*

The European Commission's recommendation is that the E.U. Member States should adopt a common approach covering a few essential rules and should ensure adequate coordination of national corporate governance codes.[19]

As a matter of fact, in most of the E.U. Member States the main corporate governance rules are provided for by corporate governance codes.[20] Approximately forty codes have been issued to date, with every Member State except Austria and Luxembourg having at least one code.[21] All of these codes call for voluntary adoption of their substantive provisions. Under some codes, a coercive pressure is exerted through "comply or explain" disclosure requirements,[22] as the tendency for some companies may be to "comply" rather than to explain. Even where a "comply or explain" disclosure mandate exists, a company is generally free to choose not to follow the code's prescriptions. Though the corporate governance codes are voluntary in nature, they have a significant influence on corporate governance practices. By and large, the code recommendations are remarkable in their similarity and serve as a converging force. The major differences in corporate governance practices among E.U. Member States result from differences in company law and securities regulation rather than from differences in code recommendations.

As a general rule, in E.U. Member States, corporations are subject to the control of a shareholder body (typically organized through a general meeting), a supervisory body, and a management body. The differences in corporate governance practices across Member States relate to the structure of the supervisory body, though similarities in actual board practices are significant.

In particular, either the unitary or the two-tier board structure can be used.[23] Although there is an extensive and ongoing academic discussion on the advantages and disadvantages of these systems, there is no consensus as to which one of the two is a more effective monitoring body. In unitary board

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19. In particular, largely in line with the suggestions contained in the Financial Reporting and Company Law, Final Report, the European Commission's (legislative and non-legislative) proposals contained in the Action Plan are aimed at achieving the following goals: (i) enhancing corporate governance disclosure; (ii) strengthening shareholders' rights; (iii) modernising the board of directors; and (iv) coordinating corporate governance efforts of Member States. *See id.*

20. A "corporate governance code" generally refers to a non-binding set of principles, standards, or best practices issued by a collective body and relating to the internal governance of the corporation. *See e.g.*, Russia's Corporate Governance Code, *available at* http://12.107.100.170/Corp%20Governance/Corp.%20Governance-%20summary.htm (last visited Nov. 7, 2003); Austria's Corporate Governance Code, *available at* http://www.andritz.com/cg-engl.pdf (last visited Nov. 7, 2003).

21. The vast majority of these codes (twenty-five) were issued after 1997. The United Kingdom accounts for the largest number of codes (almost one-third of the total).

22. Disclosure against a code is referred to as disclosure on a "comply or explain" basis whenever the code advocates disclosure by listed companies of the degree to which they comply with the code recommendations.

23. In Austria, Germany, Denmark, and the Netherlands the two-tier structure is predominant. Italy, Belgium, Finland, France, Greece, Ireland, Luxembourg, Portugal, Spain, Sweden, and the United Kingdom have adopted the unitary board structure.

systems, the board of directors is charged with leading and controlling the business and generally delegating day-to-day operations to one or more managers.[24] Two-tier board structures recognize a more formal distinction between the supervisory and the managerial bodies. In either system, the supervisory body is generally charged with appointing, dismissing and remunerating senior managers, ensuring the integrity of financial reporting and control system, as well as the general legal compliance of the corporation. However, the need for a supervisory board that is distinct from management to ensure accountability and provide strategic guidance is recognized in most, if not all, of the E.U. Member States. Under the unitary system, the distinction between the unitary board and the senior management team is accomplished through the appointment of outside (or non-executive) directors and some "independent"[25] directors to the supervisory body. Under the two-tier system, the need for independence between the supervisory and the management bodies is generally accomplished by warning against the practice of naming retired managers to the supervisory board.

In light of the above, it will be useful to highlight the key features of the U.S. reform and to consider the relevant implications for foreign private issuers, including E.U. reporting companies.

1. The Corporate Governance Structure

The corporate governance structure of U.S. public companies is significantly different from either of the two systems used in the E.U. Member States. Typically, chief executives have an immense power. The roles of the chairman and the chief executive officer (CEO) are often combined and the CEO can exert a substantial influence over the boardroom. Furthermore, directors of two companies often have interlocking relationships[26] and potential conflict of interest may arise from this "incestuous" position. Recent surveys have also shown that thirteen percent of the companies listed on the NYSE do not have a majority of independent directors and approximately twenty percent of such companies do not even have a board-level nominating committee, independent or otherwise.[27] Under such circumstances, boards have often either lacked the structure and the information to perform their

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24. In several countries, such as Denmark, Finland, and Sweden, the law provides that for companies of a certain size or type a general manager or managing director must be appointed. In such instances, managerial power is not wholly delegated at the option of the unitary supervisory body.

25. "Independence" generally involves an absence of close family ties or business relationships with company management and the controlling shareholder(s).

26. "Interlocking relationship" means that the CEO of company A sits on the board of company B and vice versa.

27. *See The Way We Govern Now*, ECONOMIST, Jan. 9, 2003, *at* http://www-unix.oit.umass.edu/~kazemi/640/govern.pdf (concerning the outcome of a survey in 2002 by the Investor Responsibility Research Centre).

roles properly, or they have simply abdicated their responsibilities to oversee the CEO's performance. The failure of corporate responsibility in the "Enron cases" has clearly demonstrated the need to ensure sound corporate governance through the active and informed participation of independent directors who can focus on the best interests of the corporation and are empowered effectively to exercise their responsibilities.[28]

In the attempt to bring about actual change and avoid the concerns raised by the concentration of power at the top of corporations, a large number of voices in the United States have suggested importing the European model of a chairman who is separate from the CEO. This solution should establish a proper balance between managing the corporation and providing independent directors with the powers and resources they need to perform their role.

In this regard, the Conference Board Commission has suggested three possible approaches. The first recommendation is that companies consider separating the offices of Chairman and CEO and requiring that the Chairman be one of the independent directors. Alternatively, separate individuals should perform the roles of the Chairman and CEO, and a "Lead Independent Director" should be appointed if the chairman is not "independent" (according to the strict definition of independence set forth by the New Corporate Governance Standards).[29] Finally, where boards do not choose to separate the Chairman and CEO positions, or when such boards are in transition to a structure where the positions will be separated, a "Presiding Director" position should be established. Each of these alternatives represent a radical break from the tradition that most U.S. corporations follow. Going even further, the Conference Board Commission has recommended that boards that choose not to take any of these approaches should also explain the reasons therefor, and how the board structure that they employ ensures the objective of strong and independent board leadership.

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28. This issue was also highlighted by the Task Force on Corporate Responsibility, which was appointed by the President of the American Bar Association to examine systemic issues relating to corporate responsibility arising out of the traumatic collapse of Enron and other Enron-like situations. *See* Michael R. McAlevey, Practising Law Institute, Preliminary Report of the ABA Task Force on Corporate Responsibility: Understanding the Sarbanes-Oxley Act of 2002, at 169 (2002).

29. According to the NYSE and Nasdaq, for a director to be deemed independent, the board must affirmatively determine that the director has no material relationship with the listed company (either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company); furthermore, certain relationships automatically preclude a board finding of independence (e.g., according to the NYSE Corporate Governance Listing Standards, *inter alia*, a director who is an employee, or whose immediate family member is an executive officer, of the company may not be considered independent until three years after his employment ends). *See* Release No. 34-48745, *supra* note 3, at 36; NYSE Corporate Governance Listing Standards, *supra* note 3, at 4-6.

2. Financial Certifications and the New Requirements for Executives Directors

To raise the bar for corporate accountability, the Act places new significant demands on the CEO and CFO of issuers with reporting obligations under the Exchange Act of 1934.

According to Section 302(a), the chief executives must certify in each periodic report that they have "reviewed" such report and that, based on their knowledge, there are no materially false statements or material omissions therein; that the report fairly presents the issuer's financial condition and results of operations; that the signing officers are responsible for establishing and maintaining internal disclosure controls and procedures, have evaluated the effectiveness of the internal controls within the last ninety days and have presented in the report their conclusions; and finally, that they have disclosed internal control deficiencies and any fraud by management or employees with a significant role in those internal controls to the auditors and the audit committee of the board of directors.[30] In the final rules issued on August 29, 2002, the SEC specified that these requirements are applicable to foreign private issuers, except for non-U.S. reporting companies relying on the Rule 12g3-2(b) exemption from registration for a class of securities under the Exchange Act of 1934.[31] In response to doubts raised by Section 302, the SEC has made it clear that a foreign private issuer is not required to include a certification with the semi-annual report on Form 6-K, which non-U.S. reporting companies must file if they have a class of securities registered under the Exchange Act. [32]

The Act also requires, under Section 906(a), that the CEO and CFO certify in each periodic report containing the issuer's financial statements that the report fully complies with applicable reporting requirements and that the information contained in the report "fairly presents, in all material respects, the financial condition and results of operations of the issuer."[33] This provision even imposes criminal liability for failure to file the required

30. *See* 15 U.S.C. § 7241 (2002). The certification requirement applies to reports filed with respect to periods ending after August 29, 2002.

31. *See* Final Rules Release, *supra*, note 10.

32. Foreign private issuers that are required to file periodic reports with the SEC must furnish on Form 6-K material information about the issuer or its subsidiaries that the issuer: (i) makes public voluntarily or pursuant to the law of the jurisdiction of its domicile or incorporation; (ii) files with a stock exchange on which its securities are traded and which was made public by such exchange; or (iii) distributes to its security holders. Reports on Form 6-K must be provided to the SEC and each U.S. stock exchange on which any security of the issuer is listed promptly after the requisite information is made public as described above. Foreign private issuers are not required to include the certification under Section 302 of the Act with the semi-annual report on Form 6-K, as the SEC deems Form 6-K a current rather than a periodic (i.e. annual or quarterly) report. *See* Certification of Disclosure in Companies' Quarterly and Annual Reports, Exchange Act Release No. 33-8124, 67 F.R. 57276 (Sept. 9, 2002).

33. Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong. § 906(b) (2002).

certification.[34] Although the Section 906 and Section 302 certifications are similar in many respects, CEOs and CEOs of reporting companies will each have to provide two separate certifications.

The certification requirements under the Act need to be harmonized with the requirements to which an E.U. reporting company is subject in its home country. In order to ensure compliance with these requirements, non-U.S. reporting companies should begin establishing appropriate internal procedures to reduce the risk for the officers signing the required certifications. Nonetheless, under the company laws of E.U. Member States, the responsibility for the probity of financial statements of the company is primarily a collective responsibility of the board: in a one-tier structure, this is a collective responsibility of both executive and non-executive directors; in a two-tier structure, this is the collective responsibility of both the managing directors and the supervisory directors.[35] The collective responsibility is an appropriate mechanism to avoid a limited number of board members, in particular certain executive directors whose performance is to be reflected in financial statements, having a decisive role in determining their content. In the view of the Group of High Level Company Law Experts, the reform of corporate governance in the E.U. Member States should not change the requirement of a collective responsibility of the full board. On the contrary, the recommendation under the Report is that this collective responsibility extend to all statements on the company's financial position and on non-financial data, subject to very limited exceptions.[36]

3. The Independent Oversight

One goal of the U.S. reform effort is to change the current corporate reality in the United States, where senior management plays a significant role in the selection, nomination, and remuneration of directors, as well as in selecting their committee assignments, in setting agendas for their meetings, and in evaluating their performance.

The need for reform in this area has been emphasized by the Conference Board Commission, who has suggested "that the independent Chairman, [the] Lead Independent Director, or the Presiding Director should have ultimate approval over the information flow that goes to the board and should chair frequent, regular meetings of the non-management directors."[37] This

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34. In the same direction, under the NYSE Corporate Governance Listing Standards, each CEO would be required to certify in the annual report to shareholders that he or she is not aware of any violation by the listed company of the NYSE corporate governance standards. *See* NYSE Corporate Governance Listing Standards, *supra* note 3, at 17.

35. This is reflected in many Member States in the requirement that all executive, non-executive, and supervisory directors sign the annual accounts of the company.

36. *See* Financial Reporting and Company Law, Final Report, *supra* note 17, at 9.

37. The Conference Board Commission, *supra* note 5.

recommendation raises potential problems, however, as steering the flow of information and setting the agenda determine corporate control, and thus, are of the essence.

Similarly, the requirement for directors to meet regularly in "executive sessions," which is provided for by the New Corporate Governance Standards, may raise the alarm of many chief executives.[38] As a practical matter, large companies do not usually hold such meetings, as they would give directors the chance to assess whether or not chief executives have really fulfilled their role and whether the agenda that they set covers the right points.

Under the New Corporate Governance Standards, corporations should set a new requirement that a majority of the board consist of independent directors, within the meaning of a tightened definition of independence. However, this requirement should not apply to foreign private issuers.[39] The Conference Board Commission went even beyond and "urge[d] boards [to] be composed of a *substantial* majority of independent directors."[40]

In the system outlined by the Act, the goal of an independent oversight, especially in those areas where there is a specific need for disinterested monitoring by non-executive and supervisory directors, can be accomplished through the establishment of "functional committees."[41] In particular, the Act requires that audit committees comprised solely of independent directors[42] take a more active role in the governance structure of U.S. corporations. According to Section 301, the audit committee should have significantly greater authority and responsibility than has been customary in the United States. Such committee will be accountable "for the appointment, compensation, and oversight of . . . any registered public accounting firm employed by the issuer"; will be required to "establish procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters," including those submitted anonymously by employees; and finally, will have the authority to engage, and determine the fees of, independent counsels and other advisors, as necessary.[43] It was not clear how the Act would be applied where the requirements under Section 301 conflict and could not be harmonized with requirements to which non-U.S. reporting companies are subject in their home country or other primary market. However, the SEC was required to adopt rules implementing

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38. *See* Release No. 34-48745, *supra* note 3.

39. *See id.* at 36.

40. The Conference Board Commission, *supra* note 5 (emphasis added).

41. Sarbanes-Oxley Act § 301.

42. Under Section 301, the need for the members of the audit committee to be "independent" means that they cannot be an affiliated person of the issuer or any subsidiary thereof and that they cannot accept any "consulting, advisory, or other compensatory fees" from the issuer, other than in the capacity as a member of the audit committee, the board of directors, or any other board committee. *See* 15 U.S.C. 78 § 10A(m).

43. Sarbanes-Oxley Act § 301.

the provision of Section 301. In its release of January 8, 2003[44] the SEC proposed a limited exemption from the independence requirements to address concerns over conflicts between the proposed requirements and the laws of some foreign private issuers' home jurisdictions. As a result, foreign private issuers with board of auditors or similar bodies or statutory auditors meeting the requirements of the Act should be exempt from the requirements regarding the independence of audit committee members.[45]

In addition to the audit committees, both the recommendations issued by the Conference Board Commission and the New Corporate Governance Standards have urged companies to establish a nominating corporate governance committee[46] and a remuneration committee[47] composed entirely of independent directors (or functional equivalent consisting solely of independent directors).[48]

This functional committee approach has been supported by the Group of High Level Company Law Experts also with respect to the reform of corporate governance in the E.U. Member States. The Report does not express any view as to how the full one-tier board or supervisory board in the two-tier structure should be constituted or to what extent independent non-

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44. *See* Standards Relating to Listed Company Auditor Committees, Exchange Act Release No. 33-8173; 34-47137, 17 C.F.R. §§ 228-229, 240, 274 (Jan. 8, 2003).

45. *Id.* The SEC proposal provides that non-management employees would be permitted to sit on the audit committee of a foreign private issuer if the employee is elected or named to the board of directors or audit committee of the foreign private issuer pursuant to home country legal or listing requirements. *Id.* In conjunction with the implementation of Section 301, the SEC has adopted rules implementing Section 407, according to which reporting companies (other than registered investment companies), including foreign private issuers, are required to disclose in their annual reports filed pursuant to the Exchange Act of 1934 whether they have at least one "audit committee financial expert" serving on its audit committee. *Id.* Unlike domestic issuers, non-U.S. reporting companies currently are not required to disclose whether their audit committee financial members are independent. *Id.* However, the SEC has determined to eventually include foreign private issuers within the scope of Section 406 and require such disclosure (by amending Forms 20-F and 40-F in conjunction with the rules implementing Section 301). *See* Certification of Management Investment Company Shareholder Reports and Designation of Certified Shareholder Reports as Exchange Act Periodic Reporting Forms; Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Exchange Act Release No. 34-47262, 68 F.R. 5348 (Jan. 27, 2003) [hereinafter Certification of Reports Release].

46. See Standards Relating to Listed Company Auditor Committees, *supra* note 44. The nominating or governance committee should be responsible for nominating qualified candidates to stand for election to the board, monitoring all matters involving corporate governance, and making recommendations to the full board for actions in governance matters. See Release No. 34-48745, *supra* note 3, at 38.

47. *See id.* at 39.

48. *See* The Conference Board Commission, *supra* note 5. In the view of the Conference Board Commission, U.S. corporations that intend to achieve the goal of effective boards should also establish "a three-tier director evaluation mechanism." *Id.* This mechanism "would include evaluation of the performance of the board as a whole, the performance of each committee and [that] of each individual director, as necessary." *Id.*

executive or supervisory directors should be members of it. Nonetheless, the Group has taken the view that for all listed companies in the E.U. it should be ensured that, within the board, and to the extent these are board matters and not for the shareholders to decide, the executive directors nomination and remuneration and the accounting audit for the company's performance should be decided upon exclusively by non-executive or supervisory directors, who are in the majority independent.[49]

Unlike the U.S. regulator, the Group rejected the requirement for nomination and audit committees to consist *exclusively* of independent non-executive or supervisory directors as a European rule.[50] Reasonably, this is due to the fact that the Group had to take account of particular situations relevant to board structure in the E.U. Member States, such as the existence of controlling shareholders and boards that are partly determined by employees.[51] It is clear that representatives of controlling shareholders and employees of the company normally could not be considered to be independent, but it would have gone too far to exclude them completely from participating in these key areas. Requiring oversight by non-executive or supervisory directors who are in the majority independent would ensure a sufficient level of independent oversight, while taking into account the specific legal requirements in the E.U. Member States.

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49. Financial Reporting and Company Law, Final Report, *supra* note 17. In the Group's view, "independent" means "independent in the operational business of the company and of those who take primary responsibility as executive directors, and also not receiving any benefit from the company other than their fully disclosed remuneration as non-executive or supervisory directors." *Id.*

50. *Id.* As suggested under the Report, the European Commission should rapidly issue a Recommendation to Member States that they have effective rules in their company laws or in their national corporate governance codes concerning principles on independence and including a list of relationships that would lead a non-executive or supervisory director to be considered as not independent. *Id.*

51. Generally, both the unitary board of directors and the supervisory board (in the two-tier structure) are elected by shareholders through participation in general meetings. However, in certain Member States (such as Austria, Denmark, Germany, Luxembourg and Sweden), employees of companies of a certain size have the right to elect some members of the supervisory body. In Finland and France, the company articles of incorporation may provide for such a right. Under the law of some Member States, work councils may also have an advisory voice on certain issues addressed by the supervisory body, as in the Netherlands and France. In particular, in the Netherlands, where the supervisory board is self-selecting, a new legislation is currently pending which would give employees a role in nominating (but not electing) supervisory board members in structure regime companies, whilst the right of election is given to shareholders. *The Dutch Corporate Governance Code: Principles of Good Corporate Governance and Best Practices Provisions, Draft,* July 1, 2003, *available at* corpgov.nl/page/downloads/ Conceptcode%20Engels%20DEFINITIEF.pdf (last visited Nov. 7, 2003).

4. Executive Compensation

The Act contains two important provisions concerning executive compensation. First, Section 304(a) provides for the obligation on the part of the CEO and CFO to disgorge certain bonuses, equity-based compensation, and profits from equity transactions in connection with certain restatement of financial statements "due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws."[52]

Second, under Section 402(a), issuers are prohibited from making loans or extending credit to directors and executive officers, subject to very limited exceptions relating mainly to U.S. financial institutions.[53] Issuers also cannot materially modify or renew any existing loans.[54] Given the broad scope of this provision, non-U.S. reporting companies should consult with counsel before authorizing or making any payments or advancing any funds to, or for the benefit of, executive officers or directors that might be viewed as a loan or extension of credit, even if the payments are not prohibited in the company's home country or are even required by an employment agreement or other contract.

5. Ethical Conduct

Under the reform, the challenge for U.S. listed companies, as well as for foreign private issuers, is to create a corporate culture, which promotes ethical conduct on the part of the organizations and its employees by supporting responsible behaviors and building environments in which employees take the initiative to address misconduct.

To this purpose, the Act provides for whistleblower protection. Under Section 806, employees are protected against retaliatory discharge or other adverse employment action for providing information to supervisors, the U.S. Government, or the U.S. Congress regarding conduct that the employee reasonably believes violates U.S. securities or antifraud laws.[55] Though it is not clear how this provision will be effective in the case of foreign private

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52. 15 U.S.C. § 7241 (2002).

53. 15 U.S.C. 78 § 7243 (2003). The Act contains two exceptions designed to mitigate this burden for banks and other financial institutions; however, only one of these exceptions is likely to be helpful to non-U.S. financial institutions. *Id.* One exception generally permits consumer loans made in the ordinary course of business, of the same type, and on the same terms made generally available to the public (home mortgages should also be permitted if they meet these requirements). *Id.* The other exception exempts loans made by banks and thrifts that are insured by the U.S. Federal Deposit Insurance Corporation and will not apply to non-U.S. banks because they are not FDIC-insured. *Id.*

54. *Id.*

55. Sarbanes-Oxley Act § 806.

issuers, non-U.S. companies will need to review their policies for possible change in light of this requirement.

In addition, Section 406 of the Act directs the SEC to adopt rules requiring public companies to disclose whether or not, and if not, why not, the company has adopted a code of ethics for senior financial officers.[56] On January 24, 2002, the SEC made it clear that foreign private issuers will have to provide the new code of ethics disclosure in its annual report (filed pursuant to the Exchange Act of 1934), just as a domestic issuer would. However, in contrast to a domestic issuer, a non-U.S. reporting company will not have to provide in a current report "immediate disclosure" of any change to, or waiver from, the company's code of ethics for its senior financial officers and principal executive officer.[57]

Listed companies would be required also by NYSE and Nasdaq to adopt a code of business conduct and ethics for directors, officers, and employees that addresses a variety of subjects, including conflict of interest.[58] The Conference Board Commission recommended policies and procedures that define and demand ethical conduct and enforce companies' code of conduct and suggested that a committee of the board should oversee ethics issues. These requirements could clearly overlap or conflict with the code of ethics provisions in foreign private issuers' home jurisdictions.

II. THE U.S. MODEL AND THE ITALIAN SYSTEM OF CORPORATE GOVERNANCE

A. The Legal Framework and the Corporate Governance Code in Italy

The issue of corporate governance has been the object of an intense debate in Italy between those who advocate a form of binding regulation and those who would leave any organizational choice to companies' discretion.

Under the current legal framework, the main corporate governance rules are provided for by the Italian Civil Code (the ICC)[59] and by the consolidated law on financial intermediation amending the ICC,[60] as implemented by the

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56. 15 U.S.C. § 7264 (2003).

57. Certification of Reports Release, *supra* note 45. The SEC is adopting the requirement that a foreign private issuer disclose any such change or waiver that has occurred during the past fiscal year in its Exchange Act annual report. *Id.*

58. *See* Release No. 34-48745, *supra* note 3, at 41; NYSE Corporate Governance Listing Standards, *supra* note 3, at 15, 21. The Nasdaq's code of conduct requirement will be effective beginning May 4, 2004. *See* NASDAQ Bulletin to Issuers on the Nasdaq's Recent Rule Changes, *supra* note 3.

59. *See* Regio Decreto No. 262 (Mar. 16, 1942) (as amended).

60. *See* Legislative Decree No. 58 (Feb. 24, 1998); Gazz.Uff. no. 71 (Mar. 26, 1998).

regulations issued by the "Commissione Nazionale per le Societa' e la Borsa" (Consob).[61]

Furthermore, the Italian corporate governance code sets forth "best practice" rules for companies that are listed on the Italian regulated markets. The corporate governance code was drafted in 1998, and subsequently revised,[62] by a committee comprised of distinguished representatives of the Italian economical and financial community, upon the request of the chairman of Borsa Italiana, Mr. Stefano Preda. The underlying assumption was that such a code (the Preda Code), if used as a guide to best practice, could reassure the investor community as to the existence in listed companies of a clear and well-defined organizational model with an appropriate division of responsibilities and powers along with a proper balance between management and control. As is the case of most of the corporate governance codes issued in the E.U. Member States, the Preda Code is consistent with the "freedom with accountability" principle, and thus, it is voluntary and not mandatory. However, companies might be required to disclose the level of compliance with the recommended standards in a "comply or explain" manner.[63]

Upon the implementation of the Legislative Decree No. 6 of January 17, 2003, the Italian system of corporate governance will materially change.[64] In particular, upon the reform, a company will be able to choose among three models of corporate governance:

(i) the traditional system, which reflects the current organizational structure based on the board of directors (elected by the shareholders' meeting), which manages the business and affairs of the company and the board of statutory auditors, which monitors the activity of the board of directors; or

(ii) the two-tier system (patterned after the German model), according to which a management board manages the business and affairs of the company, and a supervisory board (appointed by the shareholders' meeting) is responsible, among others, for monitoring, appointing,

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61. Consob is the public authority responsible for regulating the Italian securities market. *See* International Regulatory Information, *at* http://www.atmarkets.org/content/international regulations.asp (last visited Dec. 2, 2003).

62. *See* BORSA ITALIANA, CORPORATE GOVERNANCE CODE (*translated*) *at* http://www.borsaitalia.it/opsmedia/pdf/8077.pdf (last visited Nov. 7, 2003) [hereinafter *Preda Code*]. The latest revision is dated July 2002. *Id.*

63. In particular, the committee that drafted the Preda Code invited Borsa Italiana S.p.A. to acknowledge the existence of the Preda Code and to provide for listed companies to report, through procedures agreed with the same committee, on the organizational model they have chosen and the extent to which they have adopted the Preda Code.

64. *See supra* text accompanying note 6.

and removing the members of the management board; or

(iii) the unitary system (patterned after the UK model), which recognizes a board of directors (appointed by the shareholders' meeting) with general operating powers and a management control committee (established within the board of directors and composed of non-executive and independent directors), which monitors the executive directors.[65]

Unless the company expressly elects a specific model under its articles of incorporation, the traditional system shall apply.[66] Furthermore, most of the general provisions that are applicable to the board of directors in the traditional system (e.g. those relating to duties and powers, conflict of interests, etc.) may also apply to the management board in the two-tier system and to the board of directors in the unitary system.[67] Similarly, most of the general provisions that are applicable to the board of statutory auditors in the traditional system may apply to the supervisory board in the two-tier system and to the management control committee in the unitary system.[68]

Therefore, the analysis in Section II will focus on the corporate governance structure under the traditional system.

B. The U.S. Model and the Italian system

In particular, this Section will provide a brief overview of the Italian corporate governance structure and will address a direct comparison between the model outlined by the Act and the system under Italian law, with an assessment of the implications of the Act on dual U.S. and Italian listed companies, where relevant.

1. The Corporate Governance Structure

Under the Italian system, the board of directors is a unitary body and a separate board of auditors is required. Unlike in the United States, the board of directors has a central role to play in the company's organizational structure. It is charged with providing strategic and organizational guidance and "verifying the existence of the controls needed to monitor" the company's performance.[69]

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65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Preda Code*, *supra* note 62.

In particular, in the model outlined in the Preda Code, the board of directors is comprised of "executive directors (i.e., the managing directors, and those directors who perform management functions within the company) and non-executive directors."[70] The chairman of the board plays a key role in ensuring compliance with the principles of corporate governance, as he is responsible for the work of the board, the distribution of the information to directors, and the coordination of the board's activities. Decision-making powers in the running of the company are delegated to the non-executive directors, whose number and authority should result in their carrying significant weight in board decisions.

The balanced composition of the board, with the participation of executive directors and non-executive directors, of which some are classifiable as "independent,"[71] should guarantee the good governance of the company as the outcome of the confrontation and dialectic between management powers and those of strategic guidance and supervision, while ensuring that the necessary attention is paid to the performance of the company and the prevention of conflicts of interest.

The peculiar corporate governance structure of Italian corporations, as summarized above, explains why, to a large degree, the Italian system is not consistent with the U.S. model.

2. *Financial Certifications and the New Requirements for Executives Directors*

The requirements under the Act and under Italian law are significantly different. Unlike the United States model, under the Italian system, no CEOs or CFOs' certification is required and there is a collective responsibility on the part of the entire board of directors for the probity of the company's financial statements (though any director is subject to criminal liability).[72]

In particular, financial statements should properly and faithfully present the company's economic and financial conditions. The shareholders at the company's annual shareholders' meeting approve the company's balance sheet, along with the directors' report. The financial statements of listed companies are to be filed along with both the report of the statutory auditors and the certification of an auditing firm.

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70. *Id.*

71. "An adequate number of non-executive directors [has] to be independent, in the sense that they: (a) do not entertain . . . business relationships with the company," its subsidiaries, the executive directors, or the shareholder or group of shareholders who controls the company; or (b) do not "own, directly or indirectly, . . . a quantity of shares enabling them to control the company . . . or participate in shareholders' agreements to control the company." *Id.*

72. The board of directors' members are jointly and severally responsible for the damages resulting from inaccurate statements. However, as a general rule, Italian law does not provide for a collective criminal responsibility. Accordingly, any member of the board may be subject to criminal sanctions for inaccurate statements.

According to the Preda Code, the responsibility for the internal control system of listed companies, i.e., "the set of processes serving to monitor . . . the reliability of [the company's] financial information, [and the] compliance with laws and regulations," should lie with the board of directors.[73] The board, with the assistance of the internal control committee and the persons appointed to run the internal control system, should lay down the guidelines for, and periodically check the functioning of, the internal control system.[74]

The managing directors [should] identify the main risks the company is exposed to and submit them to the board of directors for its examination; they [should] implement the guidelines laid down by the board of directors for the planning, operation and monitoring of the internal control system and should appoint one or more persons to run it and provide them with appropriate resources.[75]

"In companies that have an internal audit function, the person[s] appointed to run the internal control system can also be the head of the internal audit function."[76] In companies that do not have an internal audit office, the Preda Code recommends that the board of directors should periodically assess the desirability of instituting one.[77]

The persons appointed to run the internal control system should report to the managing directors to allow them to intervene promptly where necessary and to the internal control committee and the board of auditors to keep them informed of the results of their work.[78]

In order to comply with the Act, a dual U.S. and Italian listed company must ensure that:

(i) the CEO or CFO is in a position to give the certifications in the prescribed form before approving any relevant accounts. Though the SEC has not prescribed any particular procedures for conducting a review of the company's controls and procedures, it has recommended that each company create a disclosure committee to ensure compliance with the relevant requirements; and

(ii) the design, implementation, and evaluation of internal financial and disclosure control structures and systems are sufficient for the purposes of the certification. The company may want to consider institut-

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Preda Code*, *supra* note 62.
77. *Id.*
78. *Id.*

ing an internal "cascade" certification process for key managers.[79]

3. The Independent Oversight

(i) *Audit Committee.* The requirements under the Act are broadly similar to those under Italian law. With respect to the composition of the committee, the main difference is that under the Act all members of the audit committee are required to be independent[80] while the Preda Code provides for the establishment of an internal control committee (i.e., the "*Comitato per il controllo interno*"), which is comprised of non-executive directors whose majority shall be independent.[81]

In light of the above, it is clear that dual U.S. and Italian listed companies should review the members on their committees to assess whether they may satisfy the independence requirements under the Act.

Furthermore, as an additional requirement under the Act, a U.S. and Italian listed company should disclose whether or not a financial expert has been appointed to the audit committee. As a matter of fact, under the Preda Code, there is no specific requirement that the members of the *Comitato per il controllo interno* be a "financial expert," though they must have a general understanding of audit committee functions to perform their duties.[82]

Finally, under the ICC, the shareholders in a general meeting are responsible for appointing, and determining the compensation of, statutory auditors (with the exception of the first statutory auditors that are nominated under the company's articles of incorporation). This rule would appear to conflict with Rule 10A-3, proposed by the SEC, according to which the audit committee would be directly responsible for the appointment of auditors.[83]

(ii) *Nominating Committee.* The Preda Code suggests that listed companies in Italy should consider it helpful to establish a nominating committee to propose appointments for directors. Nonetheless, in Italy, the large proportion of companies with concentrated ownership, the legal requirement for appointments to the board of directors not to last more than three years, and the bylaws providing for election lists in some companies

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79. *Id.*

80. This is, however, subject to certain exemptions for non-U.S. companies.

81. *Id.* Where another listed company controls a company, the *Comitato per il controllo interno* shall be comprised exclusively of independent directors.

82. The *Comitato per il controllo interno* is required, among other things, to: (a) assess the adequacy of the internal control system; (b) assess the work program prepared by the persons responsible for internal control and receive their periodic reports; and c) assess the proposals of auditing firms to obtain the audit engagement, the work program for carrying out the audit, and the results thereof as set out in the auditors' report and their letter of suggestions.

83. Although the SEC has maintained that the rule relates to the assignment of responsibility to oversee the auditor's work and that no conflict therefore arises.

with a broad shareholder base make it not advisable to institutionalize such a committee.

Furthermore, unlike in the U.S. proposed reform, where the board of directors establishes a committee to propose candidates for appointment to the position of director, it is only the majority of the members of such committee that must be non-executive directors. In this respect, the recommendations contained in the Preda Code are not as strict as those made by the NYSE and by Nasdaq and the suggestions of the Conference Board Commission, which would urge for the establishment of a nominating committee comprised exclusively of independent directors.

(iii) *Remuneration Committee.* The Preda Code recommends that the board of directors of Italian listed companies should set up a remuneration committee. However, under Italian law there is no requirement that this committee be comprised exclusively of independent directors, as under the NYSE and Nasdaq proposals and under the Conference Board Commission's recommendations. The Preda Code recommends that only a majority of the committee's members be non-executive directors.

Furthermore, according to the Preda Code, the committee in question should submit proposals to the board on the remuneration of the managing directors and of those directors who are "appointed to particular positions in accordance with the articles of association."[84] In other words, in compliance with the features of the Italian system of corporate governance, the remuneration committee's function could be only to make proposals, while the power to establish the remuneration of top management would remain with the board of directors.

4. Executive compensation

Under Italian law, there is no provision similar to Section 304 of the Act. Directors of dual U.S. and Italian listed companies need to be aware of the possibility of a reimbursement in the event of restatement of financial information and ensure that the company seeks reimbursement under the circumstances contemplated by the Act.

Furthermore, a recent law has abrogated the rule under Article 2624 of the ICC, which was similar to the provision of Section 402 of the Act. As a consequence, companies are no longer forbidden to make loans to, or to provide guarantees for any personal debt of, directors, executive officers, or statutory auditors.[85]

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84. *Preda Code, supra* note 62.

85. Article 2624 of the ICC has been abrogated by the Legislative Decree No. 61 (Apr. 11, 2002).

5. Ethical conduct

Though the Preda Code can be roughly compared to the corporate code of ethics, as provided for by Section 406 of the Act, the U.S. model appears to be stricter than the Italian position with respect to ethical conduct.

Under the Italian system, there is no specific job protection for employees who provide information regarding violation of securities or anti-fraud laws and retaliation would be prohibited under the shelter of the employment legislation. U.S. and Italian listed companies should, thus, consider establishing procedures for receiving and dealing with anonymous complaints.

III. CONCLUSIONS

The concerns raised by the extra-territorial application of the U.S. law, which is a critical issue in the debate concerning the scope of the provisions of the Act, should urge a reform of the Italian legal and regulatory framework regarding corporate governance.

On April 9, 2002, a commission of experts, headed by Professor Galgano, was set up with the purpose of assessing the need for such a reform. On September 27, 2002, Galgano presented to the Italian Ministry of Finance the commission's report, with recommendation that the suggested reform be implemented through Consob's regulations.[86]

The recommendations contained in the report mainly concern the accounting reform and the disclosure requirements for listed companies. With respect to corporate governance, the experts have focused especially on the issues of the directors' and auditors' independence and on the conflict of interest.[87] Most likely, the reason for this choice is that the requirement for independent directors and the risks involved in the conflict of interest are among the most critical issues that the recent corporate scandals in the United States have brought to light. Furthermore, the need to avoid situations of conflict of interest concerning directors of listed companies is particularly evident in the Italian system and has already called for the attention of Consob.

Nonetheless, though the independence requirement for directors and the absence of a conflict of interest are a *conditio sine qua non*, other steps should be taken to achieve the goal of a sound corporate governance structure of Italian listed companies. In particular, the independence of directors is not conclusive *per se*, as the procedure for their nomination, their powers and the mechanisms for their remuneration should also be scrutinized.

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86. See Commissione di Studio sulla Trasparenza delle Societa' Quotate, *at* http://www.tesoro.it/DOCUMENTAZIONE/Commissione_Studio_trasp_soc_quotate.pdf. (last modified Sept. 27, 2002), for the report. In July 2003, the draft of a second report had been submitted to the attention of the Italian Ministry of Finance.

87. *See id.* at 36-39.

The provisions of the Act might not be a model in this respect, given the number of inconsistencies between the Italian and the U.S. system of corporate governance, in terms of different corporate governance structures, as well as of different legal frameworks and different scope of the regulatory powers given to the competent supervisory authorities.

As a matter of fact, these inconsistencies are of the essence for dual U.S. and Italian listed companies, which might be required to review their structure and policy to assess whether they satisfy the requirements under the Act. *Inter alia*, these companies should consider the following key action points:

- ✓ CERTIFICATIONS—Consider instituting a disclosure committee and an internal "cascade" certification process for key managers; establish a working group and procedures to review and test internal controls, disclosure controls, and procedures in light of the Act; determine what procedures are currently in place and what additional procedures may be necessary in order to permit the CEO and CFO to make the required certifications;
- ✓ LOANS—Identify all outstanding loans and extensions of credit granted to or arranged for directors and executive officers as of July 30, 2002 and establish procedures to prevent the renewal or material modification of such loans; review any option plan permitting cashless exercise transactions and any arrangement having the quality of a loan.
- ✓ AUDIT COMMITTEE—Investigate whether all audit committee members are "independent"; review the company's audit committee charter in detail to ensure it provides sufficient authority to comply with proposed requirements; identify audit committee members who are "financial experts" and ensure that there is one on the audit committee.
- ✓ CODE OF ETHICS—Review any existing code of ethics and, if the company does not have an existing code, consider adopting a formal code of ethics that meets the Act's requirements.
- ✓ WHISTLEBLOWERS—Audit committees should consider procedures relating to complaints regarding accounting, internal controls, or auditing matters.

The reform of Italian rules should take into account the above-mentioned issues and should also consider revising the system of sanctions, following the U.S. model while accommodating the specific situations in the Italian jurisdiction. In so doing, other circumstances should also be taken into account, such as the expected changes in the Italian corporate law, which will materially affect the corporate structure of Italian listed companies starting in 2004.

The new provisions should be provided for by law and could be implemented through the Consob regulations. The current corporate governance code should also be revised and should play a substantial role in defining the new regulatory framework by means of "best practice" rules.

A RESPONSE TO THE CORPORATE CAMPAIGN AGAINST THE ALIEN TORT CLAIMS ACT

Francisco Rivera*

INTRODUCTION

Multinational corporations, along with certain governmental, business, and trade sectors, have begun a full attack against the Alien Tort Claims Act (ATCA).[1] Proponents of the ATCA maintain that the law has been an invaluable tool for holding accountable those who commit international human rights abuses, including corporations. The ATCA allows foreign plaintiffs to file lawsuits in U.S. courts "for a tort only, committed in violation of the law of nations or a treaty of the United States."[2] Traditionally, the defendants in ATCA lawsuits have been foreign government officials or foreigners who committed violations of human rights while acting under color of law. In an attempt to break with this tradition, an increasing number of victims have been attempting to successfully hold multinational corporations liable under the ATCA for human rights abuses. Although there is precedent for the proposition that private parties may be held liable in U.S. federal courts under the ATCA for certain violations of customary international law, no American-based corporation has ever faced a trial on the merits under the ATCA. And there is a growing movement seeking to prevent this from happening.

Corporations that have been sued, or that fear being sued under the ATCA, are attempting to weaken the law through lobbying groups such as the International Chamber of Commerce, the National Foreign Trade Council, USA-Engage, the U.S. Chamber of Commerce, and the U.S. Council of International Business. Victims of human rights abuses have also recruited human rights organizations, religious groups, and labor unions to counter this attack. To the victims and their allies, the corporate attack on the ATCA is only an attempt by multinational corporations to avoid accountability for their wrongdoing.

The arguments on both sides of the debate are passionate and complex. The debate has centered not only on whether "corporate ATCA" cases should be decided on the merits, but also on whether the ATCA itself should be repealed and ATCA precedents be overruled. The debate has become more heated in the aftermath of a September 2002 three-judge panel decision in the Ninth Circuit which held that the California-based energy company Unocal

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1. 28 U.S.C. § 1350 (2003).

2. *Id.*

could be held liable for its complicity in certain types of human rights abuses committed by the Burmese[3] military.[4] In essence, the panel found that plaintiffs had presented evidence that Unocal knowingly provided substantial assistance to the military in its commission of forced labor, murder, and rape. Although that decision has been vacated, and there is a possibility that an en-banc hearing that took place this past summer might result in a different outcome, the decision has already had a ripple affect because it threatens to be the first case where a U.S. corporation will face a trial for human rights violations actionable under the ATCA.

An ominous struggle thus lies ahead. According to people like Elisa Massimino, D.C. director of the Lawyers Committee for Human Rights, one of the groups defending the ATCA, "[w]hat is at stake is the last 20 years of jurisprudence and the way [the ATCA] can hold human-rights violators accountable."[5] Probably taking advantage of having a Republican-controlled Congress and an administration that is friendly to corporate interests the business community has already begun a lobbying campaign in Congress to explore ways to prevent the application of the ATCA to corporations conducting business abroad. Multinational corporations and their partners have also established a working group to provide support for companies that have been sued under the ATCA.[6] The human rights community has also rallied its troops and has begun public awareness campaigns and other efforts to defend the ATCA.[7]

This paper attempts to address what Terry Collingsworth, Executive Director of the International Labor Rights Fund, calls the business community's "series of misleading fictions about the scope and application of the ATCA."[8] The first topic addressed in the paper is whether private actors, especially U.S. corporations doing business abroad, can be held liable under

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3. The military government calls the country Myanmar. *See* http://www.myanmar.com (Myanmar website) (last visited Nov. 5, 2003).

4. John Doe I v. Unocal Corp., Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh'g granted*, 2003 WL 359787 (9th Cir. Feb.14, 2003).

5. Tom Carter, *Old Law Finds New Use Against Oppressors*, WASH. TIMES, Mar. 17, 2003, at A12.

6. Kenny Bruno, *De-Globalizing Justice, The Corporate Campaign to Strip Foreign Victims of Corporate-Induced Human Rights Violations of the Right to Sue in U.S. Courts*, 24 MULTINATIONAL MONITOR 3 (Mar. 2003), *available at* http://multinationalmonitor.org/mm2003/03march/march03corp2.html (last visited Sept. 10, 2003) (discussing the various approaches the business community is taking in attacking the ATCA).

7. For example, Earth Rights International (ERI), an environmental NGO that represents plaintiffs in various ATCA lawsuits, has organized a campaign to defend the ATCA. Earth Rights International, http://www.earthrights.org/atca/index.shtml (last visited Sept. 10, 2003). On its website, ERI allows visitors to sign an electronic petition, or they could join the "Alliance to Defend the ATCA." *Id.*

8. Terry Collingsworth, *The Alien Tort Claims Act—A Vital Tool for Preventing Corporations from Violating Fundamental Human Rights*, at 2, *available at* http://www.labor rights.org/publications/ILRF.pdf (last visited Nov. 6, 2003) [hereinafter *A Vital Tool*].

the ATCA in the first place. Assuming that the ATCA applies to private actors, the paper addresses some of the other major concerns expressed by the corporate opponents of the ATCA, including policy and economic arguments against its application to multinational corporations doing business abroad. In response to these attacks, the paper then addresses whether there are any viable alternatives to ATCA litigation aimed at holding corporations accountable for their foreign operations, followed by a discussion of the compatibility of human rights concerns with U.S. foreign policy and corporate interests. Lastly, in an attempt to dismiss concerns over whether only investment abroad would expose a corporation to ATCA liability, the paper discusses and analyzes the high legal standards courts have required plaintiffs to meet in order to hold corporations accountable under the ATCA.

I. CAN CORPORATIONS BE LIABLE UNDER THE ATCA FOR VIOLATIONS OF "THE LAW OF NATIONS"?

Although the only subjects of international law have traditionally been states, that is no longer the case. Building on Nuremberg precedent, U.S. courts have held that private actors, such as corporations—foreign and U.S.—may be sued under the ATCA depending upon the nature of the offense.[9] Through a progression of ATCA decisions, from *Kadic*[10] to *Drummond* (one of the latest ATCA decisions to-date),[11] courts have held that corporations may be liable under the ATCA as well as under its sister statute, the Torture Victim Protection Act (TVPA).[12]

Several post-World War II cases laid the groundwork for the application of the ATCA to private parties. In *United States v. Flick, United States v. Krauch,* and *United States v. Krupp,* for example, the heads of major German corporations were prosecuted for, *inter alia,* war crimes and crimes against humanity.[13] By holding individuals responsible for certain violations of international law, these cases transformed the concept of the state as the sole object of international law. Several decades later, building from these post-World War II cases and also from the jurisprudence in the post-*Filartiga*[14] era, in its *Kadic* decision the second circuit incorporated the concept of private party liability into the ATCA, and held that private parties could be held liable

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9. *See* discussion *infra at IV(A)* regarding the types of claims actionable under the ATCA against private parties and state actors.

10. Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995).

11. Estate of Rodriquez v. Drummond Co, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

12. *See* 28 U.S.C. § 1350 (note). The Torture Victim Protection Act provides U.S. citizens as well as aliens a cause of action for acts of torture and extrajudicial killing. *See* discussion of TVPA *infra at III(b)(1).*

13. *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility,* 111 YALE L.J. 443, 477-78 (2001) (discussing history of post-WWII cases).

14. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

under the ATCA for certain violations of international law.[15] Subsequent rulings, like *National Coalition Government of Union of Burma v. Unocal, Inc.*[16] in 1997 and *Wiwa v. Royal Dutch Petroleum Co.*[17] *in 2002, extended* the holding in *Kadic,* finding that corporations, like other private actors, may be liable under the ATCA for aiding and abetting in certain violations of international law. Subsequent rulings have expanded on *Unocal* and *Wiwa*, increasing the number of offenses actionable against private parties under the ATCA.[18] Other rulings have made clear that the number of actionable offenses under the ATCA is limited to violations universally condemned and readily definable.[19] Recent decisions have also held that corporations can be held liable under the TVPA as well as under the ATCA,[20] as after all, private corporations are also "persons" under the law and have no immunity as such under domestic or international law.[21] In total, a little more than two-dozen cases have been filed against U.S. and multinational corporations so far.[22] To date, no U.S. corporation has faced trial in an ATCA case.

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15. Kadic, 70 F.3d at 239.

16. Nat'l Coalition Gov't of the Union of Burma v. Unocal 176 F.R.D. 329, 348 (C.D. Cal. 1997) (noting that a private company utilizing slave labor may be subject to liability under the ATCA).

17. Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

18. *See, e.g.*, Estate of Rodriquez, 256 F. Supp. 2d at 1250 (holding that violation to right of association is actionable under the ATCA). In *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), Judge Allen G. Schwartz of the U.S. District Court in New York City rejected Talisman's argument that a corporation is "legally incapable of violating the law of nations." *Id.* at 308. The court added that, "given private individuals are liable for violations of international law in certain circumstances, there is no logical reason why corporations should not be held liable, at least in cases of *jus cogens* violations." *Id.*

19. *See* Beanal v. Freeport-McMoran, 197 F.3d 161 (5th Cir. 1999) (rejecting cultural genocide as an actionable claim under the ATCA); Flores v. Southern Peru Copper Corp., 253 F. Supp. 2d 510 (S.D.N.Y. 2002) (rejecting actions based on environmental harms even if pled as violations of the right to life).

20. *See, e.g.*, Sinaltrainal v. Coca Cola Co., 256 F. Supp. 2d 1345, 1359 (S.D.Fla. 2003) ("Bearing in mind that a corporation is generally viewed the same as a person in other areas of law, it is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so."); Estate of Rodriquez 256 F. Supp. 2d at 1263 (holding that the TVPA applies to corporations).

21. *See* Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 803 (2002).

22. There has been a recent increase in corporate ATCA lawsuits. For example, on April 24, 2003, a suit was filed against Occidental Petroleum and its security contractor, Airscan, Inc., for their role in the murder of innocent civilians in the hamlet of Santo Domingo, Colombia on December 13, 1998. Lisa Girion, *Occidental Sued in Human Rights Case*, L.A. TIMES, Apr. 25, 2003. On April 5, 2003, attorney Ed Fagan filed a 6.1 billion dollar lawsuit in New York and Nevada on behalf of former workers of the diamond companies Anglo American and De Beers, alleging that the former workers were wrongly fired for labor strikes, subjected to forced labor, and were attacked, imprisoned, and tortured during labor protests. Nicol Degli Innocenti, *Chemical Groups Face Legal Action from Apartheid Victims*, FIN. TIMES, Apr. 14, 2003, at 23.

II. OBJECTIONS TO THE ATCA

Corporate attacks on the ATCA have focused primarily on policy and economic considerations.[23] On the policy side, some say that corporate ATCA lawsuits improperly intrude upon foreign relations, which is an area exclusively reserved for the executive branch. On the economic side, some say that corporate ATCA cases discourage foreign investment, which negatively affects the interests of the U.S., the corporations, and the foreign countries where the corporations are doing business.

A. Policy Arguments Against the ATCA

One of the major arguments against the application of the ATCA in general, as well as in particular to multinational corporations, centers on the notion that courts are an improper forum to judge U.S. foreign policy.

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23. Judicial attacks on the ATCA, on the other hand, have focused more on Constitutional arguments. For example, in a recent concurring opinion in the D.C. Circuit in a case concerning detainees at Guantánamo Bay, Al Odah v. U.S., 321 F.3d 1134 (D.C. Cir. 2003), Judge Randolph suggests that the ATCA is an unconstitutional exercise of power. The argument is rooted in a separation of powers analysis and centers on whether Congress clearly expressed an intent to provide a cause of action for violations of the law of nations under Article III jurisdiction. *Id.* at 1147-48. Further, Judge Randolph questions whether the law of nations really is part of federal common law and suggests that the ATCA was meant to apply only to torts existing in 1789, like piracy. *Id.* Although such a radical interpretation of the ATCA is isolated and contradicts the vast ATCA jurisprudence that has been established in the past twenty-three years, some corporate defendants in ATCA cases have expressed an interest in adopting Judge Randolph's position in future cases. Nevertheless, all jurisdictions that have addressed these issues in a majority opinion have rejected Judge Randolph's apprehensions about the constitutionality of the ATCA, the incorporation of the law of nations into federal common law, as well as the jurisdictional nature of the act. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995) ("§1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . without recourse to other law as a source of the cause of action"); Hilao v. Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994) (joining the Second Circuit "in concluding that the [ATCA] creates a cause of action for violations of specific, universal and obligatory international human rights standards. . . ."); Kadic, 70 F.3d at 246 (rejecting Judge Bork's concurring opinion in *Tel-Oren* and holding that the ATCA provides a cause of action for "violations related to genocide, war crimes, and official torture"); Presbyterian Church of Sudan, 244 F. Supp. 2d at 289 (holding that "ATCA provides a cause of action in tort for breaches of international law"); Sarei v. Rio Tinto PLC., 221 F. Supp. 2d 1116, 1130-31 (C.D. Cal. 2002) (holding that "the ATCA both confers federal subject matter jurisdiction and creates an independent cause of action for violations of treaties or the law of nations"); John Doe I, 2002 WL 31063976 at *8 (stating that the ATCA also provides a cause of action, as long as "plaintiffs . . . allege a violation of 'specific, universal, and obligatory' international norms as part of [their] ATCA claim"); Estate of Cabello v. Fernandez-Larios, 157 F.Supp.2d 1345, 1358 (S.D. Fla. 2001) (holding the same as John Doe I); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1539 (N.D. Cal. 1987); Paul v. Avril, 812 F.Supp. 207, 212 (S.D. Fla. 1993) (holding that "[t]he plain language of the statute and the use of the words 'committed in violation' strongly implies that a well pled tort if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action]"); Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1993).

Although the lawsuits name corporations as the defendants, opponents to the act suggest that the factual setting in these cases necessarily involves passing judgment on the acts of foreign governments with whom the corporations have a relationship. In effect, therefore, courts presiding over corporate ATCA cases would be determining U.S. foreign policy.

Pati Waldmeir, a columnist for the London Financial Times, recently wrote an article criticizing ATCA judicial activism as "the naked arrogance of American power."[24] "Altering the behavior of foreign states" she says, "is the business of diplomats or soldiers but not of judges."[25] The executive branch, not the judicial branch, has been constitutionally given foreign affairs powers, and therefore judges have neither the authority nor the expertise to preside over such matters.

Thabo Mbeki, current President of South Africa, also criticizes the notion that U.S. courts can or should preside over claims that arise through actions in foreign countries. Speaking on the recently filed lawsuits for apartheid damages, discussed below, President Mbeki recently stated that "[it is] completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation."[26] In this sense, ATCA lawsuits are perceived to undermine not only the exclusive role of the executive branch in foreign affairs, but foreign sovereign immunity as well.

Further, opponents of the ATCA argue that such lawsuits also undermine U.S. interests in the "war on terrorism." Peter Nickles, defense lawyer for Southern Peru Copper Corporation in an ATCA case, argues that "[g]iven the current need to foster consensus regarding the fight against international terrorism, and the need of our Executive Branch to conduct foreign relations without interference from the judiciary, constant interference by U.S. courts with foreign affairs threatens to work as a powerfully counterproductive force."[27]

The State Department seems to agree, to some extent, with this argument. On July 29, 2002, per a request from the judge presiding over the *Exxon* case,[28] the State Department's Legal Advisor, Mr. William H. Taft IV, wrote a letter asserting that "adjudication of this lawsuit at this time would in

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24. Patti Waldmeir, *An Abuse of Power*, LONDON FIN. TIMES, Mar. 14, 2003, *available at* www.ft.com.

25. *Id.*

26. Emonitors, *For the Week Ending April 22, 2003*, *available at* http://www.worldmonitors.com/emonitors.html (last visited Nov. 6, 2003).

27. Peter J. Nickles et al., *Court Properly Limits Scope of Alien Tort Claims Act*, 18 LEGAL BACKGROUNDER 2 (2003), *available at* http://www.cov.com/publications/325.pdf (last visited Sept. 10, 2003).

28. *John Doe, I v. Exxon Mobil Corporation*, No. 01-1357 (LFO) (D.D.C.) (involving allegations of rape, torture, and kidnapping by Indonesian soldiers paid to protect an Exxon Mobil natural gas plant in the province of Aceh in Indonesia).

fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism," and added that adjudication of the lawsuit may diminish U.S. efforts to promote human rights in Indonesia.[29] Although the State Department's letter was addressing a particular case under particular circumstances, opponents of the ATCA say that the policy considerations outlined above are applicable to all ATCA cases, or at least those that involve multinational corporations as defendants.

Opponents of the ATCA also warn that the judiciary will be detrimentally affected by foreign plaintiffs who will fill the dockets with a "crippling wave" of ATCA lawsuits concerning personal injuries that have no connection to the United States.[30] Some opponents have even characterized the ATCA "movement" as having evolved into a "free-for-all in which foreign plaintiffs invoke the ATCA as an all-encompassing basis for jurisdiction in routine personal injury cases involving any conduct occurring abroad."[31] Michael Freedman, the writer for Forbes magazine who also wrote a recent article "warning" companies about the dangers of the ATCA, wrote earlier this year that "[e]verybody loves America. Especially foreign tort plaintiffs who are doing a little forum shopping."[32]

There is something to be said about this argument. The U.S. legal system does provide certain advantages and incentives for foreign plaintiffs who lack proper domestic and international judicial mechanisms to address their harms.[33] For example, unlike many other domestic courts, U.S. courts allow for civil remedies that include not only high damage awards, but also punitive damages.[34] Corporations have traditionally opposed high punitive

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29. Taft Letter, July 29, 2002, *available at* http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf [hereinafter Taft *Exxon* Letter].

30. Nickles et al., *supra* note 27.

31. *Id.*

32. Michael Freedman, *Ich bin ein Tort Lawyer*, FORBES, Jan. 6, 2003, *available at* http://www.forbes.com/global/2003/0106/017.html (last visited Sept. 20, 2003).

33. *See* Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 2 (2002) (arguing that "[g]iven the absence of effective international mechanisms, enforcement generally occurs within domestic legal systems."). *See also* Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 550 (2000) (arguing that international fora are often inadequate, especially to redress human rights violations by transnational corporations).

34. The following is a brief survey of some of the high damages awarded by U.S. courts in ATCA cases:

- Estate of Marcos, 978 F.2d at 493: $760 million in compensatory damages and 1.2 billion in punitive damages.
- Abebe-Jira, 72 F.3d at 844: $1.5 million
- Kadic, 70 F.3d at 232.: $4.5 billion
- Forti, 672 F Supp. at 1531: $80 million
- Paul, 812 F. Supp. at 207: $41 million
- Romagoza Arce v. Garcia, *NO. 99-8364 (S.D. Fla. 2002): $54.6 million*

damage awards. Foreign plaintiffs, on the other hand, see such punitive damages available in the United States as a possible deterrent for future human rights violators, while at the same time sending a message to current or previous abusers that they may be held accountable for their violations.[35] In addition to the high monetary awards, plaintiffs in U.S. courts do not have to worry about paying for the costs of litigation should they lose the case. The availability of contingent agreements between clients and lawyers also provides another incentive for foreign plaintiffs to use U.S. courts to redress their harms. Procedurally, the U.S. legal system also provides certain incentives. The broad discovery tools available in U.S. courts, for example, are often not available in some foreign countries. Critics of the ATCA say these advantages provide an incentive for frivolous claims by foreign plaintiffs.

Ultimately, opponents suggest that this abuse of the U.S. judicial system will result in enormous legal costs to corporations that engage in business activities abroad. Corporations say they should not have to defend themselves from lawsuits that have no real connection to the United States. According to the U.S. Chamber of Commerce, "U.S. national interests require that we not allow the continuing misapplication of this 18th century statute to 21st century problems by the latter day pirates of the plaintiffs' bar."[36]

B. Economic Arguments Against the ATCA

Probably the main catalyst for the recent increase in opposition to the ATCA has been a class action suit brought by apartheid victims against over 100 U.S. firms that engaged in business activities with the apartheid regime in South Africa. The plaintiffs claim that the apartheid regime could not have maintained apartheid for so long had it not been for the support of multinational corporations.[37] To many corporations, this is the type of frivolous lawsuit that epitomizes how the expansionist movement is abusing the ATCA.[38]

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35. *See* Michael Ratner, *Civil Remedies for Gross Human Rights Violations*, *at* http://www.pbs.org/wnet/justice/law_background_torture.html (last visited Sept. 20, 2003) (commenting on the effect, use and benefits of civil remedies in U.S. courts for gross human rights violations).

36. Press Release, John E. Howard, Vice-President of International Policy and Programs for the U.S. Chamber of Congress, U.S. Chamber of Commerce, *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. Chamber of Commerce Press Release (Oct., 2002), *available at* http://www.uschamber.com/press/opeds/0210howarditigation.htm (last visited Sept. 20, 2003).

37. Wambui Chege, *S. Africa Asks U.S. Court to Dismiss Apartheid Cases*, REUTERS, (July 29, 2003), *available at* http://www.forbes.com/newswire/2003/07/29/rtr1041980.html (last visited Nov. 6, 2003).

38. Similar suits have been filed recently. On March 28, 2003, for example, *Makhetha v. Credit Commercial De France* was filed in federal court in the Eastern District of New York, seeking to hold French and Swiss banks and other financial institutions responsible for allegedly aiding and abetting the apartheid regime in South Africa by providing the funds that enabled

John E. Howard, vice president of international policy and programs at the U.S. Chamber of Commerce, recently asked corporations the following:

> Did you know that, under current U.S. law, foreigners could sue your company in U.S. courts—if you simply did business, paid taxes and complied with the laws of a foreign country in which those foreigners allege that an atrocity occurred? Did you know that foreign nationals could sue your company if your products or resources were used in a U.S. military campaign against terrorists in those foreign nations? Did you know that your company could be sued if it was present in a country where that country's government had engaged in actions to put an end to riots, rebellion or other disorders, whether or not you played any role in the disorders or the government's response?[39]

In his article, John Howard warned that, under the ATCA, "all of this is possible."[40]

The danger, according to the U.S. Chamber of Commerce and other corporate groups, is not only that ATCA suits are an unacceptable extra-territorial extension of U.S. jurisdiction, but also that a U.S. company could be liable simply by virtue of the fact that it did business in, paid taxes to, and otherwise complied with the laws of the country in which the violations occurred. It does not matter if a company had nothing to do with the actual violations or any participants therein. This is one of the main battle-cries of ATCA opponents; namely, that a company that does business in certain countries with questionable human rights records may be liable under the ATCA "simply for having invested there."[41] Therefore, critics say, application of the ATCA to corporations investing abroad might discourage U.S. companies from investing abroad, and possibly discourage foreign companies from investing in the United States. For these reasons, opponents of the ATCA say that these lawsuits are frivolous, they discourage foreign investment, and they constitute an abuse of the judicial system by opportunistic plaintiffs.

III. OBJECTIONS TO IMPUNITY

Those who defend the ATCA say that civil lawsuits are one of the few ways to hold companies accountable for their role in violations of international

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South Africa to expand its police and security structures. *See* Business and Human Rights – A Resource Website, *at* http://208.55.16.210/Complicity.htm (last visited Nov. 7, 2003).

39. Howard, *supra* note 36.

40. *Id.*

41. Michael Freedman, *Supping With The Devil*, FORBES, April 28, 2003, *available at* http://www.forbes.com/global/2003/0428/034.html (last visited Nov. 6, 2003).

human rights norms. Without any effective alternative to ATCA civil litigation, corporations could literally get away with murder. Moreover, the goals of ATCA litigation, namely the protection and promotion of human rights, are goals shared both by the United States in its foreign policy, especially in the "war on terrorism," as well as by socially responsible corporations. ATCA advocates emphasize that corporations that respect the law of nations should not fear being hailed into U.S. courts under the ATCA. ATCA liability should be a concern only of those corporations whose conduct violates one of the very few actionable claims under ATCA. Even then, U.S. courts have put in place numerous and complex legal hurdles to prevent frivolous suits from surviving pre-trial motions.

A. No Effective Alternative to ATCA Litigation

Proponents of the ATCA attempt to focus the debate on the issue of accountability. Within this framework, human rights advocates suggest that there is no effective alternative to the ATCA. Voluntary initiatives of self-regulation, for example, are unenforceable and therefore ineffective in achieving the goal of accountability.

For example, in December 2000, after two years of negotiation under the auspices of the governments of the United States and United Kingdom, several leading human rights groups and extraction companies established the *Voluntary Principles on Security and Human Rights,* which provide guidelines for companies working in extractive industries in countries such as Indonesia for "maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."[42] Critics of these codes of conduct point out that because the codes are voluntary in nature, and lack any significant enforcement mechanism, they fail to force companies to truly address social concerns.

In the context of the anti-sweatshop campaign, for example, author S. Prakash Sethi says that companies "have been all too willing to make promises in the form of codes of conduct whenever they're forced to respond to public concern, but they have treated these promises as harmless paper exercises that they will not need to put into practice anytime soon—if ever."[43] ATCA advocates suggest that companies that have signed these voluntary codes of conduct or similar initiatives should not complain about being held accountable for

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42. Voluntary Principles on Security and Human Rights Fact Sheet, Feb. 20, 2001, DEP'T STATE FACT SHEET, *available at* http://www.state.gov/g/drl/rls/2931.htm (last visited Sept. 20, 2003).

43. Aaron Bernstein, *Nike: Free Speech or "False Promise"?*, BUS. WK. (Apr. 9, 2003); S. Prakash Sethi, *Setting Global Standard: Guidelines for Creating Codes of Conduct in Multinational Corporations* (2003) (book review), *available at* http://www.businessweek.com/bwdaily/dnflash/apr2003/nf2003049_6634_db021.htm (last visited Sept. 11, 2003).

their signed agreements to respect human rights.[44] According to ATCA proponents, the fact that companies are complaining about being held accountable "raises questions about the nature of their putative commitment to honor the principles of [such initiatives]."[45]

Furthermore, Sethi argues, these codes of conduct also diminish incentives for more strenuous government regulations. For example, Rio Tinto, a UK signee of the Voluntary Principles, has a dreadful environmental and human rights record in Indonesia. According to the environmental NGO Friends of the Earth, UK regulations are too lenient to have any real effect on the corporation's accountability for their overseas operations.[46] The UK has failed to strengthen its regulations on the mining industry in part because of the belief that such companies will regulate themselves through the observance of initiatives like the Voluntary Principles. Human rights advocates, on the other hand, say that without real enforcement mechanisms, and without stricter government regulations, the companies need only pay lip service to concerns about human rights violations. Therefore, in practical terms, the absence of any enforcement mechanism prevents voluntary codes of conduct from achieving the goal of corporate accountability with the same effectiveness as ATCA litigation.

The recent creation of the United Nation's *Draft Norms on the Responsibility of Transnational Corporations* has certainly been well-received by international non-governmental organizations as a step above and beyond the scope of the voluntary codes of conduct.[47] The draft Norms, and the accompanying Commentary, constitute a comprehensive checklist of international human rights principles and obligations which every transnational corporation should follow when doing business abroad.[48] The Norms, if fully adopted by the U.N. Human Rights Commission, will undoubtedly mark a step in the right direction towards corporate accountability for violations of international human rights norms. Nevertheless, the enforcement of such norms, or even their adoption by the full U.N. Human Rights Commission, is not guaranteed. The international business community, in the U.S. and abroad, concerned that the draft Norms marks a move away from voluntary principles, is already mounting yet another offensive in order to prevent the draft Norms from being

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44. Collingsworth, *supra* note 8.

45. *Id.*

46. *See Indonesia: Friends of the Earth Challenges Rio Tinto on Mining 'Impact'*, EMonitors (Apr. 23, 2003), *available at http://www.worldmonitors.com/emonitors.html* (last visited Nov. 6, 2003).

47. Lawyer's Committee for Human Rights' Press Statement, *Nongovernmental Organizations Welcome the New UN Norm on Transnational Business*, Aug. 13, 2003, *available at* http://www.lchm (last visited Nov. 6, 2003).

48. *See* Commentary for the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/38 (2003), *available at* http://www1.umn.edu/humanrts/links/CommentApril2003.html (last visited Nov. 6, 2003).

adopted.[49] If adopted, the Norms could possibly do for the accountability of multinational corporations what the United Nation's Declaration of Human Rights has done for the accountability of states. The Norms could serve as a guide for the relevant law that transnational corporations should follow. Yet, unless and until the Norms are adopted with strong enforcement mechanisms —whether at the national or international level—ATCA-type litigation will remain the best alternative for multinational corporate accountability.

Similarly, pressure by a corporation's shareholders is another important, yet less effective tool than the ATCA in achieving corporate accountability. For example, shareholders of Sears Canada have unsuccessfully put forward for the past three years a proposal to ensure that the company purchase merchandise manufactured solely from factories providing fair working conditions.[50] Unfortunately, only a small percent of shareholders vote in favor of this and other similar proposals.[51]

The alternatives to ATCA litigation, therefore, seem to fall short of the ultimate goal of accountability.[52] ATCA litigation seems like the best way, albeit not the only way, to hold corporations accountable for their acts abroad in violation of the law of nations. Neither codes of conduct, nor self-policing reports, nor shareholder pressure is as effective as the ATCA would potentially be in preventing and remedying corporate human rights violations, or in promoting socially responsible corporate practices.

B. The Goals of ATCA Litigation are Shared by the United States and Socially Responsible U.S. Corporations.

By signing voluntary codes of conduct or similar initiatives, corporations have made clear that, at least theoretically, they agree that corporate interests are not incompatible with human rights concerns. In fact, these voluntary initiatives cover a much broader range of rights than the few fundamental human rights covered under the ATCA. Thus, opponents of the ATCA are not arguing that corporations do not have to act socially responsible in their business activities abroad. Indeed, having an image of a socially responsible corporation is in their best interest. Rather, opponents of the ATCA challenge

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49. Jonathan Birchall, *Companies Face UN Scrutiny on Human Rights*, FIN. TIMES, Aug 13, 2003, *available at* http://www.lchr.org/workers_rights/wr_other/wr_ft_article.htm (last visited Nov. 6, 2003).

50. *See Canada: Sears Canada Shareholders seek anti-sweatshop policy,* Emonitors (Apr. 23, 2003), *available at http://www.worldmonitors.com/emonitors.html* (last visited Sept. 22, 2003).

51. *Id.*

52. Another alternative to civil litigation aimed at holding corporations accountable for their actions has been the lobbying efforts in favor of disclosure requirements for U.S. businesses operating abroad. *See International Right to Know Report: Empowering Communities Through Corporate Transparency, available at* http://www.irtk.org/irtkreport.pdf (last visited Sept. 22, 2003).

the judicial enforcement of their voluntary commitments. Among the many reasons for their opposition to ATCA litigation, opponents consider such litigation as an improper intrusion by the judicial branch in matters of foreign affairs.

i. The Legislative and Judicial branches favor adjudication of violations of the "law of nations" in U.S. courts.

Specifically, opponents question whether Congress really intended for claims of violations of fundamental human rights to be heard by federal courts through ATCA lawsuits. Proponents answer by saying that even if congressional intent in legislating the ATCA in 1789 is unclear,[53] Congress spoke on this issue in modern times when it passed the Torture Victim Protection Act in 1992 and sided with the human rights activists.

The TVPA provides aliens as well as U.S. citizens a cause of action in federal courts for claims of torture and extrajudicial killing.[54] The TVPA was expressly designed by Congress "[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."[55] In adopting the TVPA, Congress observed that "[the ATCA] should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."[56] By enacting the TVPA and expressly affirming the ATCA, Congress decided that adjudicating human rights lawsuits in U.S. courts is consistent with U.S. foreign policy and support for human rights worldwide.[57]

Thus, Congress is not as concerned as the opponents of the ATCA about the foreign policy implications of judicial decisions involving fundamental human rights abuses committed abroad. In a very basic sense, ATCA lawsuits implicate foreign relations in that foreign governments will not receive with open arms allegations of violations of fundamental human rights norms committed within their borders. Nevertheless, Congress has clearly expressed its intent that such suits should be heard by U.S. courts despite separation of

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53. In a pre-*Filártiga* decision, the Second Circuit noted that "although [the ATCA] has been with us since the first Judiciary Act . . . no one seems to know from whence it came." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

54. 28 U.S.C. § 1350 (note); Pub. L. No. 102-256, 106 U.S. Stat. 73 (1992).

55. *Id.* pmbl.

56. H.R. REP. NO. 102-367, at 4 (1991). *See also* S. REP. NO. 102-249, at 4-5 (1991).

57. Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105-06 (2d Cir. 2000) (finding that Congressional intent as expressed in the TVPA was to allow the types of human rights violation raised by plaintiffs to be heard in U.S. courts).

powers concerns.[58] The Supreme Court has agreed with this principle, although not in an ATCA context. In *Japan Whaling*, the Supreme Court stated that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this responsibility merely because our decision may have significant political overtones."[59] Therefore, despite possible foreign policy implications, Congress has clearly expressed its intent to provide an effective remedy in U.S. courts for human rights abuses. Any concerns about the propriety of opening up U.S. courts to aliens who seek to hold violators of fundamental human rights accountable should be raised with Congress, not with the judiciary.

ii. The protection and promotion of human rights has been an inextricable and vital element of the Executive branch's public foreign policy rhetoric.

The executive branch has also expressed in equally clear terms that the protection of human rights is a crucial component of U.S. foreign policy. Proponents of the ATCA therefore argue that these cases have little chance of disrupting foreign relations or trampling separation of powers concerns because the goals of ATCA litigation are entirely consistent with the Executive's own statements regarding human rights.

On numerous occasions throughout this nation's history, the executive branch has stated that human rights are not incompatible with U.S. foreign policy. For example, Section 502B of the Foreign Assistance Act of 1961, which was adopted in 1974, declares the joint view of the Congress and the President that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[60]

Similarly, former and current Presidents and Secretaries of State have all regarded accountability and human rights as a primary goal and mechanism of U.S. foreign policy. For example, the first President Bush, in a statement regarding the passing of the TVPA, noted his "strong and continuing commit-

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58. *See id.*

> [T]he present law, in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy *favoring* receptivity by our courts to such suits . . . [and] has . . . communicated a policy that such suits should not be facilely dismissed on the assumption that the ostensibly foreign controversy is not our business.

Id. (emphasis added). *See also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Powell, J., concurring) ("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine.").

59. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

60. 22 U.S.C. § 2304(a)(1) (1994).

ment to advancing respect for and protection of human rights throughout the world."[61] He added that "[t]he United States must continue its vigorous efforts to bring the practice of torture and other gross abuses of human rights to an end wherever they occur . . . [and that] we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere."[62] Similarly, Madeleine Albright commented in early 2000 that "[s]overeignty carries with it many rights, but killing and torturing innocent people are not among them."[63]

The State Department's website further reiterates the Administration's commitment to human rights in U.S. foreign policy, stating that "[b]ecause the promotion of human rights is an important national interest, the United States seeks to: [1] Hold governments accountable to their obligations under universal human rights norms and international human rights instruments; [2] Promote greater respect for human rights, including freedom from torture . . . ; [and 3] Promote the rule of law, seek accountability, and change cultures of impunity."[64] Secretary of State Colin Powell similarly assured the American people and the world that "President Bush, the Congress of the United States and the American people are united in the conviction that active support for human rights must be an integral part of American foreign policy."[65] More recently, Secretary Powell stated during the release of the State Department's 2002 *Country Reports on Human Rights Practices* that "[i]n a world marching toward democracy and respect for human rights, the United States is a leader, a partner and a contributor. We have taken this responsibility with a deep and abiding belief that human rights are universal [and] their protection worldwide serves a core U.S. national interest."[66] He added that "[s]preading democratic values and respect for human rights around the world is one of the primary ways we have of advancing the national security interests of the United States."[67]

Furthermore, the executive branch has already criticized the human rights records of some of the specific countries involved in corporate ATCA

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61. Statement on Signing the Torture Victim Protection Act of 1991, March 12, 1992, *cited in* DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS, LAW, POLICY, AND PROCESS 544 (3d ed. 2001).

62. *Id.*

63. Madeleine Albright, Press Briefing on the Release of Country Reports on Human Rights Practices, 1999 (Feb. 25, 2000), *quoted in* WEISSBRODT, supra note 61, at 545.

64. United States Department of State, *Human Rights*, *at* http://www.state.gov/g/drl/hr/ (last visited Nov. 6, 2003).

65. Colin L. Powell & Lorne W. Craner, *Release of the Country Reports on Human Rights Practices for 2001*, Remarks to the Press March 4, 2002, *at* http://www.state.gov/secretary/rm/2002/8635pf.htm (last visited Sept. 11, 2003).

66. Colin L. Powell, *Preface to 2002 Country Reports on Human Rights Practices*, *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18132.htm (last visited Sept. 11, 2003).

67. *Introduction: 2002 Country Reports on Human Rights Practices*, Department of State Bureau of Democracy, Human Rights, and Labor, Mar. 31, 2002, *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18134.htm (last visited Sept. 11, 2003).

cases, thus minimizing the separation of powers considerations. Burma and Colombia are two examples of such countries. In the 2002 *Country Reports on Human Rights Practices*, the State Department characterizes the Burmese military regime's human rights record as "extremely poor."[68] Regarding Colombia, the Report mentions that "labor leaders nationwide continue[d] to be attacked by paramilitaries, guerrillas, and narcotics traffickers."[69] Thus, judicial decisions highlighting these abuses would not undermine the executive branch's role in foreign affairs, but would instead reinforce the importance of the protection of human rights as stated in official U.S. foreign policy public statements. Judicial determination of fundamental human rights in ATCA cases is thus absolutely compatible with President Bush's "[pledge] to support all individuals who seek to secure their unalienable rights [and] . . . those who fight for fundamental freedoms . . . ."[70]

Despite all these statements in support of accountability for human rights violations abroad, opponents of the ATCA have been somewhat successful in obtaining letters of interest from the State Department supporting the position that judicial determination of at least some corporate ATCA cases would undermine the administration's efforts on the war on terrorism as well as negatively impact U.S. foreign relations with some countries. This was precisely the argument the State Department made in the *Exxon* case. On May 10, 2002, pursuant to a petition by the Exxon-Mobil Corporation, U.S. District Court Judge Louis F. Oberdorfer, the presiding judge in the case, sent a letter to the State Department requesting "out of an abundance of caution, in the tense times in which we are living . . . whether the Department of State has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States."[71] The Taft Letter, as the State Department's letter of interest is known, asserts that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism," and that adjudication of the lawsuit "may also diminish [the] ability [of the United States] to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia."[72] In a recent New York Times article, Arlen Specter, a Republican member of

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68. *2002 Country Reports on Human Rights Practices, Burma,* Bureau of Democracy, Human Rights, and Labor, Mar. 31, 2002, *available at* http:// www.state.gov/g/drl/rls/hrrpt/2002/18237.htm (last visited Sept. 11, 2003).

69. *2002 Country Reports on Human Rights Practices, Colombia*, Bureau of Democracy, Human Rights, and Labor, *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18325.htm (last visited Sept. 11, 2003).

70. George W. Bush, Human Rights Day, Bill of Rights Day, and Human Rights Week, 2002, *A Proclamation by The President of the United States of America* (Dec. 9, 2002), *available at* http://www.state.gov/g/drl/rls/rm/15808pf.htm (last visited Sept. 11, 2003).

71. Judge Oberdofer Letter, May 10, 2002 (on file with author).

72. Taft *Exxon* Letter, *supra* note 29.

the Senate Judiciary Committee, stated that Congress and President George H.W. Bush had already considered this argument in 1992—when the Torture Victim Protection Act became law—and rejected it.[73]

Unfortunately, proponents of the ATCA say the *Exxon* letter is not an isolated case. Rather, it is an example of the administration's contradiction between U.S. human rights foreign policy and the implementation of that policy. In the *Unocal* case, the State Department saw no conflict between adjudicating claims over human rights abuses by the Burmese military and U.S. foreign relations with that country.[74] Upon an invitation by District Judge Richard Paez of the Central District of California, Michael Matheson (State Department acting legal advisor) stated in a letter dated July 8, 1997 that "the Department can state that at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma."[75] Concluding that there is simply no public interest in the perpetration of human rights, the court forcefully dismissed this defense. But that letter was written in 1997. In 2001, the State Department, through another Taft Letter, said that pursuit of a lawsuit for similar human rights violations against Rio Tinto, the world's largest mining company, headquartered in Papua New Guinea, would harm American interests.[76] The case was subsequently dismissed.

Proponents of the ATCA suggest that such letters of interest contradict other policy statements made by all three branches of government as well as statements of support made by the State Department and the Department of Justice in previous non-corporate ATCA cases. For example, when *Filartiga* was decided in 1981, the State Department actively supported the idea of using the ATCA to hold foreign officials liable for certain human rights violations. In *Filartiga*, the State Department and the Department of Justice filed an amicus in support of using U.S. courts to redress torture violations by foreign officials, regardless of sovereign immunity and foreign policy considerations.[77] "Like many other areas affecting international relations," the amicus argued, "the protection of fundamental human rights is not committed exclusively to the political branches of government."[78] The amicus continued, stating that when an alien alleges a violation of a human right which has been widely shared to be protected among the world's nations, "there is little danger that

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73. Arlen Spectar, *The Corut of Last Resort*, N.Y. TIMES, Aug. 7, 2003, *available at* http://www.nytimes.com/2003/08/07/opinion/07SPEC.html (last visited Nov. 6, 2003).

74. Matheson *Unocal* Letter, July 8, 1997 (on file with author).

75. *Id.*

76. Taft *Rio Tinto* Letter, Oct. 31, 2001, *available at* http://www.state.gov/documents/organization/16529.pdf.

77. Brief of Amici Curiae U.S. Department of Justice, Filartiga, 630 F.2d 876.

78. United States: Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala (Torture; Human Rights Obligations; Judicially Enforceable Remedies) 19 I.L.M. 585, 603 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, at 423, 430 (1964)).

judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."[79]

The State Department's position in *Exxon* could not be any more different. When the letter became known, human rights organizations, members of Congress, as well as the media, immediately reacted. Fifty members of Congress sent a letter to Secretary of State Colin Powell expressing concern over the Taft *Exxon* Letter.[80] The following are some examples of reactions from the media and human rights NGOs:

- **New York Times Editorial:** "The Bush administration, promiscuously invoking the war against terrorism, is using its influence inappropriately to assist an American oil company that has been sued for misconduct overseas. The intervention reinforces the impression that the administration is too cozy with the oil industry." The editorial added, "the administration's statement was an invitation to more abuse, a sign that human rights could become a needless casualty of the antiterror campaign."[81]

- **Wall Street Journal**: In an article titled *White House Sets New Hurdles for Suits Over Rights Abuses*, the WSJ pointed out that "[a]mong oil and gas companies, Exxon Mobil was the second-largest campaign donor in the 2000 election cycle -- after Enron Corp. -- with 89% of its contributions going to Republicans, according to the Center for Responsive Politics in Washington."[82]

- **Human Rights Watch**: "It is the height of hypocrisy for the State Department to publicly promote human rights principles for the oil and gas industry and then tell a judge that scrutiny of an oil company's human rights record runs counter to foreign policy."[83]

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79. *Id.* at 604.

80. Taft *Exxon* Letter, *supra* note 29.

81. *Oily Diplomacy*, N.Y. TIMES, Aug. 19, 2002, at A14, *available at http://www.globalpolicy.org/security/natres/oil/indonesia/2002/1028diplomacy.htm* (*last visited* Sept. 11, 2003).

82. Peter Waldman & Timothy Mapes, *White House Sets New Hurdles For Suits Over Rights Abuses*, WALL ST. J., Aug. 7, 2002.

83. Press Release, Common Dreams Progressive Newswire, *U.S./Indonesia: Bush Backtracks on Corporate Responsibility* (Aug. 7, 2002) (quoting Kenneth Roth, Executive Director of Human Rights Watch), *available at* http://www.commondreams.org/news2002/0807-04.htm (last visited Sept. 11, 2003).

- **Lawyers Committee for Human Rights**: "Intervention by the State Department in this private litigation would send the message that the United States supports the climate of impunity for human rights abuses in Indonesia, and does not support efforts by American extractive companies to develop and implement policies that promote and protect human rights."[84]

Renowned legal scholars were also outraged by the Taft-Exxon Letter. For example, Harold Koh, Professor of international law at Yale who also served as Assistant Secretary of State for Democracy, Human Rights, and Labor in the State Department from 1998 to 2001, filed an affidavit in support of the plaintiffs' position and criticized the Taft Letter. In his affidavit, Professor Koh argues that

> it has never been United States policy that honest governmental accounting of Indonesian human rights practices—whether by Congress, the courts or the executive branch—should be relaxed because of the need to conduct cooperative counterterrorism initiatives or because the foreign officials might understand that honest accounting as 'perceived disrespect for its sovereign interests.[85]

Proponents of the ATCA, therefore, urge courts to dismiss such letters of interest as irrelevant to the status of what constitutes a violation of the law of nations. Contrary to assertions by business interests, adjudication of these cases ultimately serves a core interest of the United States in ensuring that U.S. corporate entities comply with international human rights obligations in their conduct abroad.

c. Investment Abroad Alone Does Not Rise to a Violation of "the Law of Nations"

Foreign policy and separation of powers considerations aside, opponents argue that corporations should not be liable in U.S. courts for having investments or for conducting business in countries with shady human rights records. The response by ATCA advocates is simply that investment alone is not enough to establish ATCA liability. The standard for liability is much higher, and courts are well-equipped to dismiss improper cases. The fact that courts have dismissed several corporate ATCA cases for failure to allege an

84. Letter to Mr. Taft from Michael Posner, Executive Director of LCHR, *available at* http://www.lchr.org/workers_rights/wr_indonesia/Ltr_Taft_Exxon070102.pdf (last visited Sept. 11, 2003).

85. Koh Aff. submitted in *Exxon* case ¶ 17 (quoting Taft *Exxon* Letter, *supra* note 29).

actionable claim under the ATCA evidences the capacity of federal judges to dismiss cases that fail to meet the very high standards of ATCA liability.[86]

To date, because of the narrow scope of claims actionable under the ATCA against private parties and because the standard for ATCA liability is so high, no plaintiff has successfully obtained a judgment against a U.S. corporation under the ATCA for actions committed abroad. In essence, the success of claims under the ATCA against a corporation depends on 1) whether the offense is universally condemned and well-defined; 2) whether the offense requires the plaintiff to establish state action; and 3) whether the corporation as a private actor can be held liable for the acts of the state or other parties under theories of third party liability.[87] If these requirements are met, corporate ATCA cases should move forward. After all, as Professor Koh recently stated, "If we're going to try these [multinational corporations] for violating a nickel-and-dime contract . . . why can't you sue them for genocide?"[88]

i. Offense must be universally condemned and readily defined.

The first hurdle in establishing the liability of corporations under the ATCA is alleging a violation of the "law of nations"; that is, a violation that is universally condemned and well-defined.[89] The ATCA does not provide a cause of action for any and all violations of international law. In fact, the list of actionable offenses under the ATCA is very limited. U.S. courts have held the following torts to be in violation of the law of nations within the meaning of the ATCA: summary execution,[90] torture,[91] causing disappearance,[92]

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86. *See* Bruno, *supra* note, at 3. (arguing that "courts have had no trouble dismissing ATCA cases against corporations, and they are exceedingly difficult to bring.").

87. *See* Kadic, 70 F.3d at 232 (holding that non-state actors may be liable for certain violations of international law).

88. Adam Liptak, *U.S. Courts' Role in Foreign Feuds Comes Under Fire*, N.Y. TIMES, Aug. 3, 2003, *available at* http://www.nytimes.com/2003/08/03/politics/03LEGA.html?hp (last visited Nov. 6, 2003).

89. *See, e.g.*, Filartiga, 630 F.2d at 876.

90. *See, e.g.*, Kadic, 70 F.3d at 232; Forti, 672 F. Supp. at 1531, *aff'd on reh'g*, 694 F. Supp. 707 (N.D. Cal. 1988); Xuncax, 886 F. Supp. at 162; Estate of Cabello, 157 F. Supp. 2d at 1345; In re Estate of Marcos, 978 F.2d at 493.

91. *See, e.g.*, Filartiga, 630 F.2d at 876; Kadic, 70 F.3d at 232; Xuncax, 886 F. Supp. at 162; Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D. N.Y. 2002); In re Estate of Marcos, 978 F.2d at 493; Forti, 672 F. Supp. at 1531; Unocal, 176 F.R.D. at 329, *aff'd by*, John Doe I v. Unocal Corp., 2002 WL 31063976 (9th Cir. 2002), *reh'g granted*, No. CV 96-06959-R5WL, 2003 WL 359787 (9th Cir. 2003); Abebe-Jira, 72 F.3d at 844.

92. *See, e.g.*, Forti, 672 F. Supp. at 1531 (holding that the universally recognized tort of "disappearance" has two essential elements: (1) abduction by a state official or by persons acting under state approval or authority; and (2) refusal by the state to acknowledge the abduction and detention). *See also* Xuncax, 886 F. Supp. at 162.

arbitrary detention,[93] cruel, inhuman, or degrading treatment,[94] kidnapping,[95] slavery,[96] war crimes,[97] forced labor,[98] rape,[99] denial of right of association,[100] and genocide.[101]

Although the number of actionable claims under the ATCA has increased since *Filartiga* was first decided, there are safeguards to prevent the ATCA from providing a cause of action for garden-variety personal injury claims. The limiting principles set forth in *Filartiga,* namely that the violation must be universally condemned and readily definable, have allowed judges to dismiss claims that failed to meet this high standard.[102] For example, in *Flores*[103] the court concluded that the "plaintiffs [had] not demonstrated that high levels of environmental pollution, causing harm to human life, health, and sustainable development within a nation's borders, violate any well-established rules of customary international law," because there existed no "general consensus among nations" that environmental pollution that causes harm to human health is "universally unacceptable."[104] Although causes of action involving environmental harms may one day be actionable under the ATCA, courts will only permit this if the twin principles of *Filartiga* are met. Thus, corporations should not be worried about their liability under the ATCA unless they engage in one of the limited, yet expanding, types of torts currently recognized as a violation of the "law of nations."

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93. *See, e.g.,* Forti, 672 F. Supp. at 1531; Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997); Xuncax, 886 F. Supp. at 162.

94. Unless the harm rises to the level of torture or other universally recognized violation of the law of nations, cruel, inhuman, or degrading treatment may not by itself be treated as a violation of the law of nations. There is little guidance as to what exactly constitutes cruel, inhuman, or degrading treatment, so the violation is not easily definable. The *Xuncax* court, decided after the ratification of the Convention Against Torture, defined cruel, inhuman, or degrading treatment as an actionable violation under the ATCA but only as defined by the standards applied in the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, rather than as defined by international law. *See* Xuncax, 886 F. Supp. at 186. *See also,* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Forti, 672 F Supp. 1531 (determining that cruel, inhuman, and degrading treatment was not definable and did not have universal consensus).

95. *See, e.g.,* Jaffe v. Boyles, 616 F. Supp. 1371 (W.D. N.Y. 1985); Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975) (stating that the illegal seizure, removal, and detention of an alien against his will in a foreign country may be in violation of the law of nations).

96. *See, e.g.,* Iwanowa, 67 F. Supp. 2d at 424; *Unocal Corp.*, 2002 WL 31063976 (recognizing forced labor as a modern form of slavery).

97. Kadic, 70 F.3d at 232.

98. John Doe I v. Unocal Corp., No. 00-56603, 2002 WL 31063976 (9th Cir. Dec. 3, 2000).

99. *Id.*

100. Estate of Rodriquez, 256 F. Supp. 2d at 1250.

101. Kadic, 70 F.3d at 241-42.

102. Filartiga, 630 F.2d at 876.

103. Flores, 253 F. Supp. 2d at 510.

104. *Id.* at 519. *See also* Nickles et al., *supra* note 27, at 8.

ii. Some claims have a state action requirement

Even if universally condemned and definable, some offenses may still not be actionable under the ATCA unless the plaintiff can provide evidence to satisfy the state action requirement. Although the only subjects of international law have traditionally been states, the *Karadzic* court held that private parties could also be held liable under the ATCA for certain violations of international law.[105] Currently, only the following four violations of the law of nations are actionable against private parties under the ATCA without a showing of state action: 1) genocide,[106] 2) war crimes,[107] 3) forced labor or slavery,[108] and 4) crimes against humanity.[109] Other violations, such as torture, rape, summary execution, political persecution, causing disappearance, systematic racial discrimination, and arbitrary detention, can also be actionable under the ATCA without a showing of state action, but only when such actions are perpetrated in the context of either genocide, war crimes, forced labor or slavery, and maybe crimes against humanity.[110]

If a plaintiff alleges a violation that is universally condemned and definable, and the allegation requires a showing of state action, the judge must then decide whether the plaintiff has presented sufficient evidence to satisfy this requirement. In order to do so, a judge can look at the jurisprudence of civil rights actions under 28 U.S.C. § 1983.[111] In *Kadic*, for example, the court looked to the definition of what constitutes an act "under color of state law" as defined by section 1983 to determine whether the state action requirement was satisfied. Although courts have used various tests under section 1983 jurisprudence to determine this issue,[112] the tests that have been the most

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105. Kadic, 70 F.3d at 239.

106. *Id.* at 232. *See also* Beanal, 969 F. Supp. at 370.

107. Kadic, 70 F.3d at 232.

108. John Doe I v. Unocal Corp., No. 00-56603, 2002 WL 3106976 (9th Cir. Sept. 18 2002).

109. Kadic, 70 F.3d at 232. *See also* Wiwa, 226 F.3d at 92.

110. The analysis in *Kadic* regarding the state action requirement for claims of crimes against humanity is unclear. In *Wiwa*, the Southern District of NY discussed when state action would be necessary for claims of crimes against humanity, and found that *Kadic* did not foreclose the possibility that other violations, when committed within the context of crimes against humanity, do not require state action. Wiwa, 226 F.3d at 88. Further, according to the Rome Statute of the International Criminal Court, certain violations could constitute crimes against humanity, thus eliminating the state action requirement, if committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute of the International Criminal Court, Art. 7, § 1, *available at* http://www.un.org/law/icc/statute/romefra.htm (last visited Sept. 26, 2003).

111. Kadic, 70 F.3d at 243 ("'Color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.").

112. The United States Supreme Court has described four alternative tests for establishing the state action requirement: (1) the public function test; (2) the symbiotic relationship test; (3) the nexus test; and (4) the joint action test. *See, e.g.*, Dennis v. Sparks, 449 U.S. 24, 27 (1980) (applying joint action test); Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (applying

relevant to corporate ATCA cases are the joint action test and the symbiotic relationship test.[113] Under the joint action test, a plaintiff must show that a state actor was a willful participant acting jointly or in concert with the actors of the particular deprivation of rights. Applying this test, the *Wiwa* court noted that "where there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights, state action is present."[114] Under this test, state acquiescence or approval of the deprivation of rights is probably not enough to establish the state actor requirement. The state actor must have participated, influenced or played an integral part in the conduct.

Therefore, in order for a plaintiff to sue a corporation for torture under the ATCA, the plaintiff first needs to demonstrate that torture is a universally condemned violation that is easily definable. Furthermore, if the alleged torture occurred outside the context of genocide, war crimes, forced labor or slavery, or crimes against humanity, then the plaintiff would have to demonstrate that a state actor played an integral part in the alleged torture. Both of these safeguards minimize concerns about frivolous lawsuits making it to trial.

iii. Plaintiffs must show evidence sufficient to satisfy standards of third-party liability.

Once the plaintiff has satisfied the state action requirement by showing the necessary link between the state and the particular violation, the plaintiff must then show the necessary link between the corporation and the state or third party in connection with the alleged violation.[115] Although *Unocal* is not the first time a court has addressed the issue of third-party liability in ATCA

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public function and nexus tests); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (applying symbiotic relationship test).

113. *See* Presbyterian Church of Sudan, 244 F. Supp. 2d at 289 (application of joint action test). *See also* Estate of Rodriquez, 256 F. Supp. 2d at 1250; Sinaltrainal, 256 F. Supp. 2d at 1345 (application of symbiotic relationship test). See Beanal, 969 F. Supp. at 370, for discussion of the various tests.

114. Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887 at *13 (S.D.N.Y. Feb. 28, 2002) (quoting John Doe I, 963 F. Supp. at 891).

115. It is important to distinguish the difference between the analysis for state action requirement and the analysis for establishing the legal culpability or responsibility of the corporation being sued. Both analyses are similar, but third party liability analysis is not the same as state action analysis. The tests described under section 1983 jurisprudence might be relevant to establish third-party liability in ATCA cases, but the liability of third-parties is subject to a separate standard. *Beanal*, for example, addresses the state action analysis, but not the third-party liability analysis. That is, a plaintiff may be able to prove that a state actor played an integral part in the alleged violation, but that does not necessarily mean that the plaintiff has proven that a third-party, in these cases corporations, should be held liable for that act.

cases,[116] and even though the decision has been vacated and the case is being reviewed en banc by the Ninth Circuit, the latest *Unocal* decision probably has the best discussion of third-party liability in a corporate ATCA case thus far.

The court in *Unocal* looked at international criminal law jurisprudence in order to determine the standard required to establish third-party liability in ATCA cases. Specifically, the court looked to the aiding and abetting standard described in decisions of the international criminal tribunals of Rwanda and Yugoslavia.[117] Under this standard, a third-party can be liable for the acts of others when the third-party knowingly provides practical encouragement or assistance that has a substantial effect on the perpetration of the offense.[118]

This standard has created some controversy and confusion about the size of the net this standard casts. Although the *actus reus* described by the international tribunals includes actions of "moral support," [119] the majority in *Unocal* decided to take this language out of their decision. As for the *mens rea* element in the international standard, which was also adopted by the majority, it is sufficient that the accomplice, in this case the corporation, know or reasonably should know that its actions would assist the perpetrator in the commission of the crime. Opponents to the ATCA suggest that a standard of liability based on whether a company knowingly provided moral support to a regime is just too broad. In the concurring opinion in *Unocal*, Judge Reinhardt agreed to a certain extent with this analysis. Judge Reinhardt rejected the majority's application of international criminal law standards of third-party liability and urged application of federal common law principles, such as agency, joint venture, and recklessness liability, instead.[120]

In response to Judge Renhardt's concerns, the majority opinion suggested that "the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the choice between international and domestic law even less crucial."[121] Similarly, the majority attempted to minimize the distinction between presumably broader international criminal law standards and presumably narrower

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116. District courts in the Eleventh Circuit have also relied on decisions by the International Criminal Tribunal for the former Yugoslavia and Rwanda to determine the standard to be used in determining third party liability for tort claims under the ATCA. *See, e.g.*, Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1356 (N.D.Ga. 2002); Cabello Barrueto v. Fernandez Larios, 205 F. Supp. 2d 1325 (S.D.Fla 2002).

117. *See, e.g.*, Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Trial Chamber II, Dec. 19, 1998), *reprinted in* 38 I.L.M. (1999); Prosecutor v. Tadic (Case No. ICTY-94-1), Opinion and Judgment, May 7, 1997, at ¶¶ 691-92; Prosecutor v. Delalic (Case No. IT-96-21-T), Judgment, Nov. 16, 1998, at ¶ 326.

118. John Doe I v. Unocal Corp., No. 00-56603, 2002 WL 31063976 at *9-10 (9th Cir. Dec. 3, 2002).

119. Prosecutor v. Furundzija, Case No. IT-95-17/1 at ¶ 235.

120. Unocal Corp., 2002 WL 31063976, at *26-35 (Reinhardt, J., concurring). *See also* Note, 116 HARV. L.REV. 1525 (2003) (supporting Judge Reinhardt's position).

121. Unocal Corp., 2002 WL 31063976 at *11 n.23.

domestic standards of third party liability by suggesting that "there may be no difference between encouragement and moral support"[122]

The majority may be right. The comment to Section 876 of the Restatement (Second) of Torts states that "encouragement to act operates as a moral support." Therefore, the choice of law in this particular area may ultimately be irrelevant. The type of evidence plaintiffs would have to show under either a domestic or an international standard would presumably be practically the same. Further, if the moral support standard is shown to be a well-established principle of customary international law, then it is likely that Judge Reinhardt might accept it as being part of federal common law.[123] And even if the international moral support standard is simply a statement by a few judges in two international tribunals and therefore fails to reach the level of a customary norm of international law necessary for the incorporation of the standard into federal common law, existing U.S. standards for third-party liability seem to be equally broad.[124]

Although the precise standard for third-party liability in corporate ATCA cases remains unclear, it is sufficient to say that 1) under theories of third-party liability corporations can be held liable in ATCA cases for harms caused by others, and that 2) despite repeated suggestion to the contrary by the business community, investing alone in a foreign country would not satisfy any of the proposed standards for third-party liability. At the very least, according to a Senate report on the TVPA, a third-party must have "ordered, abetted, or assisted" in the violation in order to be held liable.[125] If a plaintiff can show sufficient evidence that a corporation aided and abetted in the violation, then the corporation may be held liable under a theory of third-party liability to be clarified in future cases.[126]

Therefore, opponents of the ATCA like Daniel O'Flaherty, vice president of the National Foreign Trade Council, are right when they say that "[t]he issue is vicarious liability."[127] What is not supported in ATCA jurisprudence is the assumption that the standard for liability is broad enough to

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122. Unocal Corp., 2002 WL 31063976 at *13 n.28 (citing RESTATEMENT (SECOND) OF TORTS § 876 (1979)).

123. *Unocal Corp.*, 2002 WL 31063976, at *29 n. 8, (Reinhardt, J., concurring) (citing *Filartiga*). Judge Reinhardt states that "all international legal principles do not automatically become a part of the federal common law; only those that achieve the status of customary international law or are included in international treaties are incorporated as part of federal common law." *Id.*

124. *Unocal Corp.*, 2002 WL 31063976, at *30-35 (Reinhardt, J., concurring) (analyzing the scope of liability under federal common law standards).

125. *See* Mehinovic, 198 F. Supp. 2d at 1355 (citing S.Rep. No. 249-102, at 8-9 and n. 16).

126. The District Court for the Southern District of New York has also recently tackled this issue. *See* Presbyterian Church of Sudan, 244 F. Supp. 2d at 289 (holding that courts should look at international law standards of third-party liability to determine whether a corporation can conspire to commit, or aid and abet the commission of certain violations of the law of nations, such as genocide or war crimes).

127. Carter, *supra* note 5.

potentially hold liable corporations who are simply present in, pay taxes to, or invest in countries with questionable human rights records. Thus, the concern about "the proliferation of lawsuits against U.S. companies for behavior over which they have no control," seems unreasonably exaggerated and unsupported by precedent.[128] In fact, no court has ever held that a multinational corporation can be liable under the ATCA for simply doing business overseas. Presence or investment alone, without knowingly assisting or encouraging in the alleged violation, or without some other complicity in the violation, does not open up multinationals to ATCA liability.

d. Money Is Not the Goal of ATCA Litigation

Proponents of the ATCA also challenge the accusations that the ATCA is a tool used by trial attorneys who are pursuing frivolous claims against big multinational companies in order to cash-in large damages awards or settlements in favor of sympathetic victims. The National Foreign Trade Council has called plaintiffs' attorneys in ATCA cases "a new breed of lawyers, unconcerned about the rights of victims and more interested in gouging giant settlements out of U.S. companies with deep pockets."[129]

This Machiavellian perspective may or may not be shared by some trial attorneys, but as a broad generalization, such accusations do not represent an accurate depiction of ATCA plaintiffs' attorneys. For the most part, attorneys representing plaintiffs in ATCA litigation work on a pro-bono basis or for non-profit NGOs. Although some ATCA cases have resulted in rather large judgments, most of them have never been executed, and no U.S. corporation has had to pay any judgments in an ATCA case thus far. All the same, most ATCA advocates would say that money is not the goal of ATCA litigation. Nevertheless, monetary compensation would undoubtedly provide some form of relief for the plaintiffs. Similarly, plaintiffs in ATCA litigation are not suing corporations because they have "deep pockets." They are suing these corporations because their basic human rights have been violated.[130] For these victims, and for the lawyers that represent them, the real issue is accountability, not money.

CONCLUSION

Rather than attack a law that is sometimes the only remedy available for many victims of gross human rights violations, corporations should take a better look at their own conduct abroad and they should stop being economical with the truth in their statements about the ATCA. Proponents of the ATCA

128. *Id.*

129. *Id.*

130. Sometimes ATCA plaintiffs must even hide their identity and file their complaints under Jane or John Doe for fear of repercussions in their home countries.

should nevertheless engage in a constructive dialogue with the business community and emphasize that 1) the goals of these ATCA cases are consonant with corporate and U.S. interests in foreign relations, including the support for accountability and human rights as an integral part of the war against terrorism; 2) unless corporations agree on more effective means of accountability for their violations of the law of nations, the ATCA or the TVPA will be the only viable alternatives to redress their victims; and that 3) the judicial branch is very capable of, and has been given the authority by Congress to, adjudicate human rights cases involving foreign policy considerations, including dismissing cases that fail to meet the requirements of the ATCA or the TVPA. U.S. courts have done a remarkable job in dismissing ATCA lawsuits where plaintiffs fail to satisfy the multiple high standards necessary to establish ATCA liability. Corporations should feel confident that frivolous claims against them, or actions involving claims not actionable under the ATCA, will continue to be dismissed at the pre-trial stage. By the same token, the victims should also have their day in court if their cases are legitimate.

THE INTERNATIONAL CRIMINAL COURT: BETTER THAN NUREMBERG?

Tonya J. Boller*

I. INTRODUCTION

> *If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would be unwilling to have invoked against us.*—Justice Robert Jackson, Chief U.S. Prosecutor at Nuremberg.[1]

Justice Jackson's promise seems empty during the first days of the now permanent International Criminal Court (ICC).[2] The United States, while participating in prosecuting other countries for atrocities listed as crimes in the Rome Statute,[3] is reluctant to accept the ICC as a valid extension of law over Americans.[4] However, fifty-six years ago, the United States was instrumental in establishing the International Military Tribunal to prosecute war criminals in Nuremberg.[5] Nuremberg was "the first trial in history for crimes against the peace of the world."[6] Following the Nuremberg trials, the United Nations General Assembly[7] began discussions in an effort to establish a permanent

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1. WAR CRIMES AND THE AMERICAN CONSCIENCE 1 (Erwin Knoll & Judith Nies McFadden eds., 1970).

2. *See* Edith M. Lederer, *Int'l Criminal Court Gets Started*, ASSOCIATED PRESS, Sept. 3, 2002. The "world's first permanent war crime tribunal" held its first meeting on September 3, 2002. *Id.*

3. The Rome Statute is the statute governing the International Criminal Court. *See* Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 37 I.L.M. 999, art. 6 (1998) (entered into force July 1, 2002), *available at* http://www.un.org/law/icc/statute/99_corr/cstatute.htm (last visited Oct. 27, 2003) [hereinafter Rome Statute of the ICC].

4. *See infra* Part One II.

5. *See* SHELDON GLUECK, THE NUREMBERG TRIAL AND AGGRESSIVE WAR xi (1946).

6. Robert H. Jackson, J., Opening Speech of the Chief Prosecutor for the United States of America (Nov. 21, 1945), *in* TRIAL OF GERMAN MAJOR WAR CRIMINALS 3, 3 (William S. Hein & Co., Inc. 2001) (1946).

7. The United Nations General Assembly includes delegations from member States of the United Nations who meet to "examin[e] [] international issues." *See* United Nations General Assembly, 57th Sess., *available at* http://www.un.org/ga/57/info.htm (last visited Oct. 27, 2003).

international criminal court to deal with such atrocities in an international forum.[8] Many years and many more atrocities later, the International Criminal Court is the culmination of those efforts.[9]

This Note will review the legal problems with the Nuremberg trials to discover whether those problems are rectified through the International Criminal Court. The Note is broken into two parts; Part One will focus on the ICC, while Part Two will focus on Nuremberg. Part One, Section I discusses, in some detail, the Rome Statute. Section II addresses the specific problems that the United States has stated as reasons for not signing the Treaty. Section III lists some other important issues that should be taken into account, with respect to the ICC, such as world views on the actions of the United States. Part Two reviews the Nuremberg trials with special emphasis on the legal problems faced during those trials. Finally, the Note will conclude comparing and contrasting Nuremberg and the ICC.

PART ONE:THE INTERNATIONAL CRIMINAL COURT

I. THE INTERNATIONAL CRIMINAL COURT

A. *Introduction*[10]

On September 3, 2002, the International Criminal Court (ICC)[11] held its

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8. COALITION FOR THE INT'L CRIMINAL COURT, QUESTIONS AND ANSWERS ON THE INTERNATIONAL CRIMINAL COURT (2002), *at* http://www.iccnow.org/documents/iccbasics/Q&AJuly2002.pdf (last visited Oct. 27, 2003).

9. Atrocities that have gone untried:

> 4 million people were murdered in Stalin's purges (1937 – 1953), 5 million were annihilated in China's Cultural Revolution (1966 – 1976), 2 million were butchered in Cambodia's killing fields (1975 – 1979), 30,000 disappeared in Argentina's Dirty War (1976 – 1983), 200,000 were massacred in East Timor (1975 – 1985), 750,000 were exterminated in Uganda (1971 – 1987), 100,000 Kurds were gassed in Iraq (1987 – 1988), and 75,000 peasants were slaughtered by death squads in El Salvador (1980 – 1992).

MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG xiii-xiv (1997).

> In the past half-century alone, more than 250 conflicts have erupted around the world; more than 86 million civilians, mostly women and children died in these conflicts; and over 170 million people were stripped of their rights, property and dignity. Most of these victims have been simply forgotten and few perpetrators have been brought to justice.

COALITION FOR THE INT'L CRIMINAL COURT, *supra* note 8.

10. See LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 285-310 (2002), for an excellent overview of the court in chart format.

11. The International Criminal Court is distinguished from the International Court of Justice in that the International Court of Justice primarily handles disputes between states as opposed to acquiring jurisdiction over individuals. COALITION FOR THE INT'L CRIMINAL COURT, *supra* note 8.

first meeting.[12] The ICC is the first international effort to establish a permanent tribunal for prosecuting war crimes.[13] The United States is not a participant in this effort.[14] The Rome Statute (Statute)[15] was opened for signatures on July 17, 1998.[16] On December 31, 2000, President Bill Clinton signed the Rome Statute.[17] Participation in the ICC preparatory commission required signing the statute by that date.[18] Thus, signing the statute made it possible for the United States to have influence over the court's procedures.[19] On May 6, 2002, the Bush administration informed the United Nations Secretary General, Kofi Annan, that the United States would not ratify the Rome Statute.[20] Thus, in essence, President Clinton's signature was rescinded. President Bush took this course of action under President Clinton's advice to the Bush administration that the Senate should not ratify the Rome Statute in its current state and that the United States should continue to address concerns through participation in the Preparatory Commission.[21] The Rome Statute entered into force

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12. Lederer, *supra* note 2.

13. *Id.*

14. *Id.* At this initial meeting, the Assembly of State Parties elected as president Prince Zeid bin Raad of Jordan. *Id.* The assembly also elected as vice presidents Ambassador Allieu Kanu of Sierra Leone and Ambassador Felipe Paolillo of Uruguay. *Id.* The United States seat was empty at this very important meeting. *Id.* By not ratifying the Rome Statute, the United States is not a State Party and has neither the authority to vote for or nominate officers of the ICC nor any influence in guiding the future of the court. *See* Lederer, *supra* note 2.

15. Mahnoush H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 AM. J. COMP. L. 22, 24-25. The Rome Statute contains three principles: 1) "the principle of complementarity," 2) that the International Criminal Court "deal[s] only with the most serious crimes of concern to the international community as a whole[,]" and 3) that the Statute "to the extent possible, remain within the realm of customary international law." *Id.* The author of this article is a Senior Legal Officer in the Office of Legal Affairs at the United Nations and served as the Secretary of the Committee of the Whole of the Rome Conference. *Id.* at 22.

16. *See* Rome Statute of the ICC, *supra* note 3, art. 125. Sixty states were needed to ratify the Statute, and thus the International Criminal Court. *See id.* art. 126. *See generally* Panel Discussion, *Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV. 223 (1999) (discussing the establishment of the International Criminal Court) [hereinafter Panel Discussion].

17. Friends Committee on National Legislation, *Status of the International Criminal Court: 2001.*

18. *Id.*

19. *See id.* President Clinton made it clear that he only signed the treaty so that the United States could still influence the ICC and that he would recommend to the next president not to send the treaty to the Senate for ratification until some of the "fundamental concerns" were addressed. Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002). *See also* Fact Sheet, U.S. Dept. of State, The International Criminal Court (Aug. 2, 2002), *at* http://www.State.gov/t/pm/rls/fs/2002/23426.htm#2 (last visited Oct. 27, 2003) [hereinafter U.S. Fact Sheet].

20. Secretariat of The Coalition for an International Criminal Court, *Country-by-Country Ratification Status Report*, Sept. 19, 2002, *at* http://www.icc.igc.org/countryinfo/theamericas/unitedstates.html (last visited Oct. 3, 2003).

21. *Id.*

on July 1, 2002.[22] As of this writing, 139 countries have signed the Rome Statute, with ninety-two countries officially ratifying it.[23] The ICC is planning to start taking cases in 2003.[24]

A. The Make Up of the International Criminal Court

The International Criminal Court has four organs: (1) The Presidency; (2) A Pre-trial Division; a Trial Division; and an Appeals Division (each having respective Chambers); (3) The Office of the Prosecutor; and (4) The Registry.[25] All of the officials of the ICC must be fluent in one of the two working languages of the court, which are English and French.[26]

The President, a First Vice-President, and a Second Vice-President constitute the Presidency.[27] The judges that form the Presidency serve the ICC full-time while the other judges serve full-time as the need arises.[28] The Pre-Trial and the Trial Divisions have three judges each, while the Appeals Division is composed of four judges and the President.[29]

Any State Party, with each State Party having one nomination per election, may nominate Judges.[30] Judges are to be "of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices."[31] The

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22. The Coalition for an International Criminal Court, *at* http://www.icc.igc.org/documents/iccbasics/history.pdf (last visited Oct. 3, 2003) [hereinafter CICC Home Page].

23. *Id.* The countries that have ratified the Rome Statute as of October 3, 2003 are: Afghanistan, Albania, Andorra, Antigua and Barbuda, Argentina, Australia, Austria, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Cambodia, Canada, Central African Republic, Colombia, Costa Rica, Croatia, Cyprus, Democratic Republic of Congo, Denmark, Djibouti, Dominica, East Timor, Ecuador, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Macedonia (F.Y.R.), Malawi, Mali, Malta, Marshall Islands, Mauritius, Mongolia, Namibia, Nauru, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Saint Vincent and the Grenadines, Samoa, San Marino, Senegal, Serbia and Montenegro, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, Tanzania (United Rep.), Trinidad and Tobago, Uganda, United Kingdom, Uruguay, Venezuela, and Zambia. The Coalition for an International Criminal Court, *Rome Statute Signature and Ratification Chart, at* http://www.icc.igc.org/countryinfo/worldsigsandratifications.html (last visited Oct. 3, 2003).

24. Lederer, *supra* note 2.

25. Rome Statute of the ICC, *supra* note 3, art. 34.

26. *Id.* art. 50(2). The ICC's judgments are to be published in the "official" languages of the ICC: Arabic, Chinese, English, French, Russian, and Spanish. *Id.* art. 50(1).

27. *Id.* art. 38(3). The judges elect all three positions by a majority vote. *Id.* art. 38(1). The term for all presidential positions is three years with eligibility for one re-election. *Id.* art. 38(1).

28. Rome Statute of the ICC, *supra* note 3, art. 35.

29. *Id.* art. 39(1)-(2).

30. *Id.* art. 36(4).

31. *Id.* art. 36(3)(a).

Assembly of the States Parties (Assembly) elects judges by secret ballot.[32] Two-thirds of the Assembly must be in attendance and voting; the judges receiving the highest number of votes are elected.[33] "No two judges may be nationals of the same State."[34] Judges are elected for a term of nine years and cannot be re-elected.[35]

The Office of the Prosecutor is considered to be independent of the ICC.[36] The main function of the Prosecutor is to receive referrals for investigations and to determine whether enough evidence exists to pursue prosecution.[37] High moral character, competency, experience in prosecuting criminal cases, and fluency in at least one of the ICC's languages are requirements for both the Prosecutor, as well as any Deputy Prosecutors.[38] The members belonging to the Assembly of States Parties (Assembly) elect the Prosecutor by secret ballot; the Prosecutor, in turn, provides a list to the Assembly of potential Deputy Prosecutors.[39] The Assembly then elects the Deputy Prosecutors in the same manner.[40] Similar to the Judges, the Prosecutor and any Deputy Prosecutors have nine-year terms and may not be re-elected, although some exceptions exist to assist in the initial establishment of the ICC.[41]

The Registry has the responsibility of carrying out all of the non-judicial aspects of the ICC.[42] The Registrar is the "principal administrative officer of

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32. *Id.* art. 36(6).

33. *Id.*

34. Rome Statute of the ICC, *supra* note 3, art. 36(7). The State Parties should consider the following when electing judges: fair representation of the world's legal systems; fair representation geographically, and; "fair representation of female and male judges." *Id.* art. 36(8). State Parties should also consider legal expertise of the judges on specific issues "including, but not limited to, violence against women or children." *Id.*

35. *Id.* art. 36(9).

36. *Id.* art. 42(1). *See also* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 269 (Antonio Cassese et al. eds., 2002) [hereinafter THE ROME STATUTE]. (setting forth that the Office of the Prosecutor acts independently of the ICC). The Prosecutor having control over investigations was the most suspicious issue to the drafters of the statute. *Id.* at 1150.

37. Rome Statute of the ICC, *supra* note 3, art. 42(1). The Office of the Prosecutor may have Deputy Prosecutors to assist the Prosecutor. *Id.* art. 42(2). All Deputy Prosecutors, as well as the Prosecutor, are to be of different nationalities. *Id. See* THE ROME STATUTE, *supra* note 36, at 270 (The Prosecutor has Deputy Prosecutors who hold the same powers as the Prosecutor, all must be of varying nationalities).

38. Rome Statute of the ICC, *supra* note 3, art. 42(3). *See also* THE ROME STATUTE, *supra* note 36, at 270.

39. Rome Statute of the ICC, *supra* note 3, art. 42(4).

40. *Id. See* THE ROME STATUTE, *supra* note 36, at 270 ("The Prosecutor is elected by secret ballot by absolute majority of the members of the Assembly of State Parties, and Deputy Prosecutors are elected in the same way from a list provided by the Prosecutor.").

41. Rome Statute of the ICC, *supra* note 3, art. 42(4). *See also* THE ROME STATUTE, *supra* note 36, at 270 ("The Prosecutor and Deputy Prosecutors, like the judges, are not eligible for re-election, with the exception of those initially appointed for a term of three years or less.").

42. Rome Statute of the ICC, *supra* note 3, art. 43(1). *See also* THE ROME STATUTE, *supra* note 36, at 276 (stating that the registry is responsible for administering the ICC).

the Court" and is supervised by the President of the ICC.[43] The Registrar is to have "high moral character, be highly competent" and be fluent in at least one of the ICC's working languages.[44] The judges take recommendations from the Assembly and elect, by secret ballot, the Registrar and, if needed, a Deputy Registrar.[45] The Registrar's term is for five years with the option of one re-election.[46]

B. Jurisdiction of the International Criminal Court

The International Criminal Court is limited to four groups of crimes:[47] genocide,[48] crimes against humanity,[49] war crimes,[50] and

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43. Rome Statute of the ICC, *supra* note 3, art. 43(2); *see also* THE ROME STATUTE, *supra* note 36, at 277.

44. Rome Statute of the ICC, *supra* note 3, art. 43(3). *See also* THE ROME STATUTE, *supra* note 36, at 277.

45. Rome Statute of the ICC, *supra* note 3, art. 43(4).

46. *Id.* art. 43(5). *See also* THE ROME STATUTE, *supra* note 36, at 277.

47. *See* Rome Statute of the ICC, *supra* note 3, art. 5. See *Report of the Preparatory Commission for the International Criminal Court*, U.N. Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes (Nov. 2, 2000), U.N. Doc. PCNICC/2000/1/Add.2, for a list of proposed Elements of Crimes.

48. Rome Statute of the ICC, *supra* note 3, art. 5. Genocide is defined as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Id. art. 6. This definition "tracks the Genocide Convention" definition of genocide. Panel Discussion, *supra* note 16, at 245. *See* Arsanjani, *supra* note 15, at 30.

49. Rome Statute of the ICC, *supra* note 3, art. 5. Crimes against humanity is defined as:

> [A]ny of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Id. art. 7(1). Article 7(2) goes on to define many of the terms used in article 7(1). *Id.* art. 7(1). This definition "goes beyond Nuremberg and other previous definitions" by adding, for example, "systematic torture, rape, and forced disappearances." Panel Discussion, *supra* note 16, at 245. *See* Arsanjani, *supra* note 15, at 30-31, for a historical look at the discussions that

aggression.[51] For the ICC to exercise jurisdiction in these matters, the precondition of jurisdiction must be satisfied.[52] A precondition is that the matter involves a State Party.[53] When a State ratifies the Rome Statute, that State automatically submits itself and its citizens to the jurisdiction of the ICC.[54] The ICC has jurisdiction if the State is a State Party and 1) the crime was committed on that State's territory;[55] or 2) the State is the State of "which

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took place regarding the definition of crimes against humanity.

50. Rome Statute of the ICC, *supra* note 3, art. 5. War crimes is defined as:

> (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) willfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer of unlawful confinement; (viii) Taking of hostages.

Id. art. 8(2)(a). Article 8 goes on to define in great detail other serious violations that would constitute war crimes within the meaning of the statute. *Id.* art. 8(b). This definition is "largely drawn from the Hague Rules, the Geneva Conventions, the Geneva Protocol II, and so forth, but with controversial additions like . . . prohibiting an occupying power from transferring its own people into the occupied territory." Panel Discussion, *supra* note 16, at 245.

51. Rome Statute of the ICC, *supra* note 3, art. 5. The crime of aggression is not yet defined; it will come into effect once it is defined. *Id.* art. 5(2). Other crimes that were discussed but not added to the ICC's jurisdiction are: drug crimes, international terrorism, mercenarism, and willful and sever damage to the environment. THE ROME STATUTE, *supra* note 36, at 497. Professor Halberstam of Benjamin N. Cardozo School of Law, who has "long supported establishing an International Criminal Court[,]" thinks that the definitions of crimes are "both too broad and too narrow" in that, on one hand, the Statute does not include some crimes that have previously been defined and agreed to by many states, and, on the other hand, the Statute redefines crimes that have established, agreed upon definitions while adding the crime of aggression, to which no one can agree on a definition. Panel Discussion, *supra* note 16, at 247. *See* Arsanjani, *supra* note 15, at 30, for a discussion regarding the negotiations of the definition of the crime of aggression.

52. *See* THE ROME STATUTE, *supra* note 36, at 214. Article 12(2) of the Rome Statute gives the ICC jurisdiction over states that have "a special link" to one of the crimes enumerated in Article 5. *Id.* A special link is created when the nationality of the person who committed the crime is from that State or when the crime is committed in that State. *Id.* However, any action of the ICC upon non-member states must have consent of the State involved. *Id.*

53. Rome Statute of the ICC, *supra* note 3, art. 12. A State Party is any State that accedes to the Rome Statute. *See id.* art. 125.

54. *Id.* art. 12(1).

55. This jurisdiction is regardless of the nationality of the accused; thus, if an American is charged with a crime on the territory of a State Party, the ICC would have jurisdiction over the accused American. *See* THE ROME STATUTE, *supra* note 36, at 562. This is the reason behind the United States actively seeking bilateral agreements with State Parties to immunize Americans from jurisdiction of the ICC. *See infra* Part One III.A.

the person accused of the crime is a national."[56] Finally, a State can voluntarily accept the jurisdiction of the ICC if the State is not a State Party to the Rome Statute.[57] Thus, the ICC will typically not have jurisdiction over crimes committed on the territory of non-State Parties, by non-State Party nationals, unless the State of the accused submits to ICC jurisdiction.[58] Nevertheless, the Security Council[59] can adopt legislation through the United Nations Charter, Chapter VII, which will enable the ICC to exercise jurisdiction even in those cases where none of the circumstances involve a State Party.[60] This action would be similar to the ad hoc tribunals of Rwanda[61] and Yugoslavia.[62]

Once a precondition of jurisdiction is satisfied, the ICC can exercise jurisdiction through any of three possible referrals.[63] Referrals may come from a State Party, the United Nations Security Council, or the ICC Prosecutor[64] may initiate a proceeding.[65] Once a referral has been received, the Prosecutor will perform an initial examination to determine if there is sufficient evidence to go forward.[66] The ICC can only prosecute crimes that occur after July 1, 2002.[67]

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56. Rome Statute of the ICC, *supra* note 3, art. 12(2). For example,

> if State A is the State of nationality of a person accused of one of the crimes listed in Article 5 and this State is Party to the Rome Statute, the ICC has jurisdiction over that person, and can exercise its functions on the territory of State A. The [ICC], however, can also exercise its functions and powers on the territory of State B, Party to the Statute, though this State has no 'jurisdictional link' with the crime. This would occur, if, for instance, a witness is a national or resident of State B and is summoned to appear before the Court.

THE ROME STATUTE, *supra* note 36, at 214.

57. Rome Statute of the ICC, *supra* note 3, art. 12(3).

58. *See* THE ROME STATUTE, *supra* note 36, at 563.

59. *See infra* Part One I.D., for information on the power of the Security Council.

60. *See id.* at 563. *See also* Arsanjani, *supra* note 15, at 26 (stating that the requirement of consent of jurisdiction does not apply if the case is referred by the Security Council).

61. See United Nations, *International Criminal Tribunal for Rwanda, at* http://www.ictr.org (last visited Oct. 27, 2003), for information regarding the International Tribunal for Rwanda, including a daily update.

62. *See* United Nations, *International Criminal Tribunal for the Former Yugoslavia, at* http://www.un.org/icty (last visited Oct. 27, 2003), for information regarding the International Criminal Tribunal for the Former Yugoslavia.

63. Rome Statute of the ICC, *supra* note 3, art. 13. A referral denotes when "[a] situation in which one or more [of the crime of genocide, crimes against humanity, war crimes, or the crime of aggression] appears to have been committed is referred to the Prosecutor." *See id.*

64. *See infra* Part One I-D.

65. Rome Statute of the ICC, *supra* note 3, art. 13. *See* THE ROME STATUTE, *supra* note 36, at 1144-45 (describing the three referral sources from which the Prosecutor can investigate potential defendants: (1) The Security Council itself; (2) a State Party; (3) any other source or through the Prosecutor alone).

66. Rome Statute of the ICC, *supra* note 3, art. 15(3).

67. *See id.* art. 11(1). As more states ratify the Rome Statute, the ICC will have jurisdiction over crimes committed after the Rome Statute is in force. *Id.* art. 11(2).

There is an additional obligation of the ICC to "defer to a national investigation."[68] Once it is determined that an investigation is necessary, "the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned."[69] If, within one month of receiving notice regarding an investigation, a State informs the ICC that the State is investigating either its own nationals, or other nationals, within its jurisdiction, the State may request that the Prosecutor defer to the State's investigation.[70] However, the Prosecutor has the option of applying to the Pre-Trial Chamber[71] to authorize an investigation by the Prosecutor, disregarding the request of the State, as long as the Prosecutor can show a State's "unwillingness" and/or "inability" to investigate.[72] Either the Prosecutor or the State may appeal the decision of the Pre-Trial Chamber.[73] Additionally, the Prosecutor may review the deferral up to six-months after the deferral date "or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out an investigation."[74] Notification is unnecessary if the referral was initiated via the Security Council.[75] Therefore, it is implied that the ICC will not defer to a national investigation upon the Security Council's referral of a case.

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68. THE ROME STATUTE, *supra* note 36, at 1141-42.

69. Rome Statute of the ICC, *supra* note 3, art. 18(1). *See also* THE ROME STATUTE, *supra* note 36, at 1162 (explaining that the Prosecutor is responsible for notifying all State Parties and any States that are capable of exercising jurisdiction over the accused of the ensuing investigation to enable a national investigation if the State would like to pursue one).

70. Rome Statute of the ICC, *supra* note 3, art. 18(2).

71. *See infra* Part One I.E.

72. Rome Statute of the ICC, *supra* note 3, art. 17(2), 18(3). *See* THE ROME STATUTE, *supra* note 36, at 1163. To determine the "unwillingness" of a State to investigate or prosecute a crime,

> the Court shall consider . . . whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes with the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Rome Statute of the ICC, *supra* note 3, art. 17(2). On the other hand, to determine if a State is "unable" to properly investigate or prosecute a crime, "the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." *Id.* art. 17(3).

73. Rome Statute of the ICC, *supra* note 3, art. 18(4).

74. *Id.* art. 18(3).

75. *See* Rome Statute of the ICC, *supra* note 3, art. 18(1).

C. *The Office of the Prosecutor*

Once a referral has been received, the Prosecutor must conduct a preliminary examination of the evidence and evaluate the information available to determine whether reasonable grounds exist to initiate an investigation.[76] The preliminary examination determines whether there is a "serious and sufficient basis for an investigation to be initiated."[77] If the Prosecutor determines that there is adequate evidence to pursue an investigation, the Prosecutor must receive authorization from the Pre-Trial Chamber to proceed.[78] The Prosecutor must notify the Pre-Trial Chamber of a decision not to investigate only if the Prosecutor's opinion rested solely on the basis that an investigation would not serve justice.[79] If the Prosecutor does an investigation, once the investigation is complete, the Prosecutor must determine if the evidence is sufficient for prosecution.[80] If the Prosecutor determines there is not enough evidence to prosecute, the Prosecutor must then notify the Pre-Trial Chamber, as well as whoever referred the case to the ICC.[81] Under either circumstance, upon request of the party referring the incident, "the Pre-Trial Chamber may review a decision of the Prosecutor."[82] Anytime that the Prosecutor decides not to pursue a referral, either at the investigation stage or the prosecution stage, due to the pursuit not being "in the interests of justice," the decision is "effective only if confirmed by the Pre-Trial Chamber."[83] Upon receiving new facts or information, the Prosecutor is authorized to re-open the referral for either investigation or prosecution.[84]

While the Prosecutor has immense power in determining whether to investigate and prosecute, the Statute heavily regulates that power.[85] The Prosecutor is doubtlessly accountable to the Assembly because the Assembly elects the Prosecutor.[86] Additionally, the Prosecutor has to receive authorization from the Pre-Trial Chamber to open an investigation.[87] The Prosecutor is obligated to defer to the national investigation if so requested, although the Pre-Trial Chamber's ability to trump that investigation may diminish the

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76. *Id.* art. 53(1). *See* THE ROME STATUTE, *supra* note 36, at 269. The responsibilities of the Office of the Prosecutor are to receive referrals, investigate, and, when appropriate, prosecute the crimes within the Court's jurisdiction. *Id.* The Prosecutor must conduct a preliminary examination of all cases referred before an investigation is initiated. *Id.* at 1146

77. *Id.* at 1146. See Rome Statute of the ICC, *supra* note 3, art. 54, for a list of "[d]uties and powers of the Prosecutor with respect to investigations."

78. *See id.* art. 53(3).

79. *See id.* art. 53(1).

80. THE ROME STATUTE, *supra* note 36, at 1171.

81. Rome Statute of the ICC, *supra* note 3, art. 53(2).

82. *Id.* art. 53(3).

83. *Id.* art. 53(3).

84. *Id.* art. 53(4). *See* THE ROME STATUTE, *supra* note 36, at 1215.

85. *Id.* at 1138.

86. *Id.* at 1140.

87. *Id.* at 1141.

effect of this safeguard.[88] More importantly, the Security Council is given the deferral power for any investigation or prosecution conducted by the ICC through a resolution under Chapter VII of the Charter of the United Nations.[89] Once the Security Council has deferred an investigation, there is a twelve-month waiting period before the investigation or prosecution can proceed.[90] This deferral power may be renewed endlessly in the same fashion.[91]

The Security Council is made up of fifteen members, five of which are permanent while the other ten rotate for a two-year period after being elected by the General Assembly.[92] Since the United States is a permanent member of the Security Council and has veto power, it can greatly influence the initiation and deferral of investigations and prosecutions.[93] Any votes on "substantive matters" require that all five of the permanent members agree, which provides the five members veto power.[94] Any vote regarding an investigation or prosecution is a substantive matter; all other votes are for "procedural matters" and only require nine out of the fifteen members to agree.[95] Thus, because the Security Council may refer a case to the Prosecutor, and has deferral power over investigations and prosecutions, the United States, even though not a member of the ICC, has influential power over it.

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88. *Id.* at 1141-42.

89. Rome Statute of the ICC, *supra* note 3, art. 16; THE ROME STATUTE, *supra* note 36, at 1141. It should be noted that Article 16 contains only this provision making it seemingly quite important. The full text of Article 16 states:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Rome Statute of the ICC, *supra* note 3, art. 16. *See* CHARTER OF THE UNITED NATIONS Ch. VII, *available at* http://www.un.org/aboutun/charter/index.html (last visited Oct. 27, 2003) (Chapter VII is titled 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'); Arsanjani, *supra* note 15, at 26-27.

90. Rome Statute of the ICC, *supra* note 3, art. 16, for a historical look at the compromise reached regarding this article.

91. *Id.*

92. *See* Security Council Home Page, *available at* http://www.un.org/Docs/sc (last visited Oct. 27, 2003) [hereinafter Security Council] The five permanent members are: China, France, Russia Federation, United Kingdom, and the United States. *Id.* The current ten rotating members are: Angola, Bulgaria, Cameroon, Chile, Colombia, Germany, Guinea, Mexico, Pakistan, Spain, Syrian and Arab Republic. *Id.*

93. *See id. See generally* Amann & Sellers, *supra* note 19, at 386-88 (discussing the relationship between the Security Council, the United States, and the ICC).

94. Security Council, *supra* note 92. It is this veto power that makes the Security Council inadequate as the law dispensing body of the international community. *See* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Mauro Politi & Giuseppe Nesi eds., 2001).

95. Security Council, *supra* note 92.

D. Pre-Trial Chamber

A majority vote from the three judges sitting on the Pre-Trial Chamber is required for most decisions that the Prosecutor is involved in, including decisions of admissibility.[96] Once the prosecutor has presented evidence from the preliminary inquiry, the Pre-Trial Chamber must believe that there is a "reasonable basis to proceed" before giving the Prosecutor permission to initiate an investigation.[97] The Pre-Trial Chamber determines whether the ICC has jurisdiction over the case as well.[98]

The Pre-Trial Chamber is responsible for issuing warrants at the Prosecutor's request.[99] In order to issue a warrant for arrest, the Pre-Trial Chamber must be satisfied that the evidence reasonably shows that the accused committed one of the enumerated crimes,[100] that the ICC has jurisdiction, and that the arrest is necessary to make sure that the accused appears in court or does not obstruct justice by jeopardizing an investigation.[101] A warrant may also be issued as a preventative measure if the ICC determines that the crime, or a related crime, is still in commission.[102]

The Pre-Trial Chamber is responsible for assisting the accused in the preparation of a defense.[103] Additionally, the Chamber's responsibilities include "the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in

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96. *See* Rome Statute of the ICC, *supra* note 3, art. 57(2). A single judge sitting on the Pre-Trial Chamber has the authority to review the decision of the Prosecutor not to proceed with an investigation after the Prosecutor's preliminary inquiry. THE ROME STATUTE, *supra* note 36, at 1217. It takes a majority vote of the Pre-Trial Chamber to order the Prosecutor to investigate. *Id.*

97. *Id.* at 1215.

98. *Id.*

99. Rome Statute of the ICC, *supra* note 3, art. 57(3). The Prosecutor's application for a warrant must contain:

> (a) The name of the person and any other relevant identifying information; (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; (c) A concise statement of the facts which are alleged to constitute those crimes; (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and (e) The reason why the Prosecutor believes that the arrest of the person is necessary.

Id. art. 58(2).

100. *See supra* note 47-51.

101. Rome Statute of the ICC, *supra* note 3, art. 58(1). The actual warrant for arrest must contain the following information: "(a) The name of the person and any other relevant identifying information; (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (c) A concise statement of the facts which are alleged to constitute those crimes." *Id.* art. 58(3).

102. *Id.* art. 58(1)(b)(iii).

103. *Id.* art. 57(3)(b).

response to a summons, and the protection of national security information."[104]

If the Pre-Trial Chamber determines that a State Party's judicial system has collapsed, and therefore, the State Party cannot authorize the Prosecutor to investigate on the State's territory, the Pre-Trial Chamber may authorize that the Prosecutor carry on an investigation.[105]

The Pre-Trial Chamber performs a confirmation process where the charges are heard before the ICC, and the accused has an opportunity to "object to the charges . . . [c]hallenge the evidence presented by the Prosecutor;" and the accused may present evidence in his defense.[106] After the hearing, the Pre-Trial Chamber may either confirm the charges, decide that there is insufficient evidence to proceed, or adjourn the hearing until the Prosecutor either provides more evidence or amends the charges.[107] If the charges are confirmed, the Presidency will order a Trial Chamber to conduct the trial.[108]

E. The Trial Chamber

The trial is held at the seat of the ICC, currently The Hague in the Netherlands.[109] There can be no trials in absentia; the defendant's presence is required.[110] Although, if the defendant becomes disruptive to the trial, alternative means for the defendant to participate may become necessary, such as observing the trial outside of the courtroom.[111]

The Trial Chamber is charged with assuring that the trial is "fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses."[112] The trial is to be public, although certain proceedings may be closed as the Trial Chamber sees fit.[113] The Trial Chamber will hear the plea of the accused after reading the charges that the Pre-Trial Chamber confirmed.[114] All defendants are presumed innocent until proven guilty beyond a reasonable doubt.[115] It is also the

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104. *Id.* art. 57(3)(c).
105. *Id.* art. 57(3)(d).
106. Rome Statute of the ICC, *supra* note 3, art. 61(6).
107. *Id.* art. 61(7).
108. *Id.* art. 61(11).
109. *Id.* art. 62; *see* art. 3(1).
110. *Id.* art. 63(1).
111. Rome Statute of the ICC, *supra* note 3, art. 63(2).
112. *Id.* art. 64(2).
113. *Id.* art. 64(7). Proceedings may be closed to "protect confidential or sensitive information to be given in evidence[,]" or for the protection of victims and witnesses as set forth in article 68. *See id. See also id.* art. 68.
114. *Id.* art 64(8).
115. Rome Statute of the ICC, *supra* note 3, art. 66.

responsibility of the Trial Chamber to make sure that the trial is accurately recorded and maintained by the Registrar.[116]

G. Rights of the Accused

The accused has the right to a public, fair, and impartial hearing.[117] Additionally, the defendant has the following minimum guarantees:

> (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence; (c) To be tried without undue delay; (d) Subject to [the defendant not disrupting the court], to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute; (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks; (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; (h) To make an unsworn oral or written statement in his or her defence; and (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.[118]

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116. *Id.* art. 64(10).

117. *Id.* art. 67(1).

118. *Id.* art. 67. Professor Blakesley of Louisiana State University Law Center notes that there is "nothing at all in the Statute relating to what we in the United States would consider Fourth Amendment interests." Panel Discussion, *supra* note 16, at 237. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects,

The rights that a defendant of the ICC and a defendant in an American criminal court share are: a presumption of innocence; the proof standard of "beyond reasonable doubt"; a right to bail; the right to a "fair, impartial, speedy, and public hearing"; and the right to remain silent without the silence being used to as a factor in determining the verdict.[119] One of the most noticeable and important differences between the ICC and American criminal courts is that defendants in the ICC do not have a right to a jury trial, which is a right guaranteed to Americans by the United States Constitution.[120] Further, the ICC Prosecutor is able to appeal a verdict, while the Constitution protects people from being tried for the same crime twice.[121] Finally, the United States Constitution guarantees the right of the defendant to face witnesses, whereas witnesses in the ICC may be absent and anonymous.[122]

On the other hand, the ICC provides more protection to suspects. Suspects are given Miranda type warnings prior to their questioning as opposed to prior to their arrest as the rights afforded American defendants stipulate.[123] Furthermore, the Prosecutor of the ICC must reveal to the defense all evidence that tends to show that the accused is innocent, evidence that mitigates the guilt of the accused, or evidence that renders the prosecution's evidence questionable.[124]

> against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. *See* Amann & Sellers, *supra* note 19, at 396 ("The ICC Statute omits a hallmark of U.S. criminal litigation, the protection against unreasonable searches and seizures.").

119. Amann & Sellers, *supra* note 19, at 395-96.

120. *Id.* at 396-97. *See* U.S. CONST. amend. VI; USA for the International Criminal Court, *Get the Facts: America and the ICC, at* http://www.usaforicc.org/facts_america-icc.html# (last visited Oct. 10, 2003) (comparing the language of the Rome Statute and the language of the U.S. Constitution). Note that the comparisons only include the comparative language and do not go further to include the language of the Rome Statute that negates some of the constitutionally protected rights of Americans such as article 69(2), which states that witnesses are to testify in person "except to the extent provided by the measures set forth in article 68[,]"; thus, undermining the constitutional right to be confronted with adverse witnesses. *See* Rome Statute of the ICC, *supra* note 3, art. 69(2); U.S. CONST. amend. VI.

121. Amann & Sellers, *supra* note 19, at 397. *See* U.S. CONST. amend. V.

122. U.S. CONST. amend. V; Rome Statute of the ICC, *supra* note 3, art. 68-69.

123. Rome Statute of the ICC, *supra* note 3, art. 55(2). *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (holding that the prosecution cannot use statements of the suspect that came after the suspect "has been taken into custody or otherwise deprived of his freedom of action in a significant way," without first warning the suspect of the privilege against self-incrimination); *see also* Amann & Sellers, *supra* note 19, at 395.

124. Rome Statute of the ICC, *supra* note 3, art. 67(2).

H. Sentencing

The ICC does not utilize the death penalty.[125] Instead, the standard penalty is imprisonment for a maximum of thirty years, although the ICC may impose a life sentence "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."[126] The prison sentence will be served in a prison of a State chosen from a list of willing States based on: sharing responsibility between the States Parties, treatment of prisoners, the convicted person's view and nationality, and any other appropriate factors.[127] If no State satisfies the requirements of the ICC, the host State (currently The Hague) will provide a prison facility.[128] Every convicted person is entitled to a review to determine a reduction in sentence when two-thirds of the sentence has been served, or after twenty-five years if the term is life imprisonment.[129]

I. Appeals Process

Either the Prosecutor or the defendant may request an appeal on the grounds of procedural error, error of fact, error of law, or "[a]ny other ground that affects the fairness or reliability of the proceedings or decision."[130] Either party may also appeal the sentence of the defendant.[131] The Appeals Chamber works in the same manner and with the same powers as the Trial Chamber.[132] The Appeals Chamber may reverse a decision, amend a decision, or call for a new trial under a different Trial Chamber.[133] If the Appeals Chamber has a question regarding a factual issue, the issue may be remanded to the original Trial Chamber for resolution, or the Appeals Chamber may request evidence

125. *See id.* art. 77(1). Professor Koenig of the Thomas M. Cooley Law School considers the death penalty system in the United States to be one of the worst in the world. *See* Panel Discussion, *supra* note 16, at 239. Professor Koenig worked on eliminating the death penalty from the Rome Statute and says that this Statute "offers much more protection for defendants than is offered most defendants in the United States." *Id.* at 240.

126. Rome Statute of the ICC, *supra* note 3, art. 77(1). Sentencing gave rise to debate because a lot of countries' Constitutions prohibit life imprisonment. *See* Sadat, *supra* note 10, at 165, 167. Additionally, because the ICC is only supposed to hear cases of the "most serious crimes[,]" one might think that all the crimes should be either of "extreme gravity" or not within the ICC's jurisdiction to sentence. *See* Rome Statute of the ICC, *supra* note 3, art. 5(1).

127. Rome Statute of the ICC, *supra* note 3, art. 103(3).

128. *Id.* art. 103(4).

129. *Id.* art. 110(3).

130. *Id.* art. 81(1).

131. *Id.* art. 81(2).

132. Rome Statute of the ICC, *supra* note 3, art. 83(1).

133. *Id.* art. 83(2).

regarding the issue and make the determination sua sponte.[134] The judgment of the Appeals Chamber is made by a majority of the ICC.[135]

II. ISSUES THE UNITED STATES HAS WITH THE INTERNATIONAL CRIMINAL COURT

A. Introduction

Although the United States, in the past, has agreed with the ad hoc tribunals such as Nuremberg, Japan, Rwanda, and Yugoslavia, and has consistently agreed that a need for a permanent international criminal court exits, there has been much resistance to the current International Criminal Court.[136] There are many opinions as to why the United States refuses to join in the efforts of the ICC,[137] but, on May 6, 2002, when the United States officially withdrew from the Rome Statute, the U.S. Department of State issued a Fact Sheet listing the specific problems that the United States has with the ICC, which include: Jurisdiction; New Crimes; Aggression; the Prosecutor; Reservations; and Complementarity.[138]

Jurisdiction

The United States takes issue with article 12 of the Rome Statute,[139] which gives the ICC jurisdiction over nationals from a non-party when crimes covered by the Statute are committed in the territory of a State Party.[140] This gives the ICC jurisdiction over U.S. military personnel working in State Party territory even though the United States is not a party to the ICC.[141] Another concern for some, although not specifically listed in the Fact Sheet, is that the

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134. *Id.* art. 83(2).

135. *Id.* art. 83(4).

136. *See* AMERICAN BAR ASSOCIATION, *Recommendation That the United States Government Accede to the Rome Statute of the International Criminal Court*, at 4, Feb. 19, 2001 [hereinafter ABA RECOMMENDATION]. Of the voting nations, the United States, along with China, Iran, Iraq, Israel, Libya, and Sudan are the only nations to vote against the Rome Statute. *See id.*

137. *See supra* Part One III.B-C.

138. U.S. Fact Sheet, *supra* note 19.

139. Rome Statute of the ICC, *supra* note 3, art. 12.

140. *Id.* art. 12(2)(a). Professor Wise, Director of the Comparative Criminal Law Project at Wayne State University Law School states that the idea of a national from a non-party State falling under the jurisdiction of the ICC as "positively pernicious." Panel Discussion, *supra* note 16, at 230. Professor Wise, comparing the "democratic deficit" of the ICC with the "democratic deficit" of the Security Council, contends that, even though it takes two-thirds of the State Parties to amend the Statute, the ICC is still not a democratic institution when looking at the states comprising the two-thirds. *Id.*

141. U.S. Fact Sheet, *supra* note 138. *See* Rome Statute of the ICC, *supra* note 3, art. 12(2).

ICC gives no protection to Heads of State[142] and provides no domestic grant of amnesty.[143]

New Crimes

Under article 121 of the Rome Statute, State Parties can "opt out" of amendments to the Statute, including amendments for new crimes.[144] If a State Party chooses not to accept the amendment, the ICC will not exercise jurisdiction over the State Party's nationals or on the State Party's territory when the crimes involved fall under ICC jurisdiction solely due to a violation of that particular amendment.[145] A non-party is not offered the opportunity to opt-out of any amendments to the Rome Statute.[146] Essentially, this means that if both an American and a State Party national commit a crime, which falls under the ICC jurisdiction through an amendment, and the crime is committed on another State Party's territory, the American could be prosecuted under the ICC, yet the State Party national would not if that country had opted-out of the amendment. The United States finds this double standard completely unacceptable.[147]

Aggression

The crime of aggression[148] is included in the enumerated crimes under the ICC's jurisdiction, but the Rome Statute does not include a definition of the crime.[149] Article 5(2) states that "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted [by amendment] defining the crime and setting out the conditions under which the Court shall

142. *See* Rome Statute of the ICC, *supra* note 3, art. 27 (specifically denying any relevance to "official capacity").

143. *See* Amann & Sellers, *supra* note 19, at 392-95. *See also* Rome Statute of the ICC, *supra* note 3, art. 27; AMERICAN BAR ASSOCIATION RECOMMENDATION, *supra* note 136, at 6 (stating that the ICC exercising jurisdiction over officials is consistent with Nuremberg principles); Reuters, *U.S. Fears Prosecution of President in World Court* (Nov. 15, 2002) (discussing a senior United States official's comments regarding concerns over presidential and military leader prosecutions in "legitimate but controversial uses of force to protect world peace."). *But see* Reuters, *Report: U.S. Readies War Crimes Charges for Saddam* (Oct. 30, 2002) (discussing United States plans to bring war crimes charges against Saddam Hussein, President of Iraq).

144. *See* Rome Statute of the ICC, *supra* note 3, art. 121(5).

145. *Id.*

146. U.S. Fact Sheet, *supra* note 138.

147. *Id.*

148. Rome Statute of the ICC, *supra* note 3, art. 5(1)(d). *See supra* text accompanying note 51.

149. Rome Statute of the ICC, *supra* note 3, art. 5(2).

exercise jurisdiction . . . ."[150] Since the crime of aggression will fall under the ICC's jurisdiction through amendment procedures, State Parties, again, will have the opportunity to opt-out of this category of ICC jurisdiction.[151] According to the United States, this is a significant problem, similar to the issue of adding new crimes.[152] Another problem from the United States' position is that some states are advocating ICC jurisdictional conditions that are in "conflict with the Security Council and the UN charter[,]" although no specific conditions are mentioned in the Fact Sheet issued by the United States Department of State.[153]

The Prosecutor

The United States views the Office of the Prosecutor as potentially dangerous because the Prosecutor has the power to initiate an investigation "proprio motu" once two of the three judges on the Pre-Trial Chamber agree.[154] The United States fears that, with a mere three people needed to pursue an investigation, politically motivated prosecutions could develop.[155] The other two ways that the ICC may exercise jurisdiction is through a State Party referral or a Security Council referral.[156] The United States feels that the State Party referral, and particularly the Security Council referral, leaves less room to question the motivation behind an investigation.[157]

The checks and balances of the Court are also in question by the United States because the Prosecutor is independent of the ICC, being "not responsible to an elected body or to the UN Security Council."[158] Since the Assembly will elect, and has the power to fire, the Prosecutor, "the character and motivations of the prosecutor will reflect the character and motivations of a majority of [S]tates [P]arties."[159] The fear that the Prosecutor may feel compelled to act in favor of the interests of the majority of the States Parties is of great political concern.[160]

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150. *Id.* art. 5(2). Since the Rome Statute will not be amended for seven years, it is presumed that the ICC will not have jurisdiction over the crime of aggression until sometime after July 2009. *See id.* art. 121, 123.

151. *Id.* art. 5, 121, 123. *See* U.S. Fact Sheet, *supra* note 138.

152. U.S. Fact Sheet, *supra* note 138.

153. *Id.*

154. *Id. See* Rome Statute of the ICC, *supra* note 3, art. 15(1), (3).

155. U.S. Fact Sheet, *supra* note 138.

156. Rome Statute of the ICC, *supra* note 3, art. 13.

157. *See id. See also* U.S. Fact Sheet, *supra* note 138.

158. U.S. Fact Sheet, *supra* note 138. *See* Rome Statute of the ICC, *supra* note 3, art. 42(1) (confirming that "the Prosecutor shall act independently as a separate organ of the Court").

159. Amann & Sellers, *supra* note 19, at 389.

160. *Id.*

Reservations

Reservations are used to limit the effects of treaties so that governments may ratify treaties "conditioned on certain additional terms" that are amenable to the country.[161] "In a serious departure from common practice, the treaty does not permit states to take reservations."[162] This prohibition is especially problematic since the Rome Statute changed some definitions that have been long standing in other widely ratified treaties.[163]

Complementarity[164]

Article 17 of the Rome Statute requires that the ICC defer to the national when a State Party or a State has jurisdiction over the case and requests to handle an investigation or prosecution of an accused.[165] The difficulty the United States has with this deferral is that, ultimately, it is up to the ICC to decide if the national is willing and able to handle the case.[166] With that caveat, even though the Rome Statute purports in the preamble that it "shall be complementary to national criminal jurisdictions,"[167] it is ultimately the ICC that dictates when it is appropriate to act on that notion.[168] However, the statute states that national courts have priority jurisdiction over the ICC, even when the Security Council refers the case.[169]

"Alternate Mechanisms"

The United States has suggested more appropriate alternate mechanisms, to which the United States would be more amenable to agreement, but the ICC

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161. *See* BLACK'S LAW DICTIONARY 1049 (7th ed. 1999).

162. U.S. Fact Sheet, *supra* note 138. "No reservations may be made to this Statute." Rome Statute of the ICC, *supra* note 3, art. 120.

163. Panel Discussion, *supra* note 16, at 233. For example, the Statute makes bringing civilians of the occupier into occupied territories a war crime. *See* Rome Statute of the ICC, *supra* note 3, art. 8(2)(b)(viii). See *supra* note 48-51, for specific examples of changes.

164. The word "complementarity" comes from the adjective "complementary" and is common in physics. KRISTINA MISKOWIAK, THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION 45 (2000). "In the Preparatory Committee [of the International Criminal Court], the word was defined superficially as an expression 'to reflect the jurisdictional relationship between the international criminal court and national authorities, including national courts[.]'" *Id.* (quoting UN Doc. A/51/22 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (proceedings of the Preparatory Committee during Mar.-Apr. and Aug. 1996, p. 30, para. 109).

165. Rome Statute of the ICC, *supra* note 3, art. 17(1). *See* U.S. Fact Sheet, *supra* note 138.

166. Rome Statute of the ICC, *supra* note 3, art. 17(1). *See* U.S. Fact Sheet, *supra* note 19.

167. Rome Statute of the ICC, *supra* note 3, at 1002.

168. *See id.* art. 17(2).

169. *See* Arsanjani, *supra* note 15, at 28.

has rejected the suggestions.[170] The United States recognizes the need for punishment and accountability for these atrocities.[171] Further, the United States fiercely advocates that domestic accountability should always be the most fundamental step in bringing these criminals to justice.[172] Where the State is unable, the international community needs to intervene to assist with possible "political, financial, legal, and logistical support."[173] Where the State is not willing to investigate or prosecute the accused, there is already a mechanism in place for dealing with the State and the crimes committed – the UN Security Council.[174] The United States points to the ad hoc tribunals established to prosecute criminals in the former Yugoslavia and Rwanda as successful examples.[175]

III. OTHER ISSUES OF IMPORTANCE

A. The United States Attempts Bilateral Agreements

The United States has offered resolutions to existing differences it has with the ICC through appropriate measures, such as suggesting amendments to agreements, along with some measures that critics view as inappropriate, such as threatening to pull all peacekeepers out of peacekeeping missions.[176] Because these measures have not alleviated the fears of the United States, the United States has asked nations that are part of the ICC to sign bilateral agreements "exempting US officials from the possibility of surrender to the ICC."[177]

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170. *See* U.S. Fact Sheet, *supra* note 138.

171. *See id.*

172. *Id.*

173. U.S. Fact Sheet, *supra* note 138.

174. *Id.*

175. *Id.*

176. *See Chronology of US Anti-ICC Resolutions in the Security Council*, THE INTERNATIONAL CRIMINAL COURT UPDATE (NEW YORK), Sept. 2002, at 1, *available at* http://www.iccnow.org/publications/update/iccupdateASPedition200208.pdf (last visited Oct. 27, 2003). Currently, through Resolution 1422, the United States' peacekeepers have immunity for a year. *Id.* A political cartoon in this article shows the International Criminal court sitting at a normal sized podium saying "You are charged with evading world justice – how do you plead?" and the United States sitting at a much bigger podium with the response of "Bigger." *Id.* at 7. On August 2, 2002, the American Servicemembers' Protection Act became law in the United States. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 2002 (codified at 22 U.S.C. § 7421 (2002)). This Act confirms that the United States "will not recognize the jurisdiction of the International Criminal Court over United States nationals." *Id.* § 2002(11) (codified at 22 U.S.C. § 7421(11)).

177. *See US Launches Global Campaign for Immunity from ICC*, THE INTERNATIONAL CRIMINAL COURT UPDATE (NEW YORK), Sept. 2002, at 2, *available at* http://www.iccnow.org/publications/update/iccupdateASPedition200208.pdf (last visited Oct. 27, 2003). Absent these agreements, Americans will be subject to jurisdiction of the ICC in states that have ratified the Rome Statute because "[t]erritorial jurisdiction . . . prevails over jurisdiction based on nationality[,]" unless it is an official military operation or an act performed against any other

Currently, fourteen countries have agreed to support the agreement.[178] Canada, the Netherlands, Norway, Slovenia, Switzerland, and Yugoslavia have publicly expressed reservations about the bilateral agreements.[179]

B. Coalition for the International Criminal Court

The Coalition for the International Criminal Court (CICC) includes over one thousand non-governmental agencies that are advocating on behalf of the ICC.[180] According to the CICC, the fact that many of the United States' Allies, along with other democratic nations, will sit on the Assembly is sufficient to dispel any worries that the Prosecutor will have too much power because the Assembly will take action if politically motivated cases should arise.[181] Although, it should be noted that under the duties of the Assembly enumerated in the Rome Statute, there is no mention of specific action for politically motivated prosecutions, nor is there any indication that the

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armed forces where, under a NATO agreement, the "first right to try" is the homeland of the military personnel charged. AMERICAN BAR ASSOCIATION RECOMMENDATION, *supra* note 136, at 5-6.

178. Fact Sheet, The American Non-Governmental Organizations Coalition for the International Criminal Court, Chronology of the U.S. Opposition to the International Criminal Court (Nov. 18, 2002) *at* http://www.amicc.org/docs/UStimeline.pdf (last visited Oct. 27, 2003). The fourteen countries who have agreed, many of whom still need parliamentary approval, are: Afghanistan, the Dominican Republic, East Timor, El Salvador, Gambia, Honduras, Israel, the Marshall Islands, Mauritania, Micronesia, Palau, Romania, Tajikistan, and Uzbekistan. *Id.* Amnesty International is formally petitioning for governments not to sign the bilateral agreements stating that the agreements are "unlawful under international law." Amnesty International, International Justice, US Threats to the International Criminal Court, *at* http://web.amnesty.org/pages/int_jus_icc_us_threats (last visited Oct. 27, 2003). The CICC insists that the agreements will not protect Americans from ICC jurisdiction. *See US Launches Global Campaign for Immunity from ICC*, *supra* note 177. See Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98 Agreements*, *at* http://www.iccnow.org/pressroom/factsheets/FS-HRW-Art98.doc (last visited Oct. 27, 2003), for a legal analysis of how the bilateral agreements may violate the Rome Statute.

179. *US Launches Global Campaign for Impunity*, *supra* note 177.

180. CICC Home Page, *supra* note 22, *at* http://www.iccnow.org/index.html (last visited Oct. 27, 2003). The CICC is a nominee for the 2002 Nobel Peace Prize. *Coalition Nominated for Nobel Peace Prize*, THE INTERNATIONAL CRIMINAL COURT MONITOR (NEW YORK), Sept. 2002, at 13, *available at* http://www.iccnow.org/publications/monitor/22/Monitor22.200209.english.pdf (last visited Oct. 27, 2003). See The Cato Institute, *Policy Analysis, Reasonable Doubt: The Case Against the Proposed International Criminal Court* (July 16, 1998), *at* http://www.cato.org/pubs/pas/pa-311.html (last visited Oct. 27, 2003) [hereinafter Cato Institute], for an opposing view of the International Criminal Court. Although one of the Cato Institute's missions is to limit government, the Policy Analysis regarding the International Criminal Court makes many strong arguments against the ICC. *See id.*

181. Justice Richard J. Goldstone, *US Withdrawal from ICC Undermines Decades of American Leadership in International Justice*, The International Criminal Court Monitor: The Newspaper of the NGO Coalition for the International Criminal Court (New York), Issue 21, June 2002, at 3.

Assembly will have any true power over the cases that the ICC tries.[182] Interestingly, the CICC goes on to state that the "[p]reservation of the independence of the Prosecutor is critical for maintaining a fair and impartial Court."[183] The CICC also notes that the Security Council can stop any prosecution or investigation of any case and may renew that order indefinitely.[184]

The CICC claims, citing the complementarity policy that the ICC has adopted, that the Statute has "strong mechanisms" in place to ensure that the ICC is used as a last resort.[185] However, the strength of those mechanisms is questionable when the ICC is the body that ultimately decides if a nation is willing and able to prosecute the accused.[186] If the ICC decides that the nation is unwilling or unable to prosecute, it will prosecute against the nation's objection.[187] Furthermore, the CICC criticizes the United States' position regarding the Security Council because the Security Council is a political body, and "the hallmark of a fair and effective justice system is its independence from political influence."[188] Finally, while the United States complains that the ICC undermines the sovereignty of non-State parties by claiming jurisdiction over nationals on State Party territory, the CICC reasons that the United States is the nation undermining other nations' sovereign rights by advocating that the ICC should not have jurisdiction over States that have not ratified the Rome Statute.[189] The theory is that since all nations, including the United States, have the right to prosecute criminals on their soil, any State Party has the sovereign right to choose to prosecute criminals through the ICC.[190] The CICC is disappointed with the position of the United States and urges the United States to participate in the ICC.[191]

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182. *See* Rome Statute of the ICC, *supra* note 3, art. 112. The only enumerated duties that involve the Assembly of State Parties monitoring the ICC are found in article 112(2)(b), where the charge is to "[p]rovide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;" and article 112(4) where the Assembly "may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy." *Id.* art. 112(2)(b), (4). Because those duties are managerial duties, the Statute does not suggest that the Assembly will have any power over the ICC to halt any politically motivated case. *See id.*

183. Goldstone, *supra* note 181, at 3.

184. *Id.* This power of the Security Council is found in article 16 of the Rome Statute. Rome Statute of the ICC, *supra* note 3, art. 16. *See supra* Part One II.B (discussing the Security Council's role in deferring trial and the votes required to do so).

185. Goldstone, *supra* note 181, at 3.

186. *See* Rome Statute of the ICC, *supra* note 3, art. 17.

187. *See id.*

188. Goldstone, *supra* note 181, at 3.

189. *See id.*

190. *See id.*

191. *See id.* at 11.

C. *The American Bar Association*

The American Bar Association (ABA) has formerly recommended that the United States accede to the Rome Statute.[192] One of the motivations behind the United States' signature of the Rome Statute, according to the ABA, would have been eligibility in the Assembly, which would lead to the United States having influence over the future of the ICC including "the adoption of the Rules of Procedure and Evidence, the Elements of Crimes, and the definition of aggression."[193]

The ABA rejects the United States' argument concerning the ICC's jurisdiction over non-State parties because even if there were no Statute, if an American committed offenses on another nation's territory, that nation would have every right to prosecute that American, with or without the ICC.[194] The ABA further argues that the protections the Rome Statute offers defendants is consistent with the Bill of Rights despite the lack of a right to a jury trial.[195] The Constitution excludes military service personnel from the right of a grand jury during time of war or public danger, and the trial by jury provision is for a jury in the district where the crime was committed.[196]

Further, the ABA proposes that the Office of the Prosecutor of the ICC has "less authority than the typical County Prosecutor or District Attorney in the United States[,]" limiting yet another argument the United States has proposed.[197] In the ICC, the Prosecutor must obtain agreement from the Pre-Trial Chamber before fully pursuing an investigation that the Prosecutor has initiated.[198]

The ABA concludes by acknowledging that the Rome Statute "bears the imprint of the best of American legal professionalism, expertise and values[,]" because many "American diplomats, government officials, scholars, and representatives of nongovernmental organizations" were included in its

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192. ABA RECOMMENDATION, *supra* note 136, at 1. It should be noted, however, that on August 11-12, 1992, the American Bar Association Task Force on an International Criminal Court recommended to the United States government that there were "numerous important legal and practical issues identified" that the United States should work towards resolving. REPORT OF THE TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT OF THE AMERICAN BAR ASSOCIATION 1 (Alaire Bretz Rieffel ed., 1994). The recommendation listed four principles: 1) Member states should be able to declare the crimes that they recognize the ICC as having jurisdiction over; 2) Both the national State and the territory State should be a party to the Statute before a person is tried before the court; 3) The fundamental rights of the accused should be protected; 4) Sanctions should enforce the obligation of State Parties. *See id.* The Statute does not convey the first or second principles that the ABA found important. *See* Rome Statute of the ICC, *supra* note 3, art. 112.

193. ABA RECOMMENDATION, *supra* note 136, at 1.

194. *See id.* at 7.

195. *Id.*

196. *See id.* at 1, 7; U.S. CONST. amend. V, VI.

197. *See* ABA RECOMMENDATION, *supra* note 136, at 8.

198. *See id.* at 8; Rome Statute of the ICC, *supra* note 3, art. 15(3).

negotiations.[199] While admitting that some provisions of the Statute have room for criticism, the ABA nevertheless urges the United States to join the ICC, arguing that "[t]he security interests of the United States and of its service members and officials are as fully protected as reasonably could be provided for by an international treaty."[200]

V. CONCLUSION OF PART ONE

While the International Criminal Court, in its permanency, is seen by many nations—ninety-two as of this writing—as positive progress for the prosecution of heinous crimes, the United States refuses to adhere.[201] Some of the arguments made by the United States are viable concerns, while others are not as compelling because there Rome Statute provides safeguards.[202] There are strong arguments for why the United States should join the ICC as well as equally strong arguments for why it should not.[203]

PART TWO: IS THE INTERNATIONAL CRIMINAL COURT ANY BETTER THAN THE NUREMBERG TRIALS?

I. THE NUREMBERG TRIALS

A. Introduction

After World War II, the United States, the United Kingdom, the Union of Soviet Socialist Republics (USSR) (Russia), and France, under a Charter drafted in London along with other Allies,[204] formed an International Military Tribunal (IMT) to prosecute German war criminals.[205] Twenty-four defendants were initially charged, one being in absentia.[206] The defendants,

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199. ABA RECOMMENDATION, *supra* note 136, at 9.

200. *Id.* at 9.

201. *See* COALITION FOR THE INT'L CRIMINAL COURT, STATE PARTIES TO THE ROME STATUTE OF THE ICC (2002), *at* http://www.iccnow.org/countryinfo/RatificationsbyUNRegions.pdf (last visited Oct. 27, 2003).

202. *See* discussion *supra* Part One II-III.

203. *See id.*

204. The Allies were a group of nations that agreed to cooperate with each other during the war. *See* THE OXFORD POCKET DICTIONARY AND THESAURUS (Frank R. Abate ed., 1997).

205. THE LAW OF WAR CRIMES NATIONAL AND INTERNATIONAL APPROACHES 171 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997) [hereinafter LAW OF WAR CRIMES]. The other Allies who signed the Charter, but did not take part in the prosecutions, were: "Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxemburg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia." *Id.* at 172 n.3. Interestingly, this trial was intended to be the "first of a series of trials, but a combination of inertia, the Cold War, and a desire to get on with the peace . . . resulted in no more trials . . . ." *Id.* at 172.

206. *Id.* at 172.

among others, were top political figures, "[f]oreign [m]inisters, leading generals and navy commanders, [and] prominent Nazi party administrators . . .."[207] Of the twenty-four, one committed suicide, one was deemed unfit for trial, "three were acquitted, twelve (including the absent [defendant]) were sentenced to death, three received life sentences and four received prison terms."[208] There are two theories regarding how the Allies had the power to prosecute the war criminals of defeated Germany: 1) At the end of the war, the Allies became the official German government as the government of Germany ceased to exist;[209] or 2) The Allies were "exercising the authority of the international community operating on a type of universal jurisdiction theory."[210] The London Charter (Charter) gave the IMT jurisdiction over "crimes against peace,[211] war crimes,[212] and crimes against humanity."[213] To prosecute crimes committed prior to the war, the IMT also charged defendants with conspiracy to wage aggressive war, which was the "common plan or conspiracy" charge.[214] The Charter also effectively prevented the defendants from using the "following orders" defense.[215]

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207. *Id.*

208. *Id. See infra* note 234, for a list of defendants, along with the positions they held.

209. DONALD A. WELLS, WAR CRIMES AND LAWS OF WAR 97 (2d ed. 1991). *See* LAW OF WAR CRIMES, *supra* note 205, at 172.

210. *Id.*

211. *Id.* Crimes against peace was defined as "planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing[.]" *Id.* at 173.

212. *Id.* at 172. War crimes was defined as:

> [V]iolations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity[.]

Id. at 173.

213. LAW OF WAR CRIMES, *supra* note 205, at 172. Crimes against humanity was defined as:

> [M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Id. at 173.

214. Court TV, *The Indictments*, *at* http://www.courttv.com/casefiles/nuremberg/indictments.html (last visited Oct. 27, 2003) [hereinafter *The Indictments*].

215. LAW OF WAR CRIMES, *supra* note 205, at 174.

The Charges

a. Count One: Conspiracy to Wage Aggressive War

The United States was assigned to prosecute the conspiracy count because it was the most difficult and controversial.[216] The defendants charged with this count "were accused of agreeing to commit crimes."[217] At the time, continental law did not recognize conspiracy as a crime; it "remained controversial throughout the trial."[218] It has been argued that this count was based on Nazi policymaking and gave the defendants a chance to exculpate themselves using the confused state of the command structure and ignorance.[219]

b. Count Two: Crimes Against Peace

The British prosecutors tackled crimes against peace.[220] This count was based on the Germans violation of international agreements that were already in place such as the Kellogg-Briand Pact (Pact).[221] The signatories to the Pact agreed to "renounce[] war as an instrument of national policy . . . ."[222] Germany was not only a party to the Pact, but was, ironically, the first country to sign.[223] The problem with the violation of this international agreement is that the Pact did not define "aggressive war" and, more importantly, it did not provide any penalties for violations.[224]

c. Count Three: War Crimes

The USSR and France combined to prosecute the charges of war crimes.[225] The USSR handled the crimes committed in the East, while France

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216. *The Indictments*, *supra* note 214.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* The Kellogg-Briand Pact was signed on August 27, 1928 and entered into force on July 24, 1929. GLUECK, *supra* note 5, at 17. *See* Kellogg-Briand Pact, *opened for signature* Aug. 27, 1928, 27 I.L.M. 1699 (1998) (entered into force July 24, 1929). *See e.g.*, GLUECK, *supra* note 5, at 17-22. The Kellogg-Briand Pact made war a crime but gave no provisions for punishing violations. *Id.*

222. *The Indictments*, *supra* note 214.

223. GLUECK, *supra* note 5, at 17.

224. *The Indictments*, *supra* note 214. The Pact "failed to make violations of its terms international crimes punishable either by an international tribunal or by national courts." GLUECK, *supra* note 5, at 17. The Soviet Union violated the Pact when they invaded Finland, Poland and the Baltics and again when they "schemed with Hitler to sign the Nazi-Soviet Non-Aggression Pact in 1939[,]" secretly dividing Poland. *The Indictments*, *supra* note 214.

225. *The Indictments*, *supra* note 214.

handled the crimes committed in the West.[226] Count three dealt with "acts that violated traditional concepts" of war such as "the use of slave labor; bombing civilian populations; the Reprisal Order[227] . . . ; [and] the Commando Order[228] . . . ." This count was the least controversial as it was more settled in precedents such as The Hague Conventions[229] and The Geneva Conventions.[230]

d. Count Four: Crimes Against Humanity

For the final count, Russia and France joined forces again, dividing the responsibility along the East and the West respectively.[231] The count of crimes against humanity was "applied to defendants responsible for the death camps, concentration camps and killing rampages in the East."[232] Historically, these were crimes "committed by a government against its own people" so the addition of the crime in the London Charter was questioned.[233]

The Prosecution

The prosecuting nations selected defendants in an arbitrary fashion mostly based on their notoriety and their delegated authority.[234] The

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226. *Id.*

227. *Id.* The Reprisal Order "required that 50 Soviet soldiers be shot for every German killed by partisans." *Id.* A defendant being prosecuted by the IMT signed this order. *Id.*

228. Another defendant at the Nuremberg Trials signed the Commando Order, which ordered "downed Allied airmen shot rather than taken captive." *The Indictments*, *supra* note 214.

229. *Id.* In 1899 and 1907, The Hague Conventions prescribed rules on the treatment of prisoners of war and civilians as well as outlawed some weapons such as dum-dum bullets and poison gas. *Id.*

230. *Id.* In 1864 and 1906, The Geneva Conventions prescribed treatment of the sick and wounded. *Id.*

231. *The Indictments*, *supra* note 214.

232. *Id.*

233. *Id.*

234. *Id.* Although, Hans Fritzsche was a "minor official" in a propaganda ministry but the Russian authority that held him insisted that he was charged. *Id.* Fritzsche was acquitted of all charges by the IMT, but Russia dissented in that part of the judgment. *Judgment of the International Military Tribunal* (Sept. 30 and Oct. 1, 1946), *in* THE TRIAL OF GERMAN MAJOR WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 128, 138 (1946) [hereinafter *Judgment of IMT*]. The defendants, in alphabetical order, were:

> KARL DOENITZ[,] Supreme Commander of the Navy; in Hitler's last will and testament he was made Third Reich President and Supreme Commander of the Armed Forces[,] *Sentenced to 10 Years in Prison*[;] HANS FRANK[,] Governor-General of occupied Poland[,] *Sentenced to Hang*[;] WILHELM FRICK[,] Minister of the Interior[,] *Sentenced to Hang*[;] HANS FRITZSCHE[,] Ministerial Director and head of the radio division in the Propaganda Ministry[,] *Acquitted*[;] WALTHER FUNK[,] President of the Reichsbank[,] *Sentenced to Life in Prison*[;] HERMANN GOERING[,] Reichsmarschall, Chief of the Air Force[,] *Sentenced to*

prosecution began with Justice Robert H. Jackson, Chief Prosecutor for the United States of America.[235] In his opening remarks, Justice Jackson acknowledged that this case would not be tried as a typical case by American standards or by the standards of any other established justice system. [236] He was particularly concerned about how quickly the Nuremberg trials were proceeding;[237] he noted that American crimes of much smaller consequence would take at least a year.[238] Yet, in Nuremberg, it took less than eight months despite the myriad of evidence to evaluate, witnesses to interview, and documents to examine.[239] The evidence against the Germans was strong

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Hang[;] RUDOLF HESS[,] Deputy to Hitler[,] *Sentenced to Life in Prison*[;] ALFRED JODL[,] Chief of Army Operations[,] *Sentenced to Hang*[;] ERNST KALTENBRUNNER[,] Chief of Reich Main Security Office whose departments included the Gestapo and SS[,] *Sentenced to Hang*[;] WILHELM KEITEL[,] Chief of Staff of the High Command of the Armed Forces[,] *Sentenced to Hang*[;] ERICH RAEDER[,] Grand Admiral of the Navy[,] *Sentenced to Life in Prison*[;] ALFRED ROSENBERG[,] Minister of the Occupied Eastern Territories[,] *Sentenced to Hang*[;] FRITZ SAUCKEL[,] Labor leader[,] *Sentenced to Hang*[;] HJALMAR SCHACHT[,] Minister of the Economics[,] *Acquitted*[;] ARTHUR SEYSS-INQUART[,] Commisar of the Netherlands[,] *Sentenced to Hang*[;] ALBERT SPEER[,] Minister of Armaments and War Production[,] *Sentenced to 20 Years in Prison*[;] JULIUS STREICHER[,] Editor of the newspaper Der Sturmer, Director of the Central Committee for the Defence against Jewish Atrocity and Boycott Propaganda[,] *Sentenced to Hang*[;] CONSTANTIN VON NEURATH[,] Protector of Bohemia and Moravia[,] *Sentenced to 15 Years in Prison*[;] FRANZ VON PAPEN[,] One-time Chancellor of Germany[,] *Acquitted*[;] JOACHIM VON RIBBENTROP[,] Minister of Foreign Affairs[,] *Sentenced to Hang*[;] BALDUR VON SCHIRACH[,] Reich Youth leader[,] *Sentenced to 20 Years in Prison.*

Court TV, *The Defendants*, *at* http://www.courttv.com/casefiles/nuremberg/defendants.html (last visited Oct. 27, 2003). *See Judgment of IMT*, *supra*, at 84-128, 130-31. Martin Bormann, second in command, was tried in absentia and sentenced to hang. *Judgment of IMT*, *supra*, at 131. In an interview with Court TV, Drexel Sprecher, Assistant United States Prosecutor, said that the Tribunal made a mistake by including Schacht as a defendant. Court TV, *Interview with Nuremberg Trial Prosecutor Drexel Sprecher*, *at* http://www.courttv.com/casefiles/nuremberg/sprecher.html (last visited Oct. 27, 2003) [hereinafter *Sprecher Interview*]. *See* Court TV, *Who's Who*, *at* http://www.courttv.com/casefiles/nuremberg/participants.html (last visited Oct. 27, 2003) (confirming Sprecher as an Assistant U.S. Prosecutor) [hereinafter *Who's Who*]. While Schacht may have originally had some connections prior to the war, he eventually was sent to concentration camps by Hitler, not as part of Hitler's regime, but as a prisoner for "having conspired against Hitler." *Sprecher Interview*, *supra*, *at* http://www.courttv.com/casefiles/nuremberg/sprecher.html. Schacht was in a concentration camp "nearly a year before the trial began." *Id.*

235. *Opening Speech of the Chief Prosecutor for the United States of America* (Nov. 21, 1945), *in* THE TRIAL OF GERMAN MAJOR WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 3 (1945) [hereinafter *Opening Speech of Justice Jackson*].

236. *Id.* at 4. "I should be the last to deny that the case may well suffer from incomplete researches, and quite likely will not be the example of professional work which any of the prosecuting nations would normally wish to sponsor." *Id.*

237. *See id.*

238. *See id.*

239. *See id.*

because the Germans were such meticulous record keepers, not to mention that they were photographed while performing some of the very deeds for which they were now being prosecuted.[240] Moreover, a concentration camp film was used "as a dramatic way of showing some of the evils that had happened."[241]

The prosecution had only thirty-three witnesses that gave oral testimony at the IMT.[242] As a result, the case was decided on the immense amount of evidence that the prosecution presented, which consisted of "documentary evidence, captured by the Allied armies in German army headquarters, Government buildings, and elsewhere."[243]

The Defense

The London Charter gave the defendants the "right to an attorney of their choice," which would be paid for by the Allies.[244] The defendants were also able to present evidence and cross-examine witnesses.[245] When asked whether the defendants at Nuremberg received an adequate defense, Drexel Sprecher, United State Assistant Prosecutor, said that there was some "very good [defense] counsel."[246] Mr. Sprecher particularly was impressed with Otto Kranzbuehler, defense counsel for Karl Doenitz, saying that he was "one of the brightest counsel . . . anywhere."[247] Another impressive attorney was Dr. Rudolf Dix, defense counsel for Hjalmar Schacht, who, prior to the Nazi's taking power, was the President of the German Bar Association.[248] Some of the defendants themselves were lawyers who also helped in the defense.[249]

However, some would argue that the defense offered was not only unfair, but also conflicted with the interests of the IMT. For example, the defense's witnesses were summoned by the IMT; therefore, the prosecution was aware of who the defense would call as witnesses and had adequate time

240. *Opening Speech of Justice Jackson*, *supra* note 235, at 6.

241. *Sprecher Interview*, *supra* note 234.

242. *Judgment of IMT*, *supra* note 234, at 2.

243. *Id.* at 3.

244. Court TV, *The Creation of the Tribunal and the Law Behind It*, *at* http://www.courttv.com/casefiles/nuremberg/law.html (last visited Oct. 27, 2002) [hereinafter *Creation of the Tribunal*].

245. *Id.*

246. *Sprecher Interview*, *supra* note 234. *See Who's Who*, *supra* note 234 (confirming that Drexel Sprecher was an Assistant United States Prosecutor).

247. *Sprecher Interview*, *supra* note 234. *See Who's Who*, *supra* note 234 (confirming that Otto Kranzbuehler was a German Navy judge and defense counsel for Doenitz).

248. *Sprecher Interview*, *supra* note 234. *See Who's Who*, *supra* note 234 (confirming that Dr. Rudolf Dix was counsel for Schacht).

249. *Sprecher Interview*, *supra* note 234.

to prepare to impeach those witnesses or attack their character.[250] Conversely, the defense did not have the advantage of knowing who the prosecution would call as witnesses.[251] In one instance, the defense even made a motion asking that the prosecution forewarn them of witnesses, which was rejected by the IMT.[252] Another inequality existed in pre-examination discussions with witnesses.[253] The prosecution could freely examine any of the defense's witnesses prior to trial, but the defense was not permitted to speak with any of the prosecution's witnesses prior to trial.[254] Even more remarkable is that the defense made a motion asking to examine the documents in the possession of the prosecution; this motion was also denied.[255]

E. Legal Issues at Nuremberg

The London Charter set out the rules that the Nuremberg Court would use in prosecuting the defendants.[256] The rules were a combination of American law and Continental law.[257] Some aspects of the Charter literally mixed the two forms of law, for instance, the evidence presented.[258] The United States required only enough evidence to establish probable cause to place a defendant on trial, while continental law required that all of the evidence be presented before a defendant is put on trial.[259] The IMT combined the laws so that some of the evidence was required, but not all.[260]

Another aspect of the trial that differed from American law is that the defendants were given the opportunity to present unsworn statements at the conclusion of the trial.[261] Furthermore, in American courts, the accused has a constitutionally protected right under the Sixth Amendment "to be confronted with the witnesses against him[.]" [262] At Nuremberg, hearsay

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250. *See* AUGUST VON KNIERIEM, THE NUREMBERG TRIALS 158 (Dr. iur. Elizabeth D. Schmitt trans., Henry Regnery Company 1959). Dr. August von Knieriem (author) was prosecuted in one of the trials conducted by a United States military tribunal post IMT. Max Rheinstein, *Preface* to the American Edition, THE NUREMBERG TRIALS ix (Dr. iur. Elizabeth D. Schmitt trans., Henry Regnery Company 1959). He was found innocent of all charges. *Id.*

251. *Id.*

252. *See id.*

253. *Id.*

254. *Id.*

255. VON KNIERIEM, *supra* note 250, at 158.

256. *Creation of the Tribunal*, *supra* note 244.

257. *Id.* In Continental law, the judge asks many questions of the witnesses, as opposed to American law where counsel asks the questions. *Sprecher Interview*, *supra* note 234. This notion may be carried forward at the ICC because one of the rights of the accused is "[t]o examine, or have examined, the witnesses against him or her[,]" suggesting that judges could question witnesses. Rome Statute of the ICC, *supra* note 3, art. 67(e).

258. *Creation of the Tribunal*, *supra* note 244.

259. *Id.*

260. *Id.*

261. *Id.*

262. U.S. CONST. amend. VI.

evidence was admitted as long as it had probative value; therefore, statements were used in lieu of having witnesses on the stand for the defense to cross-examine.[263]

Another American constitutional guarantee that was unavailable at Nuremberg is the right to a jury trial.[264] Moreover, there was no right to appeal the verdict of the IMT.[265] One of the most controversial differences between the rules of the Nuremberg court and American law is that the laws were imposed ex post facto.[266] The laws that the defendants were accused of violating were, at that time, international laws that applied to nations, not individuals.[267]

II. ANALYSIS OF THE INTERNATIONAL CRIMINAL COURT IN RELATION TO THE NUREMBERG TRIALS

A. *Introduction*

Since the United States held such a key role in the Nuremberg trials,[268] it would seem only natural for the United States to agree to be bound by the Rome Statute. But, as is apparent, the United States is not only against the ICC, but actively seeking to undermine it, at least with respect to American defendants.[269]

B. *Differences in the Two Courts*

The most obvious difference between the two courts is that Nuremberg was a tribunal, therefore temporary, and the ICC is permanent.[270] Since Nuremberg was a temporary tribunal, the IMT could focus on the issue at hand. As a permanent court, the ICC will have other issues such as remaining an economically feasible unit so that the ICC can continue to operate. The Rome Statute does not expressly state what the ICC will do when there is no one to prosecute. The ICC may feel as though it needs a continuous caseload to ease this burden.

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263. *See Creation of the Tribunal, supra* note 244.

264. *See id. See also* U.S. CONST. amend. VI.

265. *Creation of the Tribunal, supra* note 244. The Control Council of Germany, which was the Allied occupation government, could reduce or change the sentences that the defendants received at the IMT. *Id.* However, the request of the defendants who did seek clemency was rejected. *Id.*

266. *See id.*

267. Court TV, *The Trial's Legacy, at* http://www.courttv.com/casefiles/nuremberg/legacy.html (last visited Oct. 27, 2003).

268. *See* LAW OF WAR CRIMES, *supra* note 205, at 171.

269. *See supra* Part One II-III.

270. *See* LAW OF WAR CRIMES, *supra* note 205, at 171; Rome Statute of the ICC, *supra* note 3, art. 1.

The most notable difference between the two courts is that, at Nuremberg, the Allied forces were able to collect an immense amount of data because they were the victors of the war. Consequently, they were able to take the evidence without the hindrance of legal procedures.[271] Since the Germans were such meticulous record keepers, the evidence that the Allies recovered was detailed and convincing enough to convict most of the defendants.[272] This scenario set a perfect stage for international criminal prosecutions; however, the International Criminal Court is not likely to have it as easy. Presumably, the atrocities that the ICC will hear most likely will not come from a war in which the Allies can collect all of the evidence against the defendants with disregard for legal procedure. Even if there was a war, the Nuremberg trials are a lesson to war criminals not to record, in such excessive detail, the events that may later be considered as war crimes; therefore, the evidence linking specific individuals to crimes will most likely be sparse.

Besides the overwhelming difference of access to evidence, there are many other differences between the two courts. For instance, at Nuremberg, the defendants were already in custody.[273] The ICC requests that State Parties arrest accused criminals when charges are brought and is silent on a situation where a State Party refuses.[274] Moreover, one defendant at Nuremberg, Martin Borman, was tried in absentia and sentenced to death.[275] Article 63 of the Rome Statute clearly states that the "accused shall be present during trial."[276]

The IMT's application of ex post facto laws is debatable,[277] but the ICC will have no such issues as the ICC only has jurisdiction for crimes committed after July 1, 2002, when the Statute entered into force.[278] The only debatable aspect of the ICC's jurisdiction in this respect is jurisdiction over nationals of non-party States.[279]

The defense at Nuremberg had problems knowing who the prosecution would call as witnesses as well as gaining access to evidence that the prosecution planned to use.[280] The Rome Statute provides for Rules of Procedure and

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271. *See* LAW OF WAR CRIMES, *supra* note 205, at 172; *see also supra* Part Two I-C.

272. *See Opening Speech of Justice Jackson*, *supra* note 235, at 6; LAW OF WAR CRIMES, *supra* note 205, at 172. *See also supra* Part Two I.C.

273. Cato Institute, *supra* note 180.

274. Rome Statute of the ICC, *supra* note 3, art. 59.

275. *See JUDGMENT OF IMT*, *supra* note 234, at 131.

276. Rome Statute of the ICC, *supra* note 3, art. 63(1). In exceptional circumstances, where the defendant continually disrupts the proceedings, the ICC may remove the defendant and provide the defendant with alternative mechanisms for viewing the trial and communicating with counsel. *Id.* art. 63(2).

277. *See supra* Part Two I.A.

278. *See* Rome Statute of the ICC, *supra* note 3, art. 11(1). As each State becomes a party to the Statute, the court will only have jurisdiction for crimes committed after the entry into force of the Statute for that State. *Id.* art. 11(2).

279. *See supra* Part One III.B.

280. *See supra* Part Two I.D.

Evidence, which should alleviate that problem at the ICC.[281] Finally, one of the more compelling differences with the ICC is that there is an appeals process,[282] which was lacking at Nuremberg.[283]

C. *Familiar Issues with Both Courts*

One familiar issue in both Nuremberg and the ICC is that both have the same category of crime that is still as controversial now as it was then: Nuremberg with the conspiracy to wage aggressive war; the ICC with the crime of aggression.[284] Additionally, both Nuremberg and the ICC crimes include war crimes and crimes against humanity, although definitions for the crimes were greatly expanded in the Rome Statute.[285]

The ICC and Nuremberg each provide the defense with counsel. Nuremberg paid for each defendant to have an attorney of the defendant's choosing.[286] The Rome Statute provides that, if the accused does not have legal counsel, the ICC will assign counsel without charge to the accused if insufficient means is shown.[287] Nuremberg may seem somewhat more just in this respect because the accused made the choice of who would represent them, whereas, at the ICC, legal assistance will be assigned to those who do not have it and only pay when the accused is unable.[288] On the other hand, with the permanent ICC, attorneys around the world will become familiar with the process of defending the accused. Since Nuremberg combined American law and Continental law, the defense attorneys probably were not as effective as in their national courts.[289] Eventually, attorneys with an expertise for defending ICC defendants will be available and capable of giving a defense in the sense that the American legal system is accustomed to.

Furthermore, hearsay evidence is allowed in both instances. This is probably because both courts exclude trial by jury. Therefore, with a bench trial, there is not as great of a potential for unfair prejudice to the defendant. Additionally, without hearsay evidence, a lot of evidence is likely to be left out, leaving a just decision out of reach.

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281. *See* Rome Statute of the ICC, *supra* note 3, art. 69; *Report of the Preparatory Commission for the International Criminal Court*, U.N. Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence (Nov. 2, 2000), U.N. Doc. PCNICC/2000/1/Add.1, for a finalized draft of the Rules of Procedure and Evidence.

282. *See* Rome Statute of the ICC, *supra* note 3, art. 81; *supra* Part One I.I.

283. *Creation of the Tribunal*, *supra* note 244.

284. *See supra* Part Two I.A.; Rome Statute of the ICC, *supra* note 3, art. 5.

285. *See* LAW OF WAR CRIMES, *supra* note 205, at 172; Rome Statute of the ICC, *supra* note 3, art. 5. *Compare supra* note 212, 213 *with supra* note 49, 50.

286. *See supra* Part Two I.D.

287. Rome Statute of the ICC, *supra* note 3, art. 55(2)(c).

288. *See Creation of the Tribunal*, *supra* note 244. *See also* Rome Statute of the ICC, *supra* note 3, art. 55(2)(c).

289. *See supra* Part Two I.E.

Finally, the Nuremberg trials prosecuted top political figures for the atrocities that occurred.[290] The Rome Statute devotes Article 27 solely to reinforce the notion that official capacity is irrelevant to the provisions of the Statute, including dismissing any immunities, national or international, that flow from an official capacity position.[291]

VI. CONCLUSION

Is the International Criminal Court better than Nuremberg? In some ways, yes it is. There is a process in place with the ICC, crimes are pre-defined, there are Elements of Crime, Rules of Procedure and Evidence, and, most importantly, there is an appeals process. Yet, even with these improvements, and even though the United States instigated the Nuremberg Trials, the United States is unwilling to join the ICC. Why? One might think it is because of the issues that make the ICC worse than Nuremberg. One concern is that once the ICC is fully staffed, it will need the influx of continuous cases in order to ward off extinction. At some point, when all of the appropriate ICC cases have been prosecuted, then what will it do? Fearfully, the ICC will start pursuing cases that may be offensive but are not of the truly heinous nature aligned with the intent of the ICC. Because Nuremberg was a tribunal, there was a natural end to the proceedings.

Bothersome too is that at Nuremberg, the Allies, collectively as nations, decided to prosecute the defendants in an international tribunal. All of the nations were sufficiently convinced that the atrocities were heinous enough to warrant such an immense undertaking of bringing together an international tribunal. Cases of the ICC will require no such vigor because the ICC is already established and awaiting cases. Even more striking is that as few as three people, as opposed to many nations, could make the determination to investigate and prosecute a crime. When crimes are of such a heinous nature as to come before any international tribunal, is it appropriate that three individuals alone bring that decision to the world? Will the world accept the determination of these three individuals?

While these questions are outside of the scope of this paper, they are important. The United States must think about these questions in deciding what path to take regarding the International Criminal Court. The problem with the United States is that, as the super power, little is gained from acceding to the ICC because the United States is capable of taking care of itself in situations where the ICC would get involved. On the other hand, the risk involved if the United States does sign the Statute is having American peacekeepers tried for crimes in front of an international tribunal that the

290. LAW OF WAR CRIMES, *supra* note 205, at 172.
291. Rome Statute of the ICC, *supra* note 3, art. 27.

United States does not agree with. Is that really fair when Americans did not have to be on that peacekeeping mission in the first place?

Apparently, the United States does not think that the International Criminal Court is better than Nuremberg since it fully supported Nuremberg and does not support the ICC in its current form. The Nuremberg Trials served a noble purpose, limited in its scope. There were atrocities that needed to be punished, many powerful nations agreed, and the atrocities were punished. The International Criminal Court, structured as it is, does not give quite the same amount of deliberation as the Nuremberg trials. So, in the end, Justice Jackson's promise is not empty – the United States is not "laying down a rule of criminal conduct against others" that it is unwilling to have invoked against Americans.[292] The United States does not think that the open-ended rule of criminal conduct that the International Criminal Court will prosecute should be invoked against anyone.

292. *See supra* text accompanying note 1.

EVOLUTION OF THE "TRADITIONAL FAMILY": A COMPARATIVE ANALYSIS OF UNITED STATES' AND UNITED KINGDOM'S DOMESTIC AND INTERNATIONAL ADOPTION LAW

Brandi R. Foster*

I. INTRODUCTION

A family is "[a] group of persons connected by blood, by affinity, or by law, esp. within two or three generations . . . [a] group of persons who live together and have a shared commitment to a domestic relationship."[1] This definition demonstrates that the legal definition of family is not limited to a blood relationship or even to a socially acceptable relationship.[2] This definition also infers that an accepted definition of a family can be as non-traditional as a single parent and child[3] or a homosexual couple[4] seeking to raise a child and establish a family.[5] It seems sensible to accept that these non-traditional parents,[6] who have committed themselves to have and share in a relationship,

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1. BLACK'S LAW DICTIONARY 273 (2d ed. 2001). Family is further defined as "[a] group consisting of parents and their children." *Id.*

2. *See generally* D'Vera Cohn, *Single-Father Households on Rise; Census Report Reveals Trends in Custody, Adoption Cases*, WASH. POST, Dec. 11, 1998, at A1. The societal trends of acceptance are continually changing in the area of family law. *See id.* The 1998 Census Report reflects an increase in societal acceptance of single men as parents. *See id.* "The number of single fathers with children at home has increased by 25 percent in the past three years . . . ." *Id.* "People once looked at the two-parent family as being the ideal permanency plan . . . [b]ut people are becoming more enlightened about what constitutes a family." Ruth-Ellen Cohen, *Single Men Embrace Adoption*, BANGOR DAILY NEWS, Nov. 28, 1998.

3. *See* Cohn, *supra* note 2. While single women have historically had an easier transition becoming an acceptable adopter, no single parent is given preferential treatment. *See* Cohen, *supra* note 2. However, it seems that society is becoming more acceptable to the single parent. *See id. See also* Cohn, *supra* note 2, at A1. "[S]ociety is awakening to the importance of parenting . . . and that bodes well for single men who want a child in their lives." *See* Cohen, *supra* note 2.

4. "There has been a trend in recent years to make sexual orientation a protected class especially in employment and hate-crime statutes." BLACK'S, *supra* note 1, at 642. Sexual orientation is further defined as "[a] person's predisposition or inclination toward a particular type of sexual activity or behavior . . . homosexuality or bisexuality." *Id.*

5. *See id.* at 273.

6. The term "parent" will be used in this Note to portray a person seeking to adopt, alternatively, a potential adopter.

should not be barred from adoption[7] simply based on their non-traditional status.[8]

Non-traditional parents have difficulty in many aspects of daily routine, not limited to the family law arena. These parents are likely to be discriminated against without the aid of an adoption arena. Yet, societal acceptance of the non-traditional family continues to be a great challenge for several cultures,[9] including, but not limited to, the United States and United Kingdom.[10] However, the inherent similarities between the two countries formulate an interesting area for analysis.

The inquiry into the adoption and family law operations of the United States[11] and the United Kingdom[12] is important in order to determine whether the current adoption practices are acceptable. An analysis of the two countries will determine if a less restrictive and less discriminatory adoption policy, coupled with a more acceptable practice toward non-traditional parents, creates a more beneficial environment for children and families in the United States and the United Kingdom. This Note will compare the domestic and international adoption policies of the United States and the United Kingdom

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7. *See* BLACK'S, *supra* note 1, at 20. Adoption is defined as "[t]he creation of a parent-child relationship by judicial order between two parties who usu. are unrelated. This is accomplished only after a determination that the child is an orphan or has been abandoned, or that the parents' parental rights have been terminated by court order." *Id.*

8. Although there are additional types of parents who can be labeled into the category of non-traditional, the focus of this Note will be on homosexual and single parent adopters. Parents of a mixed race or ethnicity, parents seeking to adopt a child of a different race or ethnicity, parents with a disability and others can all be labeled as non-traditional. *See* Erika Lynn Kleinman, *Caring For Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 337 (1997). These groups have all experienced some level of discrimination and difficulty in their attempts to adopt children. *See id.*

9. Discrimination against homosexuals is apparent in China. *See* Adoption Programs Asia: China, *available at* http://www.planlovingadoptions.org/programs/asia_china1.html (last visited Oct. 29, 2003) [hereinafter China]. Discrimination against single persons is apparent in India. *See* Adoption Programs Asia: India, *available at* http://www.planlovingadoptions.org/programs/asia_india1.html (last visited Oct. 29, 2003).

10. *See generally* China, *supra* note 9.

11. *See The World Factbook 2002*: United States, *available at* http://www.cia.gov/cia/publications/factbook/geos/us.html (last visited Oct. 29, 2003) [hereinafter U.S. Background]. The United States is the most powerful economic country in the World. *See id.*

12. The official name of the United Kingdom is: The United Kingdom of Great Britain and Northern Ireland. *See U.S. Department of State*: Background Note: United Kingdom, *available at* http://www.state.gov/r/pa/ei/bgn/3846.htm (last visited Oct. 4, 2003) [hereinafter U.K. Background]. The population of the United Kingdom is approximated at slightly less than sixty million, which is not nearly comparable to the United States estimated population of over two hundred ninety million. *See* U.K. Background, *supra* note 11. Nevertheless, the United Kingdom is one of the closest allies to the United States and its social policies and government practices are also comparable to the United States. *See id.*

and the effects on the evolution of the notion of the traditional family[13] within each country.

The scope of this Note will be limited to non-traditional adopters, specifically homosexual and single parents, with a particular focus upon gay and lesbian adoption. This approach of addressing non-traditional parents is in contrast to what is thought of as the more traditional parents that are young, heterosexual, married couples.[14]

Part II of the Note provides a brief introduction into the history and development of intercountry adoption as an option within the international community. This section includes a discussion of the development of international regulations and their subsequent affects on the international community with respect to intercountry adoption.

Part III of the Note examines the United States' policies and procedures for domestic adoptions and the effect on non-traditional parents. This section explores the history and development of domestic[15] adoptions as well as the relevant case law in the area. This section also addresses the standard arguments against non-traditional adoption. Finally, this section addresses criticisms of the United States' current domestic adoption policy.

Part IV of the Note examines the United States' policy on intercountry adoption[16] and the effect on non-traditional parents. Additionally, this section explores the history and development of intercountry adoption within the United States. The section continues with an explanation of the implementation of procedures for intercountry adoption within the United States. Finally, this section of the Note addresses criticisms of the United States' current

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13. The notion of the traditional family is a statement that is commonly used. The adoption agencies and departments have historically looked for adoptive parents, which meet these common notions. *See* Elizabeth Bartholet, *Transracial Adoption, Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99, 104 (1995). Traditional notions of family are sought by agencies who look for "standards an adoptive parent must meet . . . [which] have historically reflected preference for marital, age, income, and religious participation requirements modeled after the ideal majoritarian family." Stephanie Sue Padilla, *Adoption of Alien Orphan Children: How United States Immigration Law Defines Family*, 7 GEO. IMMIGR. L.J. 817, 821 (1993).

14. *See* Cohen, *supra* note 2. The ranking system administered by many adoption processes places "young, happily married couples at the top [of the waiting list]; single, older, and disabled people in the middle; and those who are homosexual or severely disabled people near the bottom, or excluded entirely." Roseanne Romano, Comment, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT'L LAW. 545, 550 (1994).

15. Domestic adoptions are termed to reflect to each country's inner-country policies regarding adoption. *See* BLACK'S, *supra* note 1, at 218.

16. Intercountry adoption is referred to with respect and parallel to the term 'Convention' which is more formally the "Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, done at The Hague on May 29, 1993." The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139 [hereinafter Hague Convention].

policy toward intercountry adoption with specific reference to non-traditional parents.

Part V of the Note examines the United Kingdom's policies and procedures for domestic adoptions and the resulting affect on non-traditional parents. This section explores the history and development of domestic adoptions and addresses the relevant case law in the area. This section also addresses the complexities involved with non-traditional parents. Finally, this section addresses the criticisms of the United Kingdom's current domestic adoption policy.

Additionally, Part V of the Note examines the United Kingdom's policy for intercountry adoption and the effect on non-traditional parents. This section of the Note explores the history and development of intercountry adoption within the United Kingdom. This section further explains the procedure for intercountry adoption within the United Kingdom. Finally, this section addresses the criticisms of the United Kingdom's current policy toward intercountry adoption.

In conclusion, Part VI provides some general suggestions to make each country's standard more effective for the non-traditional parent. More uniform standards and policy considerations will be suggested to eliminate some of the discriminatory practices of each country's current adoption regulations and proceedings with respect to their practices in adoption toward the non-traditional parent.

II. INTRODUCTION TO INTERCOUNTRY ADOPTION

Intercountry adoption is "a process by which a married couple or single individual of one country adopts a child from another country."[17] In 1993, delegates from sixty-six countries met at The Hague to discuss the need for uniformity in dealing with intercountry adoptions.[18] The resulting treaty entitled, The Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption[19] (*Hague Convention*), sought to develop new standards for intercountry adoption and to apply those already in effect more consistently.[20] The Hague Convention had three general purposes: (1)

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17. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILDREN'S BUREAU, INTERCOUNTRY ADOPTION GUIDELINES 97 (1980).

18. The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139.

19. *See id.*

20. *See id.* The Convention

> purports to establish minimum standards for intercountry adoptions to prevent the abuses associated with such adoptions and to promote the welfare of homeless and abandoned children everywhere [which] represents a revolutionary step towards a global law, breaking down national walls to achieve a common goal: ensuring the welfare and rights of homeless children.

Lisa Hillis, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?*, 6 IND. J. GLOBAL LEGAL STUD. 237 (1998).

to create legal minimum standards for adoptive parents to meet when attempting to internationally adopt;[21] (2) to create a binding agreement between the nations, in order to promote compliance with the standards;[22] and (3) to relieve any difficulty or conflicts of law between the sending and receiving countries.[23]

International adoptions rose to nearly 20,000 per year during the 1990's,[24] even though they were virtually unheard of prior to World War II.[25] The effects of the war on European families and children sparked the initial interests of intercountry adoption and led many people to open their homes to orphaned children.[26] The process was popularized further after the Korean War.[27] The devastation of that war and the fact that many American soldiers fathered children while they were stationed in Korea,[28] coupled with the Korean government's increased willingness to grant adoptions, motivated the increase in foreign parents adopting within the Korean society.[29] Yet, the popularity and exercise of international adoptions has continued to flourish throughout the World.[30] The increased number of impoverished countries in addition to the war torn countries account for the increased amount of children in need.[31]

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21. *See* Hillis, *supra* note 20, at 240. "These standards include safeguards to prevent the abduction, sale, and trafficking of children." *Id.*

22. *See id.*

23. *See id.* at 241. The sending country is the country of the child's origin, while the receiving country is the country of the parent's origin. *See id.*

24. *See New Rules Could Govern International Adoptions*, CHI. TRIB., May 28, 1993, at N22.

25. *See id.*

26. *See* Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 191 (1994). The influx of adoptions was initiated primarily by the military who were spectators to the devastation and need. *See id.* at 192. Some European countries such as the U.S.S.R., Great Britain, and France were able to accommodate their children while others such as Germany, Japan, Italy, and Greece were unable, thereby creating the need for alternative options. *See* Bridget M. Hubing, Note, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?*, 15 NOTRE DAME J.L. ETHICS & PUB POL'Y 655, 661 (2001). However, the international adoptions at this time were not only limited to the countries which were devastated by the war. *See id.* People adopted children from other affected and devastated countries, where children were in need. *See id.*

27. *See* Liu, *supra* note 26, at 192-93.

28. *See* Hubing, *supra* note 26, at 662. The fact that American soldiers fathered many of the children in need created a negative stigma against these children. *See id.*

29. *See* Michelle Van Leeuwen, Comment, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM L. & POL'Y J. 189, 191 (1999). Between 1953 and 1981, the United States took in over 38,000 Korean children through international adoption. *See id.*

30. *See generally* Jennifer M. Lippold, Note, *Transnational Adoption From An American Perspective: The Need For Universal Uniformity*, 27 CASE W. RES. J. INT'L L. 465 (1995).

31. *See id.* The quality of life and conditions for orphaned children in several countries, not limited to such countries as Africa and Latin America, continue to decrease. *See* UNICEF, *The State of the World's Children*, 1998.

However, even non-poverished countries, such as China, provide a great resource for intercountry adoption.[32] China's one child per family policy has been cited as the source of China's continued need for intercountry adoption.[33]

While the continued need for child placement is apparent and continues to grow, whether intercountry adoption is a valid solution to this problem is greatly debated.[34] The major concern is the apparent diversity that intercountry adoption creates.[35] Transnational adoption, in most cases, creates a family that is made up of different cultures, ethnicities, and races.[36] Other concerns include the black market baby trade,[37] and the theory of imperialism.[38]

Despite the debate over the legitimacy of intercountry adoption, it is apparent that "international adoption saves lives."[39] Intercountry adoption is the solution to the numerous children of the world in need of a family, as well as the answer to the difficulties inherent in the policies of domestic adoption.[40] Similar to domestic adoption, intercountry adoption is concerned with the best interest of the child. And while, "questions are generally raised regarding whether transplanting a child from one country to another is in the child's best interests, the bottom line is that these families are able to provide the children

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32. *See generally* Sarah Jackson-Han, *Chinese Moves Put Foreign Adoptions in Doubt*, AGENCE FRANCE PRESSE, Jan. 12, 1997.

33. *See id.* While United States parents account for the majority of Chinese adoptions and approximately eighty to ninety percent of the intercountry adoptions, China continues to have overcrowded orphanages. *See id.* "China currently has more children needing homes than will be adopted throughout the world." Hubing, *supra* note 26, at 663.

34. *See* Hubing, *supra* note 26, at 663.

35. *See id.*

36. *See id.* at 665. The fact that the wealthier are more able to proceed with an international adoption creates the theory of exploitation, that the "taking by the rich and powerful of the children born to the poor and powerless . . . the adoption by the privileged classes in the industrialized nations, of the children of the least privileged groups in the poorest nations, the adoption by whites of black-and brown-skinned children from various Third World nations, and the separation of children not only from their birth parents, but from their racial, cultural, and national communities as well." Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181, 183 (1996).

37. *See* Hubing, *supra* note 26, at 665. The opposition to intercountry adoption tends to focus on the financial gain of illegitimate adoption agencies in the foreign countries, which profit from the process of black market baby selling. *See id.* While the use of the black market is definitely not in the best interest of the child or the parents involved, a more uniform international process, as formed by the Hague Convention seeks to alleviate such illegal practices. *See* Hague Convention, *supra* note 16, at 1140.

38. *See* Hubing, *supra* note 26, at 665. "Developing countries view international adoptions as a redistribution of children from poor, developing nations to the rich, industrialized nations of the world. 'First you want our labor and raw materials; now you want our children,' is a common response of developing nations to the practice of international adoption." Liu, *supra* note 26, at 194-95 (quoting JANE ROWE, PERSPECTIVES ON ADOPTION, IN ADOPTION: INTERNATIONAL PERSPECTIVES 6 (Euthymia D. Hibbs ed., 1991)).

39. Hubing, *supra* note 26, at 664.

40. *See* Liu, *supra* note 26, at 195.

with love and support and an adequate standard of living."[41] Furthermore, the focus should be "meeting the child's basic needs, even if that did not occur in the child's home nation."[42]

III. UNITED STATES: DOMESTIC ADOPTION

In the United States, individual states regulate domestic adoption policies.[43] Each state's adoption policy is statutorily created and varies greatly throughout the country.[44] The choice to adopt is made by parents for a variety of reasons.[45] However, gay and lesbian couples wishing to start a family have a limited number of options available.[46] In addition, while a single person may be more capable than a homosexual couple to naturally conceive a child, adoption is also an available method to people willing to be single parents.[47]

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41. Hubing, *supra* note 26, at 665

42. Liu, *supra* note 26, at 193.

43. *See generally* 2 AM. JUR. 2d Adoption § 7 (1994). "[O]ne may be legally adopted as the child of another . . . by complying with the provisions of the adoption laws of the state in which such relationship [is] created . . . ." *Id.* (emphasis added).

44. *Id.* The state statutes vary in several ways. *See id.* Some state statutes allow for homosexual parent adoptions, while others do not. *See, e.g.*, FLA. STAT. § 63.042 (2002); N.H. REV. STAT. ANN. § 170-B:4 (2002); IND. CODE ANN. § 31-19-2-6 (2002) (illustrating the discrepancy among the state statutes in determining who is eligible to adopt). The Florida statute states that a potential adopter is ineligible if he or she is a homosexual, specifically prohibiting that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual." FLA. STAT. § 63.042 (2002). The New Hampshire statute was amended in 1999 to state that:

> [A]ny individual not a minor may adopt [specifically following the following guidelines]:
> I. Husband and wife together.
> II. An unmarried adult.
> III. The unmarried father or mother of the individual to be adopted.
> IV. Any foster parent.
> V. A married individual without the other spouse joining as a petitioner, if the individual to be adopted is not such married individual's spouse . . .

N.H. REV. STAT. ANN. § 170-B:4 (2002). This statute was recently amended for the purpose of deleting the phrase, "any individual not a minor and not a homosexual may adopt" which preceded the above guidelines. *Id.* The Indiana statute lists several criteria that a potential adopter must include in its petition for adoption including:

> [N]ame, age, and place of residence of a petitioner for adoption; and if married, place and date of their marriage. . . . Whether the petitioner for adoption has been convicted of a felony; or a misdemeanor relating to the health and safety of children; and, if so, the date and description of the conviction.

IND. CODE ANN. § 31-19-2-6 (2002).

45. *See Infertility Begets a Family, available at* http://www.comeunity.com/adoption/infertility/family.html (last visited Oct. 29, 2003) [hereinafter *Infertility*]. Infertility is a major reason for heterosexual couples to choose adoption. *See id.*

46. *See generally* Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 116 (1996).

47. *See* Bartholet, *supra* note 41, at 182. "[A]doption constitutes the major alternative to infertility treatment and infertility 'by-pass' arrangements such as donor insemination and surrogacy." *Id.*

Once a potential adopter has decided against a natural conception method,[48] or with no other available options chosen to stay within the borders of the United States, they next have three types of domestic adoption options available to them.[49]

Domestic adoptions are available and facilitated through private adoption agencies,[50] public agencies,[51] and independent adoptions.[52] Public adoption organizations are not-for-profit, funded, and ran by the guidance of the individual states.[53] Private agencies are profit organizations, which solicit both the potential adopters and the birth families through advertising.[54] Independent adoptions are generally initiated by a facilitator or attorney retained by the adoptive or birth parents.[55] Each of these different types can function as an open or closed adoption.[56]

While all sectors of adoption agencies use some type of criteria requirement when determining if a potential adopter is eligible, there are certain agencies, which seem to use a more traditional approach than others.[57] Independent adoptions offer the least amount of restrictions for potential adopters and are the most popular method of domestic adoption in the United States.[58] There are various reasons for this. First, while the costs of an independent adoption are exponentially higher than either of the alternatives, the outcomes seem to be more reliable.[59] Second, the ultimate decision about child

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48. *See id.* Natural methods other than pregnancy can include the choice of surrogacy. *See id.* Surrogacy includes a process of the parents contracting with a woman who will become pregnant and carry a child on behalf of the parents and relinquish her rights to the child upon its birth. *See id.* Non-traditional parents have often chosen the option of surrogacy as have traditional parents who are unwilling to undergo the difficult adoption process. *See id.*

49. *See* Charles Chejfec, Comment, *Disclosure of an Adoptee's HIV Status: A Return to Orphanages and Leper Colonies?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 343, 348-50 (1995).

50. *See id.*

51. *See id.* Both private and public agencies are regulated by statute. *See id.* at 348.

52. *See id.*

53. *See* Colleen Alexander Roberts, *Adoption Sources and Options, in* ADOPTION RESOURCES AND INFORMATION 3-5 (Adoptive Families of America ed., 1993). While the state funded status of the public adoption agencies may seem to provide more uniform application of adoption regimes, it may also damage the adoption process through its "overworked and understaffed personnel. [Such] problems create a long waiting period of several years for adoptive parents." Lippold, *supra* note 30, at 471.

54. *See* Kleiman, *supra* note 8, at 329-30. "A private agency may be bound less tightly to certain placement policies than a public agency." *Id.* at 330. However, public agencies may have "more flexible parent requirements than private agencies regarding age, income, marital status, number of current children, and religious affiliation." Roberts, *supra* note 53, at 3.

55. *See* Lippold, *supra* note 30, at 471-72.

56. *See id.* An open adoption is one in which the birth parents and adoptive parents are known to each other. A closed adoption includes anonymity among the parties. *See Open Adoption, available at* http://www.adopt.adoption.com (last visited Oct. 29, 2003).

57. *See* Kleiman, *supra* note 8, at 330.

58. Roberts, *supra* note 53, at 5.

59. *Id.* People seem to be willing to come up with funding more readily when they are given more security that adopting a child is significantly possible. *See id.* There are several options available to parents who need additional funding. *See* Adoption Funding Options,

placement within an independent adoption rests with the parties and not an independent agency.[60] Unlike other agencies, adoptive parents do not have to fulfill any requirements.[61] However, a drawback of an independent adoption is the length of time involved in locating and placing a child, which can be as short as a few days and as long as several years.[62]

No matter the method chosen to initiate the adoption process, a potential parent will be required to go through a substantial number of steps before they will be allowed to start a family.[63] First, the prospective parents will be required to fill out a large amount of paperwork and then endure and fulfill a home study or evaluation.[64] It is at this point where the discrepancies in policies and performance of ranking systems are apparent. Even if the statutory requirements seem to allow non-traditional parents the opportunity to adopt, there are still complications to overcome. While in the United States:

> [D]iscrimination on the basis of age, race, religion, and disability is forbidden in most situations [discrimination on the] basis of marital status and sexual orientation is also prohibited. However, because most adoption statutes provide adoption agencies with the discretion to determine parental fitness, discrimination in this area has continued to abound.[65]

While the adoption agencies are guided by statute and "[i]n theory. . . must follow statutory guidelines, . . . the governing standard in virtually all judicial decisions . . . is a determination of what is in the child's 'best interests'."[66] The adoption agencies use ranking systems to determine a potential parent's eligibility to receive a child.[67] The ranking systems are the point where discrimination toward non-traditional parents is the most evident.[68] The ranking systems are employed by the adoption agencies and they position potential adoptive parents "according to their eligibility for a

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available at http://www.chrysalishouse.com/funding.html (last visited Oct. 29, 2003) [hereinafter Funding Options]. Loans are available for parents who are willing to request personal loans in order to adopt children. *See* Adoption Financing, *available at* http://www.adoptionfinancing.com (last visited Oct. 29, 2003). [hereinafter Financing].

60. *See* Bernadette Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 303-04 (1989).

61. *See* Roberts, *supra* note 53, at 5.

62. *Id.*

63. *See id.* These steps are similarly guided by statute, with each individual state's requirements varying from the next state. *See id.* For instance, in Indiana, the requirements for the initial adoption petition are specifically laid out by statute. *See* IND. CODE ANN. § 31-19-2-6 (2002). However, the adoption petition requirements in New Hampshire are not as specific. *See* N.H. REV. STAT. ANN. § 170-B:4 (2002).

64. *See* FLA. STAT. ANN. § 63.112(2) (b) (2002).

65. Romano, *supra* note 14, at 551.

66. Kleiman, *supra* note 8, at 345.

67. *See id.*

68. *See id.*

child."[69] These ranks are determined subjectively by the agencies and tend to "put young, happily married couples at the top of the waiting list . . . and homosexuals . . . at the bottom."[70] The standards that a potential adoptive parent must meet "in order to provide for the best interests of a particular child have historically reflected preference for marital, age, income, . . . and family."[71] While these standards seem to put the child's best interest first and may not seem to be discriminatory, they tend to extend the adoption process. Additionally, they increase the waiting time for both the child in need of a home and the parents seeking to adopt; yet, they ignore the parental capabilities of a non-traditional parent.[72]

While it is important that the agencies sustain some criteria in order to meet the best interests of the child, non-traditional parents can arguably meet these interests.[73] "It is not sound policy to insist that a child can be parented only by an individual who is exactly like him or her . . . 'a potential parent's particular sexual orientation should not be used as a proxy for the special parenting skills that . . . children might require.'"[74] Furthermore, if a state statute is openly hostile to the homosexual community, it is not likely that a potential adopter will be honest about his or her sexual orientation.[75] Additionally, the restrictions imposed upon non-traditional parents will lead these parents, who would rather help a child in need of a home, to seek alternative options.[76] Such options include pregnancy, surrogacy, and international adoptions.[77] These alternative options tend to have less stringent policies and prohibitions toward the non-traditional parent.[78]

There is no evidence or empirical data that the traditional family is better for a child, or in the child's best interest.[79] Additionally, there is no proof that

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69. *Id.* at 346.

70. *Id.* at 344. These agencies classify the young, happily married couples as "traditional notions of family." *Id.*

71. Padilla, *supra* note 13, at 821.

72. This is similar to what has been termed "race-matching" policies, which has drastic effects particularly in a transracial adoption, where either the child is of a different race or ethnicity or the potential parents are of a different race. *See* Kleiman, *supra* note 8, at 344. "[B]ecause most agencies have very strong race-matching policies . . . a prospective parent whose race does not match that of the available children will have a long wait before a 'match' can be made." *Id.* This analysis can also add that a child who does not match a potential parent based solely on the race criteria will have to wait as well. *See id.*

73. *See* Mishra, *supra* note 46, at 116.

74. *Id.* Furthermore, "it should be recognized that people possessing those special skills are found across the spectrum of human sexuality." *Id.* at 116-17.

75. Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 209 (1995). Adequate records of the number of homosexual, adoptive parents are not available because "lesbian and gay people do not reveal their sexual orientation when adopting." *Id.*

76. *See id.*

77. *See id.*

78. *See generally* Romano, *supra* note 14.

79. *See id.*

a single parent family or a homosexual parent family affects the development of children.[80]

Yet, states such as Florida have continually upheld the validity of statutes, which explicitly prohibit the adoption of a minor by a homosexual.[81] The Florida courts, most recently in *Lofton v. Kearney*,[82] upheld the statute's validity, stating: "[T]he best interest of the child is to be raised by a married family."[83] This case involved a gay couple, two men, both registered nurses, who acted as foster parents for the state of Florida.[84] The men provided foster care for special needs children, particularly children with H.I.V.[85] The couple provided excellent care for the children.[86] One of the children in their foster care[87] was initially diagnosed with H.I.V. at infancy but no longer tested positive.[88] When this child was available for adoption, the couple was unable to adopt him because of Florida's statutory prohibition.[89] The court held that homosexuals are not a protected class and did not successfully meet the burden of proving the best interest of the child standard with regard to a married family placement and the homosexual prohibition in the statute.[90] The court further explained that a foster family relationship is contractual in nature and does "not warrant justified expectations of family unit permanency."[91]

The decision in *Lofton* is logically flawed in certain areas. The court stated that a main concern was the contractual nature of the foster parent-foster child relationship.[92] While the ultimate goal of fostering should be child placement in a permanent home, it seems logical that the child's best interests

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80. *See id.*

81. *See* FLA. STAT. ANN. § 63.042 (2002).

82. *See* Lofton v. Kearney, 157 F. Supp. 2d 1372 (So. Dist. Fla., 2001). This case has received a considerable amount of media attention. Actress and comedian Rosie O'Donnell, a lesbian and a single parent adopter, has taken great interest in this case and provided much publicity for the gay parents involved. *See* Jane Meredith Adams, *Love vs. The Law*, Rosie Magazine, Apr. 2002, *available at* http://www.rosiemagazine.com/people/archive.jsp (last visited Oct. 29, 2003).

83. Lofton, 157 F. Supp. at 1384.

84. *See id.* at 1375.

85. *See id.*

86. *See id.* One of the foster parents received the Outstanding Foster Parenting Award from the Children's Home Society. *See id.*

87. *See id.* The child has lived with the men since he was voluntarily left with them by the child's biological father. *See* Lofton, 157 F. Supp. at 1375-76.

88. *See id.* at 1375. The child, called Doe in the case, "successfully sero-converted during infancy and no longer tests positive for H.I.V." *Id.*

89. See FLA. STAT. ANN. § 63.042 (2002).

90. *See* Lofton, 157 F. Supp. at 1382-84.

91. *Id.* at 1380. The court uses the permanency argument, yet the child was not made available for adoption until after he tested negative for H.I.V. in 1994 and had been living with his foster parents since he was a toddler. *See id.* at 1375-76.

92. *See id.* at 1380. The court stated that the foster family arrangement does "not warrant justified expectations of family unit permanency. Foster families are grounded in state law and contractual arrangements .... [F]oster care is typically a short term placement while the State seeks to find permanent placement in an adoptive home." *Id.*

standard should also be a central goal.[93] In keeping with the best interests of the child, it seems that it should be as important for the foster parent to develop more than a contractual relationship with the child. Feelings of love and security between the foster parent and child would most likely be more helpful for the positive development of the child than a sense of contractual obligation. The court also does not recognize the hypocrisy of allowing a homosexual couple to act as foster parents for H.I.V. infected children but explicitly prohibiting homosexual adoption.[94] The court stated its concern that homosexuals cannot prove the overall best interests of the child standard, which does not seem to take into account the short-term affects of foster care on a child.[95] If the court is concerned by homosexual care for the child, it seems to be ignoring that such short term foster care could cause potential harm. Furthermore, the court ignores the apparent reality that children in foster care can be there for years, possibly their entire childhood up to the age of majority, or alternatively, adulthood.[96] These issues that the court overlooks seem to outweigh the court's reasoning in upholding Florida's statute expressly prohibiting the adoption of children by homosexuals.[97]

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93. The best interests standard involved in adoption cases has historically been found to be the ultimate determination in the placement of a child. *See in re: Adoption/Guardianship No.* 2633, 646 A.2d 1036 (1994). The court reiterated the general concept accepted that, "a trial court must employ the 'best interest' standard. The determination as to what would most appropriately serve the welfare and best interests of the child is made at the [trial court]." *Id.* at 1043.

94. *See* Lofton, 157 F. Supp. at 1372. The gay couple currently provides permanent foster care for three foster children none of which, other than the boy in this case, had been freed for adoption due to their H.I.V. status. *See id.* This seems to illustrate that the gay couple is adequate to parent, as Florida is willing to let the couple ultimately raise the other three H.I.V. positive boys, who are not freed for adoption. *See id.*

95. *See* NANCY NEWTON VERRIER, THE PRIMAL WOUND: UNDERSTANDING THE ADOPTED CHILD (1993). Children in foster care generally seem to have difficulty adapting to new situations. *See id.* They have not generally been given a good foundation to grow on, many have abandonment issues and can present a challenge to both a foster or adoptive parent. *See id.* Moving from home to home is a difficult transition for children and many tend to feel that they are not wanted, creating even more difficult situations. *See id.* Furthermore, there is no guarantee that a foster placement will be short term. *See id.* Noting the difficulty of understanding the various situations of children affected by adoption, the author explains:

> Adoption isn't a concept to be learned, a theory to be understood, or an idea to be developed. It is a real life experience about which adoptees have had and are continuing to have constant and conflicting feelings, all of which are legitimate. Their feelings are their response to the most devastating experience they are ever likely to have: the loss of their mother. Just because they do not consciously remember it does not make it any less devastating. It only makes it more difficult to deal with, because it happened before they had words with which to describe it (preverbal) and is, therefore, almost impossible to talk about.

Id.

96. *See id.* The time that a child remains in foster care is fluctuant. *See id.* Since adoption is a subjective process, there is no way to determine how long a child will remain in foster care. *See id.* However, it is possible to assume that a healthy baby will be placed with a permanent home rather quickly. *See id.*

97. *See* FLA. STAT. ANN. § 63.042 (2002).

A. United States Domestic Adoption: Criticisms

The decision to stay within the United States to begin a family is a difficult choice to make with the current practices and policies of the domestic adoption agencies. While not all people should be given the absolute right to adopt a child, when a potential parent chooses the option of adoption, there should be a presumption that the best interests of all involved should be met throughout the process, regardless of the traditional notions of family.

The best interests of a child in need of a loving home should come first over any discrimination based on a non-traditional status. If the states are not willing to provide equal opportunities to non-traditional parents by statute, the statutes should place more stringent guidelines upon the agencies to deter the ranking decisions based upon the traditional criteria. This criterion is detrimental to both the child and the potential adoptive parents, when neither meets the traditional notions of family.[98]

Furthermore, the traditional arguments against adoption by gay and lesbian couples are without merit. There are several arguments against allowing adoptions by gay and lesbian couples. One argument is that children raised by homosexual parents are more likely to become homosexuals themselves.[99] Another argument is that children raised in a homosexual environment are more likely to encounter sexual abuse.[100] A third argument is that children raised by homosexual parents will be stigmatized and face a social bias.[101] A final argument against homosexual parents' adoption of children is that homosexuality is "immoral, unnatural, or otherwise threatening to the survival of humanity."[102]

These arguments, made by anti-homosexual adoption advocates,[103] is unwarranted by empirical research.[104] In fact, research shows that a parent's "sexual orientation is unrelated to parental ability."[105] There is no data to support the idea that a child raised by a homosexual parent is more likely to become a homosexual.[106] There is also no empirical data that supports the contention that a parent's sexual orientation affects a child's own sexual orientation.[107] Additionally, statistics demonstrate that heterosexual males

98. *See* Padilla, *supra* note 13, at 821.
99. *See* Hubing, *supra* note 26, at 668.
100. *See id.*
101. *See id.*
102. *Id.* at 669.
103. *See id.* at 668.
104. *See id.* at 669.
105. Hillis, *supra* note 20, at 246 (1998).
106. *See* Elovitz, *supra* note 75, at 213. Three research studies found that being raised by a gay or lesbian parent is not correlated with a child's sexual orientation. *See id.*
107. *See* Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 198 (1995).

encompass the majority of sexual abusers.[108] Furthermore, any discriminatory arguments related to the immoral nature of a homosexual relationship are derogatory in nature and should not be supported, as they are mere opinion and discrimination that are insufficiently supported. Finally, studies reveal that children raised by homosexual parents do not experience developmental deficiencies, nor do they perform any differently in social situations than children raised in a heterosexual environment.[109]

Similarly, the traditional arguments against adoption by single parents are without merit.[110] The primary argument against single parent adoption is that one parent cannot adequately provide for the best interests of the child.[111] One specific concern is what would happen to the child should the parent become unable to care for the child.[112] Yet, this similar concern can be made for several parents, as single parent households are increasingly common around the world.[113]

Several non-traditional parents have chosen to bypass the domestic arena because the prevalent issues surrounding domestic adoption in many countries. However, because of the continual changes in intercountry adoptions, and the discrimination against the non-traditional parents, the adopters are facing increasingly similar problems in the international arena.

IV. UNITED STATES' LAW

A. United States' Policy for Intercountry Adoption

International adoption has become an increasingly popular option for parents within the United States.[114] The opportunities to go outside the borders of the United States to adopt a child have been increasing since World War

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108. *See* Elovitz, *supra* note 75, at 216. A research study indicated that approximately five percent of children interviewed experienced harassment by other children. *See id.* at 215.

109. *See* Kleinman, *supra* note 8, at 345-46.

110. *See id.*

111. *See* Hubing, *supra* note 26, at 668.

112. *See id.*

113. *See id.* Non-traditional parents are adopting in unprecedented rates. *See* ADAM PERTMAN, ADOPTION NATION, HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 161 (2000). "[S]ingle people are adopting at an unprecedented rate, as are those with disabilities who couldn't have dreamed of becoming parents before. It also means escalating numbers of overtly gay and lesbian adults are adopting . . . as same-sex couples." *Id.* However, the same source subsequently cites the growing number of states to impose restrictive legislation with respect to homosexual and single parent adoptions. *See id.* "[M]agistrates and social workers all over the country take it upon themselves to apply that same standard [that only straight, married couples can be foster homes] every day." *Id.* at 162 (emphasis added).

114. *See* PERTMAN, *supra* note 113. "Americans adopt more children internationally than do the inhabitants of the rest of the planet combined." *Id.* at 51. "An estimated 20,000 international adoptions take place worldwide every year. Nearly half of these adoptions involve U.S. citizens as the adoptive parents." Hubing, *supra* note 26, at 660.

II.[115] This type of adoption has allowed several parents the opportunity to adopt a child more quickly and somewhat more easily than they could have through domestic adoption.[116] The reasons behind the increase in intercountry adoptions within the United States is a subject of various opinions. Some credit the humanitarianism of United States citizens.[117] Other theories involve the idea that there is a shortage of available American children in the United States.[118] However, the most weight and credit toward this increase is the ability of a prospective parent, traditional or non-traditional, to easily adopt a child and avoid the difficulties inherent in the domestic system.[119]

The United States attended the Hague Convention in 1993.[120] However, the treaty was not signed until 1994.[121] Furthermore, Congress did not pass the bills for implementation of the treaty until 2000, when they finalized and passed the Intercountry Adoption Act of 2000.[122]

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115. *See* Lippold, *supra* note 30, at 467. "Transnational adoptions have occurred for over forty years." *Id.* Before the war, intercountry adoption was not a conventional option for parents seeking to adopt a child. *See id.* The trend toward intercountry adoption began as a humanitarian act, adopting orphans from war torn countries. *See id.* Thus, avid numbers of children originally came from Korea, Romania, Yugoslavia, and Russia. *See* Hillis, *supra* note 20, at 237. The countries included in intercountry adoptions is not limited and often includes: "Brazil, Colombia, Korea, India, Chile, Guatemala, Peru, El Salvador, Albania, Bulgaria, and China." Lisa Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 287-88 (1995).

116. *See* Kleiman, *supra* note 8, at 333. However, this is not to ignore the difficulties involved in an international adoption. *See id.* "There are several risks and roadblocks associated with transnational adoptions, in addition to having to fulfill the diverse jurisdictional requirements [imposed by the United States]. These problems include war, changes in governments, changes in adoption laws and procedures, illegal baby trading, undisclosed medical histories, and racism." Lippold, *supra* note 30, at 486.

117. *See* Kleiman, *supra* note 8, at 333. After the Korean War, American's aided the orphaned children, by adopting them and bringing them home to the United States, which began the trend toward intercountry adoption. *See id.*

118. *See* Liu, *supra* note 26, at 198. The idea that there is a shortage of available American children is unwarranted really, unless you consider that the shortage is the lack of healthy, young Caucasian American babies. *See* Richard Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 334 (1988). The shortage might be removed if an acceptable system of transracial adoption were addressed and implemented. *See id.* "However, an increased use of contraception, legalization of abortion, and the tendency of single parents to keep their children have reduced the number of babies available for adoption in these countries." Hubing, *supra* note 26, at 659. *See* HOWARD ALSTEIN AND RITA SIMON, INTERCOUNTRY ADOPTION, A MULTINATIONAL PERSPECTIVE 8-10 (1991).

119. *See* Kleinman, *supra* note 8, at 333. Many parents feel like they have a better chance of successfully completing an international adoption over a domestic adoption. *See id.* Again, this view of many potential adopters does not address the complexities involved in an intercountry adoption, which will be discussed last in this note.

120. *See* Hague Convention, *supra* note 16, at 1134.

121. *Hague Convention on Intercountry Adoption, available at* http://www.travel.state.gov/hagueinfo2002.html (last visited Oct. 6, 2003) [hereinafter *Hague Outline*].

122. *See id.* The final legislation of the convention only applied small differences from the original agreement made at the Hague. *See id.*

President Clinton[123] signed the Intercountry Adoption Act on October 6, 2000.[124] Around the same time, Congress advised that the United States would ratify the treaty after the preparations for its implementation had been put into place by the United States.[125]

Since that time, the United States has been actively pursuing the resources and developing the personnel and departments needed in order to comply with the Intercountry Adoption Act and the agreements made at the Hague Convention.[126] Complete implementation of these policies and regulations planned for the year 2004.[127]

There are several benefits to implementing the Intercountry Adoption Act.[128] First, implementation provides a formal, uniform application of recognition for intercountry adoptions.[129] Second, it recognizes intercountry adoption as the source of an answer to the growing number of children in

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123. *See id.*

124. *See* 42 U.S.C. § 14901 (2003). The Intercountry Adoption Act provides in relevant part:

> (a)(1) the international character of the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (done at The Hague on May 29, 1993); and
> (2) the need for uniform interpretation and implementation of the Convention in the United States and abroad, and therefore finds that enactment of a Federal law governing adoptions and prospective adoptions subject to the Convention involving United States residents is essential.
> (b)(1) to provide for implementation by the United States of the Convention;
> (2) to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests; and
> (3) to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.

Id.

125. *See* Hague Outline, *supra* note 121. Federal regulations need to be set as to:

> (1) the requirements entities must meet to qualify for designation to accredit or approve adoption service providers as required by the Convention and the IAA [Intercountry Adoption Act];
> (2) specify the standards to be met by agencies and individuals seeking to become Hague Convention accredited or approved to be able to provide adoption services for adoptions covered by the Convention; and
> (3) set out the procedures to be followed for incoming and outgoing adoptions involving the United states that are safeguarded by the Hague Convention and the IAA.

Id.

126. *See* Hague Outline, *supra* note 121. The specific provisions relating to accreditation and approval in order to provide adoption services, in order to comply with the regulations of the Intercountry Adoption Act and the Hague Convention, within the United States can be found in 42 U.S.C. § 14921-14924 (2003).

127. *See id.*

128. *See id.*

129. *See id.*

need.[130] Third, it establishes internationally agreed upon "minimum requirements and procedures uniformly to govern intercountry adoptions in which a child moves from one Convention party country to another."[131] Fourth, it requires creation of a Central Authority in each Convention country.[132] This authority will be the source of information for the countries' citizens and will provide a place for the uniform application of the implemented laws and regulations.[133] This authority will also be better equipped to communicate and work with other convention countries, creating a more accessible place to receive answers regarding other convention countries.[134] Most importantly, the Intercountry Adoption Act will ensure that intercountry adoptions are provided for and regulated within the United States.[135] It will ensure that these adoptions are recognized in the other partner Convention countries, while at the same time, providing potential United States parents a safeguard and automatic naturalization in the United States, when they choose intercountry adoption as their ultimate option.[136]

B. United States: Intercountry Adoption Procedure

When deciding to initiate an intercountry adoption, a potential parent must first determine whether to use a private agency, public agency, or independent adoptions.[137] However, with the new regulations implemented in the Intercountry Adoption Act,[138] it may become more difficult for smaller, private adoption agencies as well as independent agencies to assist with intercountry adoptions.[139] These new regulations are to ensure a uniform practice toward

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130. *See id.*

131. *Id.*

132. *See* Hague Outline, *supra* note 121.

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.* In the years preceding the Intercountry Adoption Act, American parents who adopted a child internationally were required to petition the United States, requesting citizenship for their adopted child, even with a finalized adoption decree. *See id.* This step could sometimes take years to complete and was an agonizing step of the international adoption process. *See* Office of the Spokesman of U.S. Department of State, *"Child Citizenship Act of 2000," available at* http://www.travel.state.gov/childcit.html (last visited Oct. 29, 2003). With the implementation of the Intercountry Adoption Act and additionally, the Child Citizenship Act of 2000, internationally adopted children will automatically become citizens upon their admission into the United States. *See id.* Provided that certain specific conditions within the adoption proceedings have been successfully completed. *See id.*

137. *See* Hartfield, *supra* note 60, at 303-04. For a full discussion of the role of these agencies within United States domestic adoptions, see discussion *infra* section III.

138. *See* 42 U.S.C. § 14901 (2002).

139. *See* Hillis, *supra* note 20, at 243. The Hague Convention created the idea that the Central Authority would accredit and regulate the agencies that could legally assist an intercountry adoption. *See id.* The Intercountry Adoption Act provides a list of specific provisions that an entity must meet in order to be qualified as an agency that can assist in intercountry adoptions. *See id.* at 243-244. The implementation of these regulations may

intercountry adoptions and lowering the inconsistencies of the current system.[140]

Next, the parent ordinarily must complete several forms, available from either an adoption agency, or available through the sending[141] country. The sending country has a set list of guidelines that an adoptive parent must meet to be eligible to adopt from that country.[142] Most countries' requirements include a home visit, or home evaluation and study, conducted by a trained and accredited agency.[143] Once the sending country receives the appropriate paper work, and approves the potential adopter, the country next begins the process of finding a child who best matches the parent.[144]

"affect the ability of smaller private agencies to provide adoption services. Also, independent adoptions . . . may be [affected] by the accreditation requirements of the Convention." *Id.* at 243. Furthermore, independent adoption agencies have historically been and continue to be heavily criticized for their involvement with intercountry adoptions. *See id.* Several people criticize independent agencies for their reliance on the financial gain aspect of the adoption rather than the best interest of the child aspect. *See id.* The discussion of independent agencies turned into a serious debate during the 17th session of the Hague Convention. *See* Peter Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise,* 28 FAM. L.Q. 53, 67. (1994). Many believe that problems with intercountry adoption started with the independent adoption agencies, and many of the adoptee countries would like to eliminate the agencies from the intercountry adoption process completely. *See id.*

140. *See id.*

141. The sending country is the country of the child's origin. Generally, a parent choosing to adopt internationally will need to complete research, which is abundantly available through the internet, in order to best determine which country they would like to pursue an adoption.

142. These guidelines are available and vary from country to country. For instance, China requires that an adoptive parent have no more than fifteen percent body fat.

143. The Intercountry Adoption Act also provides the regulations with respect to the accreditation requirements for these steps of the intercountry adoption process. *See* 42 U.S.C. § 14922 (2002).

> (a) Designation of accrediting entities.
>
> (1) In general. The Secretary shall enter into agreements with one or more qualified entities under which such entities will perform the duties described in subsection (b) in accordance with the Convention, this title, and the regulations prescribed under section 203 [42 USCS § 14923], and upon entering into each such agreement shall designate the qualified entity as an accrediting entity.
>
> (2) Qualified entities. In paragraph (1), the term "qualified entity" means—
>
> (A) a nonprofit private entity that has expertise in developing and administering standards for entities providing child welfare services and that meets such other criteria as the Secretary may by regulation establish; or
>
> (B) a public entity (other than a Federal entity), including an agency or instrumentality of State government having responsibility for licensing adoption agencies, that--
>
> (i) has expertise in developing and administering standards for entities providing child welfare services;
>
> (ii) accredits only agencies located in the State in which the public entity is located; and
>
> (iii) meets such other criteria as the Secretary may by regulation establish.

Id.

144. The scope of this Note does not include the process or biases of the sending country.

C. *Criticisms of the United States: Intercountry Adoption*

The inherent and obvious problem of the implementation of the Hague Convention and the Intercountry Adoption Act[145] is the power retained by the individual adoption agencies within the states to determine the eligibility of the potential adopters.[146] The same institutions, which are capable of discriminating against the non-traditional parents in the domestic adoption arena, are seemingly placed in a similar position under the new provisions of the Intercountry Adoption Act.

V. UNITED KINGDOM LAW

A. *United Kingdom: Domestic Adoption*

Domestic adoption in the United Kingdom is regulated by the Adoption Act 1976.[147] The Adoption Act 1976 establishes that the local authorities are responsible for maintaining the services of adoption.[148] The Adoption Act 1976 also provides regulations that a local service must meet in order to become eligible to provide services.[149] The Act states that the duty of the organizations is to promote the welfare of the child involved.[150] The statute expressly states the requirements that each applicant parent must meet in order to be considered eligible to adopt.[151]

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145. *See* 42 U.S.C. § 14901 (2003).

146. *See* Hillis, *supra* note 20, at 243.

147. *See* Adoption Act 1976, Ch. 36, s.1 (Eng.). The Adoption Act 1976 came into force on 1 January 1988. *See id.* The Adoption Act 1976 consolidated the law on adoption as found in the Adoptions Acts of 1958, 1960, 1964 and 1968 and the Children Act 1975. *See id.*

148. *See* Adoption Act 1976, Ch. 36, s.1 (Eng.). The Adoption Act 1976 further provides that it is the duty of the local service "to provide the requisite facilities, or secure that they are provided by [approved adoption societies]" *Id.* The facilities include "temporary board and lodging where needed by pregnant women, mothers or children; arrangements for assessing children and prospective adopters, and placing children for adoption; and counseling for persons with problems relating to adoption." *Id.* The Act also provides that these services shall be fully provided "so that help may be given in a coordinated manner without duplication, omission or avoidable delay." *Id.*

149. *See id.*

150. *See* Adoption Act 1976, Ch. 36, s.6 (Eng.). In determining placement of a child, the organization's first consideration should be "given to the need to safeguard and promote, the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding." *Id.*

151. *See* Adoption Act 1976, Ch. 36, s.14-15 (Eng.). One party of a married couple must have attained the age of eighteen and the other attained the age of twenty-one. *See* Adoption Act 1976, Ch. 36, s.14. At least one of the parties must be domiciled in a part of the "United Kingdom, or in the Channel Islands or the Isle of Man." *Id.* Adoption by a single parent can also be made upon the showing that the party has attained the age of twenty-one, is domiciled in the "United Kingdom, or in the Channel Islands or the Isle of Man." Adoption Act 1976, Ch.

The United Kingdom's adoption laws do not expressly prohibit the adoption of children by non-traditional parents.[152] However, the same discriminatory views and arguments against placing children in a non-traditional home exist as are present in the United States.[153] The lack of material addressing homosexual adoption and foster care within the United Kingdom provides a source of difficulty. The personal accounts of United Kingdom citizens provide an insight into the experiences of lesbians and gay men who have been successfully approved to care for children.[154]

The current trend in the United Kingdom case law is that the courts are willing to free[155] an adoption order to non-traditional parents in certain situations. In *Re E*,[156] a eleven-year-old girl was placed with a lesbian who wished to adopt the child at some future point.[157] The local authority sought a freeing order to allow the foster parent the option to adopt.[158] The judge at first instance made the order and dispensed with the birth mother's consent and

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36, s.15. The applicant must further show that he or she is not married, or if married can prove that the spouse can not be located, is separated from the party, or is too ill to make an adoption order. *See id.*

152. *See* Adoption Act 1976, Ch. 36, s.1 (Eng.).

153. For a refresher on what the ordinary arguments are regarding the non-traditional parents: homosexuals and single parents. *See* discussion *infra* Section IIB. *See also* STEVEN HICKS & JANET MCDERMOTT, LESBIAN AND GAY FOSTERING AND ADOPTION: EXTRAORDINARY YET ORDINARY 11 (1999). This book is a collection of stories involving lesbians and gay men who have attempted to adopt within the United Kingdom. *See id.*

154. *See id.* The highlighted accounts from the book demonstrate the continual discrimination which exists in general society of the United Kingdom. *See id.* Many people believe that gays and lesbians are "unnatural parents and believe that they should be actively barred from caring for children." *Id.* at 12. The stories provide accounts on a wide variety of situations including bi-racial lesbians, young gay men, older gay men; in a wide assortment of stories. *See id.* The ongoing theme of the difficulties stemmed from the discrepancies involved with the local adoption agencies. *See* HICKS & MCDERMOTT, *supra* note 153, at 11. The agencies tend to have control over who becomes eligible to adopt, with no apparent place to appeal. *See id.* Of course there are exceptions, as the book noted at least one adoption agency that actively recruits gay and lesbian parents. *See id.* at 38.

155. Freeing an adoption order means to grant an adoption order. In the case of a disputed adoption, the court has to look at two entirely separate matters:

> The first question is whether adoption is in the best interests of the child. In that context the welfare of the child is the first consideration, and the test is set out in s 6 of the Adoption Act 1976. The second question is whether the court should dispense with the agreement of the parent, and the court must decide whether it has been established that this parent is withholding her agreement unreasonably on the test of the hypothetical reasonable parent. These two considerations are distinct and separate and, although they can be heard together, they must be decided separately.

Re E [1995] 1 FLR 382

156. *See id.*

157. *See id.*

158. *See id.*

birth mother appealed.[159] The Court of Appeal considered whether the judge had applied the correct principles to the evidence before him including expert evidence concerning possible effects upon a child being brought up in a lesbian household.[160] At first, the judge had reservations about the placement and said that in principle it would not be desirable for a child to be placed with a lesbian.[161] Ultimately however, the judge decided that this case was a special one.[162] The Court of Appeal was satisfied that the judge at first instance had exercised his discretion properly and the birth mother's appeal failed.[163]

Similarly, in *Re W*,[164] a local authority had placed a girl who was subject to a care order with a lesbian couple who desired to adopt the child.[165] The justices determined that the child's parents had neglected her and exposed her to moral danger. Before being placed with the couple in 1995, she had been through several unsuccessful placements.[166] The local authority sought an order freeing the child for adoption and the birth mother objected on the grounds that it was contrary to public policy to make an adoption order in favor of a party living in a same-sex relationship.[167] A freeing order for adoption was made and the court stated that adoption provisions should be drawn widely and should not exclude, as a matter of public policy, a homosexual cohabiting couple or a single person with homosexual tendencies from applying to adopt a child.[168]

Although a number of adoption orders have been made to gay men, there are no reported English cases concerning gay male applicants. In the Scottish case of *AMT*,[169] the court considered an application by a gay man to adopt a five-year-old disabled boy for whom he had been caring pursuant to permission from the English High Court.[170] The applicant was a nurse with experience in nursing children and adults with physical and mental disabilities, and had been involved in a stable relationship with his partner of ten years.[171]

At first instance, the Scottish application was refused mainly upon the basis of whether an adoption should be allowed in circumstances where a single gay man was going to bring up the child jointly with a male partner with whom he was cohabiting.[172] However, the Lord President, Lord Hope, held

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159. *See id.*
160. *See id.*
161. *See* Re E [1995] 1 FLR 382.
162. *See id.*
163. *See id.*
164. Re W [1997] 2 FLR 406.
165. *See id.*
166. *See id.* The prospective adopter was living with her lesbian partner of ten years, who was herself a mother. *See id.*
167. *See id.*
168. *See* Re W [1997] 2 FLR 406.
169. AMT [1997] 8 Fam. Law 225.
170. *See id.*
171. *See id.*
172. *See id.*

that "the suggestion that it is a fundamental objection to an adoption that the proposed adopter is living with another in a homosexual relationship finds no expression in the language of the statute."[173]

The Courts of the United Kingdom also seem to be further developing the idea of a family with the recent decision in *Fitzpatrick v. Sterling*.[174] In *Fitzpatrick*, the appellant was the partner of a man who had died.[175] The appellant sought review of an order that did not allow him to succeed in tenancy of the residence.[176] The appellant's initial application to the county court was dismissed.[177] The appeal that followed affirmed the previous dismissal.[178] However, a majority of the House of Lords Court eventual decided that the partner was entitled to succession of tenancy of the flat.[179] The court recognized that a "a person living with another in a homosexual relationship may qualify as a member of the other's family."[180]

B. Criticisms of the U.K.: Domestic Adoption

Similar to the criticisms of the United States, the current practice and policy of the domestic adoption agencies seem to discriminate against non-traditional parents. While the United Kingdom does not expressly prohibit the adoption of children by non-traditional parents, the agencies in charge of child placement have historically prohibited such adoptions. The ability for these agencies to solely determine the eligibility of a parent is detrimental to both the child and the potential adoptive parents. However, the case law of the United Kingdom, unlike the United States, seems to be more liberal in allowing the non-traditional adoption orders.

Although it is less difficult to find successful stories of adoption by non-traditional parents in the United Kingdom than in the United States, the few highly publicized examples do not negate the potential criticisms of the United Kingdom's domestic adoption policies.

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173. *Id.*
174. Fitzpatrick v. Sterling Hous. Assoc.,[2000] 1 F.C.R. 21.
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id.*
179. *See id.*
180. Fitzpatrick, [2000] 1 F.C.R. 21. Although this case brings recognition of gay men within the definition of family. *See id.* This case also provided more stringent standards for the recognition of a same sex relationship. *See id.* With respect to the rent act involved in the above case, the surviving partner acquired a more inferior form of tenancy than a heterosexual couple. *See id.* The standards required that a homosexual couple must be living together for at least two years while there is no term requirement for heterosexuals, and finally, homosexual couples must provide some sort of evidence of the quality of the relationship. *See* Alan Inglis, *We are Family? The uneasy engagement between Gay Men, Lesbians and Family Law*, FAM L.J. 31 (2001).

Even when looking at instances of successful adoption by non-traditional parents a prevailing discriminatory mindset is still present. In *Re W*, even in rendering a decision allowing a lesbian to adopt the child, the court made it clear that this was an unusual instance and not something which the homosexual community should take for granted when it stated "[n]aturally, in a family law context, the fact of homosexual conduct cannot be ignored, but no more can the consequences of taking it into account be standardised."[181] While this statement indicates that the court is not willing to refuse adoption by non-traditional parents in all circumstances, neither is it willing to allow the adoption of children by homosexuals without further inquiry into the fact of the potential parents lifestyle.

Even when making decisions in favor of homosexual parents petitioning for permission to adopt, the courts show a tendency to use such phrases as "those whose sexual abnormalities have denied them the possibility of a normal family life"[182] which certainly does not indicate that the Court is pleased to open the door to such petitioners. As a further example of the discriminatory mindset in the United Kingdom, in *Re P*,[183] the judge determined that custody by the lesbian birth mother would be acceptable as the woman was "not one of those homosexuals who, as many do nowadays, flaunt their homosexuality"[184] and a concurring justice stated that although the adoption should be allowed in this instance, it caused him "disquiet"[185] and that such a placement should "only be countenanced by the courts when it is driven to the conclusion that there is in the interests of the child no other acceptable form of custody."[186] In addition to a mindset of discrimination present even in the best of circumstances, the United Kingdom, much like the United States, frequently allows adoption agencies to be the sole determiners of who is considered an eligible parent. Often, when a parent does not meet the traditional notions of family, they are denied eligibility.

However, in sharp contrast to the United States, there is no express prohibition of adoption by non-traditional parents. The absence of such a provision has increased the instances of non-traditional parents having their petitions to adopt granted in the judicial system.

181. Re W [1997] 2 FLR 406.
182. *Id.*
183. Re P [1983] 4 FLR 401.
184. *Id.*
185. *Id.*
186. *Id.*

VI. UNITED KINGDOM: INTERCOUNTRY ADOPTION

Similar to the United States, the popularity of intercountry adoption in the United Kingdom began mainly as a humanitarian embargo.[187] The Adoption (Intercountry Aspects) Act 1999[188] provides for the first time a statutory basis for the regulation of intercountry adoption in England, Wales and Scotland. When fully enacted, the Act will enable the United Kingdom to ratify the Hague Convention on Protection of Children and Co-operation in respect to intercountry adoption. This is similar to the goals of ratification in the United States. Both systems are attempting to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law and without any profit being made from the process. They are both establishing a system of co-operation amongst those who have ratified the Hague Convention to ensure that those safeguards are respected and thereby prevent the abduction of, the sale of, or traffic in children. Finally, the establishment of the Hague provisions secures the recognition of adoption orders between convention countries.

A. Criticisms of the U.K.: Intercountry Adoption

Similar to the United States, The Adoption (Intercountry Aspects) Act 1999,[189] gives power to the local agencies in determining whether a potential adoptive parent is eligible to adopt.[190] This power, which appears necessary, often goes unchecked and provides the source of much discrimination.[191]

VII. CONCLUSION

While the citizens of each country may not be willing to set aside their own feelings of discrimination, it is in the best interests of the children that they do so. The role that a capable, loving, non-traditional parent can play in a child's life must be examined as a higher priority than the alternative. The evolution of the traditional family is continuing. The role of family has been continually assumed by those not related by blood, and people of other races, ethnicities, and backgrounds.

Each country would be socially improved by implementing a friendly policy toward non-traditional adopters. Such a policy would eliminate the

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187. *See* Peter Thurnham, *Inter-Country adoption: A view from the House of Commons, in* INTER-COUNTRY ADOPTION: PRACTICAL EXPERIENCES 138-39 (Michael Humphrey and Heather Humphrey, 1993).

188. *See* The Adoption (Intercountry Aspects) Act 1999 (Eng.)

189. *See id.*

190. *See id.*

191. *See id.*

need for the non-traditional parents to feel less worthy, or resort to lying about their sexual orientation. Overall, accepting the non-traditional as parents will hopefully become a wide spread practice, overcoming the discriminatory stigma attached to non-traditional parents.

To accomplish this, not only will the legislation regarding the prohibition of non-traditional parents need to be eliminated, but also the attitudes and policies of the adoption agencies will need to be altered. It is in this area of the adoption process in which the most discrimination occurs. While this change will likely be the most difficult to achieve, it would provide the best chance of success for placing children in non-traditional homes and illustrate that discrimination based on a non-traditional status is illogical.

SMOKE AND MIRRORS: THE SELF-EXAMINATION OF CANADIAN MARIJUANA POLICY IN THE CONTEXT OF DECRIMINALIZATION IN THE NETHERLANDS

Kurt V. Laker*

INTRODUCTION

Drug policy reform is almost a non-issue in American government.[1] The only politically viable stance is a hardline position against all illegal drugs with harsh penalties for offenders.[2] Congress has attempted to stifle research into alternative drug policies by introducing House Bill 135.[3] This only illuminates the boldness of the Canadian Senate,[4] which released a report in September of 2002 recommending that the federal government legalize marijuana for use by Canadian citizens ages sixteen and over.[5] This recommendation may or may not turn into actual policy. Nevertheless, it is a major step toward a policy change, and just as shocking, it is a strong indicator of a shift in public opinion on marijuana policy.[6]

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* J.D. candidate, Indiana University School of Law—Indianapolis; expected graduation date, May 2004. Many thanks go to my fianceé, Megan, for tolerating my absence during the writing process and to *The Simpsons* for keeping me laughing and sane. Thanks also go to the good people who created Folger's French Vanilla coffee, which kept me alert for far longer than a human being should be in a 24-hour period.

1. *See* Ed Leuw, *Introduction* BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY xiii (Ed Leuw & I. Haen Marshall eds., 1996). Strong stances against drugs "boost politicians' popularity by providing them with uncontroversial and gratuitous rallying themes and election platforms." *Id.* at xvi.

2. *See id.*

3. *See* H.R. 135, 104th Cong., 1st Sess. (1995). The resolution states: "[n]otwithstanding any other provision of law, no department or agency of the U. S. Government shall conduct or finance, in whole or in part, any study or research involving the legalization of drugs." *Id.* § 3. This restriction is based on Congressional findings of fact, citing the negative impacts of drug use on society and the dangers the usage represents. *See id.* § 2.

4. *See* Inba Kehoe, *How a Government Bill Becomes Law*, Canada Online, *at* http://frenchcaculture.miningco.com/cs/bills/index.htm (last visited Oct. 7, 2003). Legislative proposals in Canada must pass in both houses of Parliament, the House of Commons and the Senate; and then the proposals must be given "Royal Assent" by the Queen via the Governor General. *See id.* With the exception of bills that involve spending public funds, which must originate in the House of Commons, all other bills may originate in either the House of Commons or the Senate. *See* Guide to Legal Research, *Overview of the Legislative Process*, University of Toronto Law Library, *at* http://www.law-lib.utoronto.ca/resguide/chapt3.htm (last visited Oct. 7, 2003).

5. *See generally* Senate of Canada, Special Comm. on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy* 1 (Sept. 2002), *at* http://www.parl.gc.ca/illegal-drugs.asp (last visited Oct. 27, 2003) [hereinafter *Cannabis Report*].

6. *See* Julian Beltrame, *Grass, Pot, Ganja, Reefer Madness; The Sequel*, MACLEAN'S, Aug. 6, 2001, at 22-25. As of May 2001, forty-seven percent of Canadians favored marijuana legalization. *See id.* This rate increased further from twenty-six percent in 1975 to thirty-one percent in 1995. *See id.*

The Canadian Senate's recommendation is even more surprising when considered in light of the marijuana policy of the Netherlands, which is generally regarded as one of the most liberal in the world.[7] The two policies are illustrative of the point that different historical backgrounds and different surroundings breed different policies regarding social ills, or in the case of these two countries, perceived social ills - ones that should be regulated and limited by public policy, not prohibited by it.

Part I of this Note examines the historical background of Canadian marijuana policy from the initial ban to the current proposal. This includes an analysis of the recently modified policy regarding the use of marijuana for medicinal purposes[8] and an evaluation of the current penalties for the commission of common marijuana-related crimes.[9] Finally, Part I explores the steps leading up to the preparation and issuance of the Canadian Senate's report.[10]

Part II outlines the proposal made by the Canadian Senate. The report contains recommendations for sweeping modifications in many areas of marijuana policy, all of which will be reviewed.[11] The report also contains a myriad of statistics and medical data regarding the physiological, psychological, and sociological effects of marijuana, which will be discussed as well. Also, Part II briefly investigates possible local and international obstacles that may prevent Canada from implementing its proposal.

Part III discusses the marijuana policy of the Netherlands beginning with a brief historical look at the evolution of Dutch drug policy from after World War II to the decriminalization of marijuana in 1976. It further examines the

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7. *See* Christopher Dickey & Friso Endt, *Playing by Dutch Rules*, NEWSWEEK, June 4, 2001, at 18. *See also* U.S. Dept of State, Bureau for Int'l Narcotics and Law Enforcement Affairs, International Narcotics Control Strategy Report 438 (1999) [hereinafter Strategy Report].

8. *See* Institute of Medicine, *Marijuana and Medicine: Assessing the Science Base*, The National Academy of Sciences, *available at* http://www.nap.edu/readingroom/books/marimed/index.html (last visited Oct. 27, 2003). As a result of several states taking steps to allow the use of marijuana for therapeutic purposes, the Institute of Medicine's study was commissioned by the White House Office of National Drug Control Policy in January of 1997. *See id.* at 1. The various states that are putting forth efforts to allow the use of marijuana include: Alaska, Arizona, Colorado, Nevada, Oregon, and Washington. *See id.* The report thoroughly discussed the merits and drawbacks of marijuana and concluded that the chemicals derived from cannabis, called cannabinoids, could be useful in the treatment of chronic pain related to cancer. *See id.* at 144. It was determined that clinical trials would be necessary. *See id.* The Institute also examined some beneficial side effects of cannabinoids including appetite-stimulation, vomit-suppression, and sedation. *See id.* See Alicia Ault, *Institute of Medicine Says Marijuana Has Benefits*, THE LANCET, Mar. 27, 1999, at 353, for a qualified summary of the Institute's report.

9. *See generally* Controlled Drugs and Substances Act, S.C., ch. 19 (1996) (Can.) [hereinafter CDSA].

10. *See* Regina v. Parker, [2000] 49 O.R.3d. 481.

11. *See generally Cannabis Report*, *supra* note 5.

current state of Dutch marijuana policy and evaluates its results in Dutch society.

Finally, Part IV compares the Canadian proposal to the current Dutch policy, focusing on the differing backdrops giving rise to both the Canadian proposal and the Dutch policy. The structures of their respective political systems also had an impact on their choices in drug policy. The Dutch policy cannot be directly transplanted into the Canadian legal system, a phenomenon that will also be discussed in Part IV. This Note also observes a problem that Canada and the Netherlands may have in common, being neighbors of the United States and Germany, respectively, countries with strict anti-drug policies.[12]

This Note will not determine whether the passage of the Canadian proposal into law is likely or unlikely. Such a determination is chiefly an exercise in speculation. The significance of the proposal at this stage lies mainly in the fact that the Canadian government took an objective look at a politically sensitive issue. The fact that the results of that examination were a drastic departure from Canada's current policy and the policies of most industrialized nations compounds this significance even further.

I. THE PAST AND PRESENT OF CANADIAN MARIJUANA POLICY

Marijuana's history in Canada has been relatively consistent. The drug has been illegal in Canada even before it became accepted as a recreational drug and has remained illegal ever since, despite Parliamentary studies that essentially concluded that marijuana's effects were probably less harmful than the short and long-term social costs associated with criminal prosecutions of marijuana offenders.[13] Recent years have marked a loosening of the formerly harsh treatment of the drug with the reduction of most maximum sentences for marijuana offenses and the acknowledgement that marijuana seems to have some value in easing the suffering of those with grave and terminal illnesses.[14] These trends are indicative of a change in legislative and public attitude toward marijuana in general.[15] This movement reached a new summit in September of 2002 with the release of the Canadian Senate's radical recommendations: primarily that marijuana be legalized for recreational use.[16]

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12. *See* Dirk J. Korf, *Drug Tourism and Drug Refugees*, *in* BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY 119 (Ed Leuw & I. Haen Marshall eds., 1996). When a foreigner comes into a country to use or sell drugs, this is referred to as drug tourism. *See id.* This author primarily discusses drug tourism in the context of heroin. *See id.*

13. *See Cannabis Report*, *supra* note 5, at 278.

14. *See* discussion *infra* Part I.D.

15. *See* Beltrame, *supra* note 6.

16. *See Cannabis Report*, *supra* note 5, at 624.

A. *The Initial Ban*

Before any honest discussion of drug policy can take place, an understanding of why certain drugs were banned in the first place is essential. The social and political pressures that were present during the initial formation of drug policy must be reexamined in light of 100 years of progression in medical science and public policy. The beginnings of marijuana policy are the key to understanding its current state and future.

Drugs have a nearly century-long tradition of prohibition in Canada beginning with the ban of opium in 1908.[17] The Opium Act,[18] renamed the Opium and Narcotic Drug Act in 1911,[19] was amended in 1923 to include cannabis sativa[20] on its list of controlled substances.[21] The amendment procedures for the Act were, and still are, remarkably discretionary.[22] The Schedules, which list the substances regulated by the Act, can be amended by the Governor in Council[23] when he deems it necessary and in the public interest.[24] Originally, the list consisted of only four drugs: opium, cocaine, morphine, and eucaine.[25]

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17. *See id.* at 248. Passage of the Opium Act in 1908 by the British House of Commons banned the "importation, manufacture and sale of opium for other than medicinal purposes." *Id.* at 252. Seven countries banned opium at the Shanghai Conference on Opium in 1909. *See id.* at 248. One reason for the prohibition of opium was the increase of Chinese immigrants in certain parts of Canada that coincided with an economic decline. *See id.* at 250. The Chinese were blamed for the importation of opium as well as the economic decline, which resulted in the formation of groups like the Asiatic Exclusion League. *See id.*

18. *See id.* at 252.

19. *See Cannabis Report, supra* note 5, at 253. The name of the Act was changed on January 26, 1911, when newly appointed Minister of Labour, Mackenzie King, introduced Bill 97. *See id.* The name of the Act was changed when other substances, specifically cocaine, became widely used in Canada; referring to it as the Opium Act no longer seemed appropriate. *See id.* Bill 97 was intended to make the Act more restrictive with additional enforcement measures. *See id.*

20. *See* Ernest G. Walker, Jr., *Cannabis: The Hemp Plant*, Southern Illinois University, *at* http://www.siu.edu/~ebl/leaflets/hemp.htm (last visited Oct. 27, 2003). Cannabis sativa is the scientific name of the plant used to produce marijuana, which is commonly smoked but can also be consumed in other ways. *See Cannabis*, Drugs Information, *available at* http://www.drugs-info.co.uk/drugpages/ cannabis/cannabis.htm (last visited Oct. 27, 2003).

21. *See Cannabis Report, supra* note 5, at 253.

22. *See id.*

23. *See* Governor General of Canada, *Role and Responsibilities of the Governor General*, Government of Canada, *at* http://www.gg.ca/governor_general/role_e.asp (last visited Oct. 27, 2003). The Governor in Council is now called the Governor General, and is the *de facto* head of the Canadian government, acting as the Queen's representative. *See id.* The Governor General's primary duty is to represent the Crown by giving "Royal Assent" to acts passed by both houses of Parliament. *See id.*

24. *See Cannabis Report, supra* note 5, at 253. This broad power was granted to the Governor to quickly prohibit new drugs that might spread quickly through society rather than waiting for legislation to be passed through the typical parliamentary channels. *See id.*

25. *See id.*

Minister of Health Henri-Séverin Béland almost casually added cannabis to this list in 1923 when he simply announced, "[t]here is a new drug in the schedule."[26] The reasons for his decision to include cannabis remain unclear since there were no substantiated reports of recreational cannabis use until the 1930's.[27] The physiological and psychological effects of cannabis were not even addressed in the Canadian Parliament until 1932, which makes Béland's decision to ban it rather perplexing.[28] But with the 1923 addition of cannabis to the Schedules, possession and trafficking of cannabis without a license became illegal in all Canadian provinces, punishable by imprisonment from six months up to seven years or a fine up to $1,000.[29]

Meanwhile, marijuana was gaining a broader base of recreational users in the United States, and as a result, the American media threw the country into a mild panic.[30] Canadian newspapers latched onto these stories as well, resulting in police officers giving terrible accounts of young Canadians whose minds and bodies were destroyed from marijuana use.[31] As the frequency of these reports increased, federal parliamentary attitudes toward cannabis and drugs in general became more hostile, culminating with the 1932 amendments to the Opium and Narcotic Drug Act.[32] The new amendments were mainly procedural, such as prohibiting convicted drug offenders from appealing their convictions for numerous offenses.[33]

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26. *Id.* at 256.

27. *See id.*

28. *See* P.J. GIFFEN ET AL., CANADIAN CENTRE ON SUBSTANCE ABUSE, PANIC AND INDIFFERENCE: THE POLITICS OF CANADA'S DRUG LAWS 53 (1991). In 1932, when asked by a member of parliament what cannabis was, the Minister of Health replied, "[i]t is one form of the drug used in India which, I believe, goes under the popular name hashish." *Cannabis Report*, *supra* note 5, at 257. There is no objection to the use of it. *Id.*

29. *See* Francois Dubois, Office of Senator Pierre Claude Nolin, *The Federal Parliament and the Evolution of Canadian Legislation on Illegal Drugs* (2002), *reprinted in Cannabis Report*, *supra* note 5, at app. IV. Trafficking includes exportation, importation, and transportation within Canada. *See id.* It also includes distribution and sale of illegal drugs. *See id.*

30. *See Cannabis Report*, *supra* note 5, at 257. Marijuana was being imported from Mexico in the 1920's, and although use did increase during this time, the media inferred that usage was more widespread than it actually was. *See* Richard Dvorak, *Cracking the Code: "De-Coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 646 n.174 (2000).

31. *See Cannabis Report*, *supra* note 5, at 257.

32. *See id.* at 257-58. The Minister of Health, Charles Power, called marijuana "a new menace to the youth of the country." *Id.* at 258.

33. *See* Dubois, *supra* note 29, at 23-24. Appeals were severely limited for the following offenses: (1) a physician prescribing a drug for non-medical purposes; (2) a physician refusing to provide required information relating to the preparation of prescription drugs; (3) obtaining the same drug from two physicians; (4) a pharmacist selling a product containing specified quantities of illegal drugs to children under two years of age without proper labeling; (5) a pharmacist refusing to keep records of drug purchases, sales, and renewals; (6) possession of paraphernalia; and (7) "drug trafficking by mail." *Id.* Offenses one, two, four, and five involve health care professionals who may lawfully prescribe specific amounts of certain narcotics, such as morphine, in the treatment of pain and disease. *See Cannabis Report*, *supra* note 5, at 263.

Unlike for other prohibited drugs, Canada's climate was ideal for growing and producing cannabis.[34] Section 3 of the 1938 Act prohibited growing cannabis without a permit from the Department of Health.[35] Parliamentary debates show that the Department of Agriculture had conducted experiments on industrial hemp by growing cannabis at farms in Ottawa and Montreal, and private businessmen were producing hemp as well.[36] The 1938 Act made further production illegal.[37]

By 1938, all major cannabis offenses were enumerated in the Opium and Narcotic Drug Act.[38] 1938 marked the complete integration of Canada's ban on marijuana and its derivatives. In the years to follow, that policy would significantly evolve.

B. A New Philosophy

The 1954 amendments to the Opium and Narcotic Drug Act helped to modernize the act by adding an offense for possession with intent to distribute and increasing the maximum prison term for this and all trafficking offenses to fourteen years.[39] However, the events of 1955 were even more significant in moving Canadian policy in-line with late twentieth century philosophy.

In 1955, the Canadian Senate formed the Special Committee of the Senate on the Traffic in Narcotic Drugs in Canada (the Committee).[40]

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34. *See Cannabis Report*, *supra* note 5, at 257. The optimum temperature for growing marijuana is between sixty-eight and seventy-eight degrees Fahrenheit with a drop of about fifteen degrees in the evening hours. *See Beginner's Guide to Growing Marijuana*, Growing Marijuana, *at* http://www.growing-marijuana.org/beginner.html (last visited Oct. 27, 2003).

35. *See Cannabis Report*, *supra* note 5, at 257. The penalty for this offense was the same as the penalties for possession and trafficking. *See id.* The Department of Health had the power to issue permits to businesses, pharmacists, and physicians to obtain certain drugs for scientific experimentation and medical treatments. *See id.* at 263. Through the years, the Department developed varying regulations for prescription as well as prescription renewal procedures. *See id.* The Department imposed different obligations on scientific research companies and medical professionals. *See id.*

36. *See id.* at 257.

37. *See id.*

38. *See* Dubois, *supra* note 29.

39. *See Cannabis Report*, *supra* note 5, at 263-64.

40. *See id.* The Committee was formed on a motion by Senator Thomas Reid and was passed on February 24, 1955. *See id.* The Committee was originally formed due to increased traffic of opium and other drugs, mainly in Vancouver, where the problem had become too widespread for police to control. *See id.* The purpose of the Committee was best stated on the Senate floor during debate over Senator Reid's motion. *See id.* Senate Leader, W. Ross MacDonald, stated:

> The work of the committee will largely be to consider the causes of this unfortunate problem with which this country is faced, to hear expert witnesses and to determine in what way the Government can make its most valuable contribution in resolving this unfortunate condition. The reports of this committee, based upon objective, cautious and factual assessment of the problem, may well become a document of the utmost importance and have far-reaching consequences in helping to found policy upon which the successful solution of this problem can rest.

Id. at 264-65.

Essentially, the Committee set out to evaluate the effectiveness of Canadian drug policy and reexamine its basic philosophy.[41] The Committee heard testimony from fifty-two witnesses in various fields including law enforcement and medicine.[42] Medical witnesses, testifying primarily on the topic of addiction, probably had the most crucial impact on the Committee's conclusions.[43] They testified that the majority of addicts in Canada were so-called "criminal addicts," ones who typically came from less affluent backgrounds and whose addiction became known not through voluntary treatment but contact with the criminal justice system, either by way of convictions under the Opium and Narcotic Drug Act or another law that revealed their addiction.[44]

This testimony led the Committee to conclude that drug addiction was a criminal problem, a social evil that should be deterred through strict enforcement of drug policy as opposed to simply funneling addicts into treatment centers.[45] The Committee reported that "the evidence of medical authorities was to the effect that drug addiction is not a disease in itself. It is a symptom or a manifestation of character weaknesses or personality defects in the individual."[46]

Based on this philosophy, the Committee rejected, without dissent, the idea of establishing treatment centers run by the government to assist addicts.[47] It argued, instead, that localities should more strictly enforce other provisions of the criminal codes, believing this would indirectly solve the addiction problem.[48] The theory was that by curbing prostitution, theft, vagrancy, and other crimes that drug addicts would likely commit, local police could drastically decrease the addiction problem.[49] The Committee recommended that incarcerated addicts be isolated from the rest of the prison population to

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41. *See Cannabis Report, supra* note 29, at 264-65.

42. *See id.* The Committee heard from thirteen law enforcement agencies, ten different federal departments that all deal with drug trafficking, and twelve individual experts on addiction treatment. *See id.* at 265.

43. *See id.*

44. *See Cannabis Report, supra* note 5, at 265. There were 3,212 known addicts in Canada at the time. *Id.* Of those addicts, 2,364 were "criminal" addicts and 515 were "medical" addicts who became addicted through lawful use of controlled substances such as morphine, during medical treatments. *See id.* The final 333 addicts were categorized as "professional" addicts, including medical professionals who became addicted through access to narcotics meant for prescription or sale. *See id.* One study revealed that 1,101 of the criminal addicts were located in the city of Vancouver. *See id.*

45. *See id.* at 266.

46. *Id.* at 265.

47. *See Cannabis Report, supra* note 5, at 266.

48. *See id.* This conclusion was based on the testimony of Harry J. Anslinger before a U.S. Congressional Committee. *See id.* Anslinger was named Commissioner of the Federal Bureau of Narcotics in 1930. *See* John F. Galliher et al., *Lindesmith v. Anslinger: An Early Government Victory in the Failed War on Drugs*, 88 J. CRIM. L. & CRIMINOLOGY 661, 664 (1998). Before taking that position, Anslinger worked in the Treasury Department's Prohibition Division in the 1920's. *See id. See also* JOHN C. MCWILLIAMS, THE PROTECTORS: HARRY J. ANSLINGER AND THE FEDERAL BUREAU OF NARCOTICS 1930-1962 (1990).

49. *See Cannabis Report, supra* note 5, at 266.

avoid spreading addiction within the penitentiary, and during their stay, addicts would receive treatment and specialized training to aid the rehabilitation process and help addicts deal with the specific troubles they face.[50] In addition, harsher penalties for trafficking offenses were recommended to attack the illegal drug supply.[51]

The majority of the Committee's recommendations were enacted into law in 1961 with the passage of the Narcotic Control Act.[52] The Act increased trafficking penalties, carrying a twenty-five year maximum prison term as well as introducing the treatment provisions discussed above.[53] The purpose of these new provisions was to address all illegal drugs and not cannabis specifically.

C. The Le Dain Commission

The Le Dain Commission was formed in 1969 with the mission to examine Canada's drug policies.[54] Parliament gave the Commission broad discretion to conduct its study, and its purpose was, in many respects, similar to the Special Committee of the Senate on the Traffic in Narcotic Drugs in Canada.[55] Unlike the Committee, however, the Le Dain Commission did a more extensive study into marijuana use itself and issued a report on the topic in 1972.[56]

At the outset of their report, the Commission made several "observations" about the nature of marijuana policy in Canada.[57] Most significantly, the Commission observed that the criminalization of marijuana was done "without any apparent scientific basis nor any real sense of social urgency[.]"[58] It also observed that in a three-year span the proportion of possession fines handed down for marijuana use increased from one percent in 1968 to seventy-

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50. *See id.*

51. *See id.* at 267.

52. *See id.* at 268. This law retained most of the offenses contained in the Opium and Narcotic Drug Act and was divided into two sections: 1) Offences and Enforcement and 2) Preventive Detention and Treatment. *Id.* Under the second section, the government could detain an addict for up to ten years, mandate addicts participation in treatment programs, or opt instead to imprison the addict. *See id.* at 269. The majority of amendments passed with little debate. *See id.*

53. *See* Dubois, *supra* note 29.

54. *See Cannabis Report*, *supra* note 5, at 272. The Commission of Inquiry into the Non-Medical Use of Drugs was chaired by Gerald Le Dain and operated for over four years. *See id.* During this time, the Commission heard from 639 individuals and groups. *See id.* Marijuana legalization advocacy groups often cite the Commission's report on cannabis to support their position. *See also* Dale Gieringer, *The Case for Legalization*, The National Organization for the Reform of Marijuana Laws, *available at* http://www.norml.org/index.cfm?Group_ID=4422 (last visited Oct. 27, 2003).

55. *See Cannabis Report*, *supra* note 5, at 264-65, 272-73.

56. *See id.* at 264-65, 273.

57. *Id.* at 274.

58. *Id.*

seven percent in 1971.[59] This could be an indicator of many facts: a drastic increase in use, better enforcement by police, the movement of cannabis to the foreground of drug culture, or most likely, a combination of all three.

In a novel approach, the Commission focused its recommendations and its conclusions on the relative harm, to both the individual and society, caused by marijuana.[60] Although it did not have access to much scientific data, the Commission concluded not only that the harms caused by marijuana use were inconclusive but also that they appeared to be "less serious than those which may result from excessive use of alcohol."[61] It qualified this assessment by noting that the effects of long-term marijuana use could not be measured because of its relative infancy as a recreational drug.[62] Even though the harms caused by marijuana did not appear severe, the Commission did not feel that a policy of decriminalization or legalization was an appropriate recommendation.[63]

The Commission concluded that the government still had an obligation to protect the country's youth from exposure to harmful substances.[64] Based on this rationale, the Commission found it inappropriate to legalize marijuana for use and distribution, instead believing that increased availability of marijuana, even at controlled quantities and qualities, would lead to increased use and increased abuse, primarily among those already using marijuana.[65] With this in mind, it recommended that current offenses for cannabis trafficking, possession for the purpose of trafficking, and importing and exporting should remain in the Narcotic Control Act.[66]

The Commission was more liberal with respect to sentencing. The Commission saw a problem with lumping a less harmful drug like marijuana together with more harmful drugs like cocaine,[67] and therefore, it concluded that the negative consequences of a cannabis conviction to the individual were

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59. *See id.* at 275-76

60. *See id.* See Norbert Gilmore, *Drug Use and Human Rights: Privacy, Vulnerability, Disability, and Human Rights Infringements*, 12 J. CONTEMP. HEALTH L. & POL'Y 355, 370-82 (1996), for a detailed discussion of the harms and benefits of drug use to both society and the individual.

61. *Cannabis Report*, *supra* note 5, at 276.

62. *See id.*

63. *See id.* at 276-77. The *Cannabis Report* contains a glossary of terms at its outset and defines decriminalization as the "removal of a behaviour or activity from the scope of the criminal justice system." *Id.* at xii. The definition distinguishes between *de jure* decriminalization, involving amendments to criminal law, and *de facto* decriminalization, involving an administrative decision not to prosecute illegal acts. *See id.* Legalization is defined as allowing and regulating the sale, distribution, and production of a drug. *See id.* at xiv. The "free market" form of legalization involves no state control; and the "regulatory regime" involves state controls similar to those restricting the consumption of alcohol and tobacco. *See Cannabis Report*, *supra* note 5, at xiv.

64. *See id.* at 277.

65. *See id.*

66. *See id.*

67. *See id.*

much greater than the negative consequences of the crime itself.[68] Aside from a potentially long prison term or large fine, those convicted often could not obtain employment, were stigmatized by neighbors, and subjected to restricted travel rights; these consequences of a criminal conviction were deemed severe when contrasted with the seemingly negligible impact on the user's health.[69]

With this background in mind, the Commission made several recommendations for marijuana policy change. It suggested decreased penalties for trafficking offenses and giving a judge the option of not ordering imprisonment.[70] It advocated the repeal of simple possession of cannabis.[71] It wanted to modify trafficking offenses to include importation and exportation and exclude non-sale transactions in which an individual gives another a small amount of marijuana at no charge.[72] The Commission also recommended that the prohibition on growing cannabis for personal use be repealed.[73] In its view, these changes would foster more respect for the Narcotic Control Act among the populace and would codify their philosophy of basing the severity of penalties and the extent of prohibition on the potential harm that could be caused by the drug.[74]

However, the Commission was hardly in agreement on these recommendations. One dissenter, Marie-Andrée Bertrand,[75] suggested removing cannabis from the schedules of the Narcotic Control Act entirely, thus leading to a policy of "controlled legalization."[76] Another dissenter, Ian Campbell,[77]

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68. *See id.* at 278.

69. *See Cannabis Report, supra* note 5, at 277.

70. *See id.* at 279.

71. *See id.*

72. *See id.* The amount of marijuana would be small enough if it were an amount that could "reasonably be consumed on a single occasion." *Id.*

73. *See id.*

74. *See Cannabis Report, supra* note 5, at 279.

75. *See* Marie-Andrée Bertrand, *Affidavit of Marie Andrée Bertrand*, The Media Awareness Project, *at* http://www.mapinc.org/drugnews/v97/n000/a003.html (last visited Oct. 27, 2003). This was an affidavit filed by Bertrand in support of a local Ontario challenge to Canadian drug laws in 1997 and adequately summarized her beliefs on marijuana prohibition. *See id.* After serving on the Commission, Bertrand became the President of the International Anti-Prohibitionist League. *See id.* She retired as a Professor of Criminology at the University of Montreal in 1996. *See id.* The constitutional challenge is still pending review in higher courts, but the Ontario Court of Appeal dismissed the appeal. *See* R. v. Clay, [2000] 49 O.R. (3d.) 577, 598 (Ont. C.A.).

76. *See Cannabis Report, supra* note 5, at 281. Bertrand felt that the added income from taxes on marijuana sales would benefit the Canadian economy. *See id.* This argument, too, is one frequently used by supporters of marijuana legalization. *See* Michael L. Dennis & William White, *The Marijuana Legalization Debate: Is There a Middle Ground?, in* THE DRUG LEGALIZATION DEBATE 79 (James A. Inciardi ed., 2nd ed. 1996).

77. *See* Line Beauchesne, *Setting a Public Policy on Drugs: A Question of Social Values What Do We In Canada Want?, at* http://www.parl.gc.ca/36/2/parlbus/commbus/senate/come/ille-e/presentation-e/beauchesne-e.htm (last visited Oct. 8, 2003). Ian Campbell was a prohibitionist who felt that keeping cannabis illegal was the only way to prevent children and families from being contaminated. *See id.* Campbell also advocated increasing police raids, monitoring and testing offenders, and making medical treatment mandatory. *See id.*

agreed with the majority in most respects; however, he recommended that cannabis possession remain illegal.[78] Despite the dissenters, Minister of Health John Munro committed to following some of the Commission's suggestions on treating marijuana differently from the powerful narcotics with which it had been associated.[79]

In November of 1974, Bill S-19, containing some of the reforms suggested by the Commission, was proposed in the Senate.[80] This Bill would have removed cannabis from the Schedules of the Narcotic Control Act and placed it under Section V of the Food and Drugs Act.[81] The new classification of cannabis products would have resulted in a drastic reduction in penalties for some cannabis-related offenses.[82] The Senate passed Bill S-19 in June of 1975 and referred it to the House of Commons for consideration.[83] The bill died there after two readings and was never considered for reintroduction.[84]

The demise of the reforms suggested by the Le Dain Commission essentially marked the end of liberal marijuana reform movements in Canada for twenty years. The United States "war on drugs,"[85] ushered in by Ronald Reagan's presidency,[86] along with international galvanization in fighting

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78. *See Cannabis Report*, *supra* note 5, at 281.

79. *See id.* at 282-83.

80. *See id.* at 283.

81. *See id.* The Food and Drugs Act is designed to allow the government to set and enforce safety standards for food and non-illicit drugs. *See* Pearl Reimer & Bryan Schwartz, *Biotechnology: A Canadian Perspective*, 1 ASPER REV INT'L BUS. & TRADE L. 91, 98 (2001).

82. *See Cannabis Report*, *supra* note 5 at 283. Possession is still an offense, punishable by a maximum fine of $5,000; or if the offender is unable to pay the fine, the offender can be imprisoned for up to six months. *See id.* For simple possession cases, fines were always preferred over imprisonment. *See id.* The new Bill maintained trafficking offenses as well, with penalties ranging from a minimum of eighteen months to a maximum of fourteen years. *See id.* Despite the Commission's recommendations, the maximum prison term for cultivation offenses of the Narcotic Control Act of 1961 were set at seven years. *See id.* Subsequently, the Food and Drugs Act increased the allowable prison term to ten years. *See id.*

83. *See Cannabis Report*, *supra* note 5, at 284.

84. *See id.*

85. Michael D. Blanchard & Gabriel J. Chin, *Identifying the Enemy in the War on Drugs: A Critique of the Developing Rule Permitting Visual Identification of Indescript White Powder in Narcotics Prosecutions*, 47 AM. U.L. REV. 557, 599-602 (1998) (providing a brief history of the "war on drugs" in America).

86. *See id.* at 600 n.271. Ronald Reagan was elected U.S. President from 1981 – 1989. *See Ronald Reagan Biography*, The White House, *available at* ttp://www.whitehouse.gov/history/firstladies/nr40.html (last visited Oct. 27, 2003). President Reagan announced his administration's drug policy in 1982, striving to combine the efforts of various agencies to fight illegal drugs. *See* Blanchard & Chin, *supra* note 85, at 600 n.271. First Lady Nancy Reagan crafted the famous "Just Say No" campaign, which was designed to empower children to avoid giving into peer pressure to use drugs. *See Biography of Nancy Reagan*, The White House, *available at* http://www.whitehouse.gov/history/firstladies/ nr40.html (last visited Oct 27, 2003).

drugs, led Canadian lawmakers to follow suit and alter their drug policy to fit the mold.[87]

D. The Controlled Drug and Substances Act: The Current Policy

In 1992, Minister of Health Perrin Beatty proposed Bill C-85, which called for a unified law governing psychotropic substances.[88] This bill eventually became the Controlled Drugs and Substances Act (CDSA),[89] which became effective in 1996 and remains in effect today.[90] The CDSA merged the Narcotic Control Act and certain provisions of the Food and Drugs Act, resulting in a single piece of legislation governing all psychotropic substances in Canada.[91]

Schedule II of the CDSA contains cannabis and its byproducts.[92] Schedules VII and VIII were special sections, designed to reduce penalties for trafficking and possession, respectively, of small amounts of cannabis.[93] Part I of the CDSA defines the offenses and criminal penalties for trafficking, producing, cultivating, possessing, and importing and exporting the drugs listed in the various Schedules, including marijuana.[94] The marijuana offenses listed in Part I are slightly more lenient than under the Narcotic Control Act,

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87. *See Cannabis Report*, *supra* note 5, at 285. Canada's most significant change in policy was a more focused effort to curb trafficking, both local and international. *See id.* Other laws relating to drug trafficking, such as money laundering and enterprise crime, also became areas of emphasis in combating trafficking. *See id.*

88. *See id.* at 285-86. This particular bill never passed beyond the report stage and died when the 1993 session of parliament ended. *See id.* at 286.

89. *See* CDSA, *supra* note 9.

90. *See id.* Bill C-85 was proposed again in 1994 under a different name by Beatty's successor, Diane Marleau. *See Cannabis Report*, *supra* note 5 at 286. The new proposal was passed in the House of Commons on October 30, 1995. *See id.* The bill went on to the Senate, numbered as Bill C-8, was passed into law, and became effective on June 20, 1996. *See id.*

91. *See id.* at 285-86.

92. *See* CDSA, *supra* note 9, sched. II. The CDSA contains eight schedules that outline the types of controlled substances. *See id.* The Schedules enumerate the controlled substances (over 150 of them), with offenses such as possession and trafficking being defined in other parts of the act. *See Cannabis Report*, *supra* note 5, at 286-87. Schedule I contains opiates like opium, morphine, and cocaine. *See* CDSA, *supra* note 9. Schedule III contains amphetamines and hallucinogenic drugs. *See id.* Schedule IV contains barbiturates and steroids. *See id.* Schedule V contains miscellaneous substances that can be abused, like inhalants. *See id.* Schedule VI contains so-called "precursors," designer drugs like ecstasy. *See id.*

93. *See* Dubois, *supra* note 29. See discussion *infra* Part I.D.1., for an explanation of how Schedules VII and VIII operate.

94. *See* CDSA, *supra* note 9, §§ 4-7. Section 4 describes offenses and punishment for possession. *See id.* § 4. Section 5 lists offenses and punishments for trafficking. *See id.* § 5. Section 6 lists offenses and punishments for importing and exporting. *See id.* § 6. Section 7 lists offenses and punishments for production. *See id.* § 7.

and marijuana is separated from more dangerous drugs through use of the Schedules.[95]

1. Marijuana Offenses and Punishments

Penalties for possession of marijuana, contained in section four of Part I, vary based on the amount possessed and whether the offender had any prior drug convictions. Possession is punishable by a maximum of five years in prison and a minimum $1,000 fine.[96] Possession of less than thirty grams of marijuana results in a less severe sentence, carrying a maximum penalty of six months in prison and a $1,000 fine.[97]

Trafficking offenses, contained in section five of Part I, are much more serious.[98] Trafficking over three kilograms of marijuana is punishable by a maximum of life imprisonment.[99] Trafficking an amount lower than three kilograms brings the offense under the purview of Schedule VII, making the offender subject to imprisonment of up to five years.[100] Section six describes offenses for importing and exporting controlled substances, which are punishable by a maximum of life imprisonment in the case of marijuana.[101] Section seven deals with the production of illicit drugs, punishing the production or cultivation of marijuana by up to seven years in prison.[102]

The existence of the Schedules to classify various substances, along with even more lenient penalties for marijuana violators, reflects a shift to a philosophy that penalties for drug offenses should vary based on the harm caused by that particular drug, with marijuana resting relatively low on the

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95. *See Cannabis Report*, *supra* note 5, at 288. For example, possession of a Schedule I substance, like cocaine, is punishable by a maximum of seven years in prison. *See* CDSA, *supra* note 9, § 4(3). Section 4(1) makes it illegal to possess any substance listed on Schedules I, II, or III. *See id.* § 4(1).

96. *See* CDSA, *supra* note 9, § 4(4).

97. *See id.* § 4(5). The statute says a person in possession of a Schedule II substance "in an amount that does not exceed the amount set out for that substance on Schedule VIII is guilty of an offen[s]e punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both." *Id.* Most of the statutes are worded similarly. *See id.* § 4. Schedule VIII, like Schedule II, lists cannabis but in amounts less than thirty grams. *See id.* Schedule VIII results in lighter sentences for those possessing small amounts of cannabis. *See id.* § 4(5).

98. *See* CDSA, *supra* note 9, § 5. Similar to section 4(1), section 5(1) forbids the trafficking of substances contained on Schedules I, II, and III. *See id.* § 5(1). Section 5(2) forbids possession for the purpose of trafficking. *See id.* § 5(2).

99. *See id.* § 5(3).

100. *See id.* § 5(4). Schedule VII operates in the same way as Schedule VIII. *See id.* Schedule VII lists cannabis in amounts less than three kilograms, the trafficking of which results in the lighter penalty. *See id.*

101. *See* CDSA, *supra* note 9, § 6(3).

102. *See id.* § 7(2)(b).

totem pole.[103] Although most of their policy suggestions were not made part of the CDSA, treating marijuana offenses differently from offenses with seemingly more harmful drugs is reminiscent of the strategy suggested by the Le Dain Commission in 1972, which focused on the relative harm caused by each drug and not simply its illicit status.[104]

2. *Medical Exemptions*

Passed on June 20, 1996, section 56 of the CDSA allows the Minister of Health to exempt individuals or groups of individuals from any or all provisions of the CDSA.[105] This means that the Minister has the discretion to authorize the use of marijuana to treat disease, but because no legal source of marijuana existed, as a practical matter, this section had little impact.[106] The Governor in Council has additional authority, under section 55(1), to create regulations concerning the medical application of the substances in the CDSA, including cannabis.[107] Section 55(1) led to the creation of the Marihuana Medical Access Regulations (Regulations) in July of 2001.[108] These Regulations allow individuals to apply to the Office of Cannabis Medical Access[109] for a permit to possess marijuana to be used in the treatment of their

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103. *Compare* CDSA, *supra* note 9, § 4(3)(a), (punishing the possession of even small amounts of cocaine, a Schedule I substance, with a seven-year prison term), with, § 4(5)(a) (punishing the possession of small amounts of cannabis, a Schedule VIII substance, with a $1,000 fine or a six month prison term).

104. *See Cannabis Report*, *supra* note 5, at 273-76.

105. *See* CDSA, *supra* note 9, § 56. Section 56 states:

> The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

Id.

106. *See* Regina v. Parker, [2000] 49 O.R.3d. 481, 518. In *Parker*, the Ontario Court of Appeal gave the federal government one year to improve access to medical marijuana and exempted Parker from prosecution in the meantime. *See id.* at 484. The ruling was based on the notion that forcing a person to choose between his continued health and going to prison is unconstitutional. *See id.* at 481. The lack of a practical medical exemption violated Parker's right to "life, liberty, and security of the person" under the Canadian Charter of Rights and Freedoms. Canada Act, 1982, ch. 11, sched. B, Pt. I, § 7 (Eng.).

107. *See* CDSA, *supra* note 9, § 55(1).

108. *See* Marihuana Medical Access Regulations, C.R.C. ch. 227, Preamble (2001) (Can.). The court's ruling in *Parker* also precipitated the formation of these regulations. *See Canada Improves Access to Medical Marijuana for the Seriously Ill*, Canada Online, *at* http://www.canadaonline.about.com/cs/marijuana/a/medmarijuana.htm (last visited Oct. 27, 2003). "Marihuana" is an alternate spelling of marijuana that is sometimes used in Canadian writings. *See id. See also* CDSA, *supra* note 9, sched. II.

109. *See* Office of Cannabis Medical Access, Health Canada, *available at* http://www.hc-sc.gc.ca/hecs-sesc/ocma/ (last visited Oct. 6, 2003). The Office is used to administer the new Marihuana Medical Access Regulations and coordinate all Canadian initiatives relating to marijuana, including research into developing a supply of safe marijuana for ill Canadians to use. *See id.*

illnesses, a license to grow marijuana for that purpose, or a license allowing a third party to grow marijuana for them.[110]

Three categories of symptoms make individuals eligible to receive permits. Category 1 includes symptoms caused by terminal illness or the treatment of terminal illness.[111] Category 2 symptoms are ones associated with the treatment of AIDS, cancer, HIV, multiple sclerosis, spinal injuries, epilepsy, and severe arthritis.[112] Category 3 is a "catch-all" that allows access to marijuana for the treatment of symptoms not named in Category 1 or 2.[113] As of October 4, 2002, 405 authorizations to possess marijuana, 263 production licenses, and eighteen third-party production licenses have been granted by the Regulations.[114]

The current Minister of Health, A. Anne McLellan,[115] has not officially conceded that marijuana is an effective treatment of illness symptoms, claiming instead that the Regulations are in place because of the popular belief among patients and physicians that smoking marijuana eases the pain and suffering of the gravely ill.[116] Although McLellan feels that this belief is widespread enough to justify limited access, scientific research should continue to better determine the benefits and risks of marijuana as a medicine.[117]

II. A NEW REFORM MOVEMENT: THE CANNABIS REPORT OF 2002

The Canadian government's marijuana policy seems to flow through the same patterns as the United States, beginning with an early and somewhat

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110. *See* Marihuana Medical Access Regulations, C.R.C. ch. 227, § 2 [hereinafter MMAR]. MMAR allows individuals with permits to possess marijuana for medicinal purposes. *See id.* § 24. The regulations permit marijuana to be grown for personal medical use. *See id.* § 34. It also permits a "designated person" to grow marijuana for another's medical use. *See id.* The Canadian government is currently working toward producing its own supply of marijuana to supply successful applicants. *See* Office of Cannabis Medical Access, *supra* note 109, *at* http://www.hc-sc.gc.ca/hecs-sesc/ocma/information3.htm (last visited Oct. 27, 2003). In December of 2000, the government, through a competitive process, selected Prairie Plant Systems, Inc. to grow a quality-controlled supply of medical marijuana and conduct laboratory testing; Prairie Plant Systems was authorized to eventually distribute marijuana to successful applicants. *See id.* The company has not yet provided a satisfactory product. *See id.*

111. *See* MMAR, *supra* note 110, § 1. Section 1 defines all crucial terms in the Regulations, including "category 1 symptom," "category 2 symptom," and "category 3 symptom." *Id.*

112. *See id.* The symptoms associated with these diseases include nausea, anorexia, weight loss, severe pain, seizures, and muscle spasms. *See id.* § 73.

113. *See id.* § 1. Section 1 defines a Category 3 symptom as one "other than a category 1 or 2 symptom, that is associated with a medical condition or its medical treatment." *Id.*

114. *See* Office of Cannabis Medical Access, *supra* note 109.

115. *See* The Honourable A. Anne McLellan, Anne McLellan: Working With You for Edmonton West, *available at* http://www.annemclellan.ca/about.html (last visited Oct. 27, 2003). McLellan serves in the House of Commons, representing Edmonton West. *See id.* She was elected to the House of Commons in November of 2000 and appointed Minister of Health in January of 2002 by Prime Minister Jean Chrétien. *See id.*

116. *See* Office of Cannabis Medical Access, *supra* note 109.

117. *See id.*

puzzling prohibition based, at least in part, on racism.[118] Increased usage led to a more strict policy during the 1980's and 90's. [119] The main difference between Canadian and Unites States' marijuana policy is that Canada has been more willing to critique and reevaluate its own policies based on scientific evidence.[120] The 600-plus page report, "Cannabis: Our Position for a Canadian Public Policy," (the Report) issued by the Senate Special Committee on Illegal Drugs (the Senate Committee) is certainly proof.[121]

A. The Senate Committee's Research

The Senate Committee separated its research strategy into five areas. First, it set out to examine social, economic, historical, criminological, and political issues surrounding the use and regulation of marijuana.[122] Second, it wanted to gather information on the medical and pharmacological properties that marijuana may or may not possess and its effectiveness in treating disease or symptoms of disease.[123] Third, the Senate Committee examined the legal aspects of marijuana on a national level.[124] Fourth, it wanted to examine marijuana-related political and legal issues at the international level, focusing on U.S.-Canada relations and Canada's status as a member of many international drug treaties and conventions.[125] Finally, it set out to investigate behavioral and moral standards of Canadians themselves, looking at tolerance levels among the populace, behavioral norms, and other issues.[126]

To successfully and fully investigate these five axes, the Senate Committee took two paths. It first set out to synthesize current scientific and social data on marijuana use and abuse contained in existing literature,

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118. *See* Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 493 (1997). In the 1930's, Hispanics were referred to as "reefer-mad Mexicans." *Id.* It is asserted that marijuana became a concern during the Great Depression when Mexicans began to immigrate and work for low pay on Southwestern farms. *See* Holly Sklar, *Reinforcing Racism with the War on Drugs*, Z Magazine, *at* http://www.zmag.org/zmag/articles/dec95sklar.htm (last visited Oct. 27, 2003).

119. *See Cannabis Report*, *supra* note 5, at 285.

120. *Compare* discussion *infra* Part I.C. (noting the reforms suggested by the Le Dain Commission), *with* H.R. 135, 104th Cong., 1st Sess. (1995) (noting Congressional attempts to forbid funding for research into drug legalization).

121. *See Cannabis Report*, *supra* note 5, at 8-10. The Senate Special Committee on Illegal Drugs had its beginnings in 1995 to address concerns with the almost enacted CDSA. *See id.* The elections of 1997 interrupted this process. *See id.* Senator Pierre Claude Nolin, who would eventually chair the Committee, moved for its creation in 1999, and the motion passed in April of 2000. *See id.* The Committee dissolved in October and was reformed in March of 2001. *See id.* However this time its scope was not drug policy on the whole, but was limited only to cannabis. *See id.*

122. *See Cannabis Report*, *supra* note 5, at 16.

123. *See id.*

124. *See id.* at 17.

125. *See id.*

126. *See id.* at 18. More than 100 people with diverse backgrounds testified before the Committee during forty days of public hearings in Ottawa and other locations. *See id.* at 21.

including a Senate Committee-sponsored public opinion survey, and second, it heard testimony in public hearings from witnesses from a variety of fields.[127] The Senate Committee was relentless in ensuring its own objectivity and tirelessly examined its most basic philosophies about the operation of government, the core purposes of criminal law, and the constantly changing relationship between government and citizen.[128]

B. Crucial Findings

The Senate Committee's research was extensive.[129] Data received by the Senate Committee indicates that thirty percent of the population between the ages of twelve and sixty-four has tried marijuana at least once.[130] Two million Canadians have used marijuana in the past twelve months.[131] Most people who experiment with marijuana stop using it, and most people who use long-term were introduced to the drug at a young age, with the average age of introduction being fifteen.[132] The Senate Committee found that cannabis use itself is not a cause of delinquency, crime, or violence.[133] Seventy percent of all drug charges involve marijuana, with forty-three percent of the charges being for marijuana possession.[134] Cannabis has a significantly lower addiction rate when compared to alcohol and tobacco.[135] An examination of "danger factors" led to the conclusion that alcohol and tobacco are, in some respects, more harmful to the individual and society than marijuana.[136]

Most importantly, based on all the data it received, the Committee concluded that, "for the vast majority of recreational users, cannabis use presents no harmful consequences for physical, psychological or social well-being in either the short or the long term."[137] Their policy suggestions emanate from the basic idea that marijuana simply is not that harmful to the individual or

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127. *See Cannabis Report*, *supra* note 5, at 22.

128. *See id.* at 22-50.

129. *See id.* App. II-III. Appendix II lists the witnesses heard by the Committee. *See id.* App. II. Appendix III lists the research papers submitted to the Committee. *See id.* App. III.

130. *See* Senate of Canada, Special Comm. on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy*, Summary Report 15 (Sept. 2002), *at* http://www.parl.gc.ca/illegal-drugs.asp (last visited Oct. 27, 2003) [hereinafter Summary Report].

131. *See id.*

132. *See id.*

133. *See id.*

134. *See Cannabis Report*, *supra* note 5, at 365.

135. *See id.* at 156. This was based on a U.S. study, which determined that thirty-two percent of fifteen-year-olds to fifty-two-year-olds who became addicted after a single use of tobacco. *See id.* Of those who used alcohol once, 15% became addicted; whereas 4.2% of one-time cannabis users became addicted. *See id.*

136. *See id.* at 161. The "danger factors" include the degree of physical dependence, psychic dependence, neurotoxicity, general toxicity, and danger to society. *See id.* In most of these categories alcohol and tobacco were given a "high" or "very high" rating, while cannabis received a "low" or "very low" rating in all categories. *See id.*

137. *Id.* at 165.

society, when compared with heroin and cocaine or even alcohol and tobacco.[138]

C. *The Senate Committee's Recommendations*

On the whole, the Senate Committee's recommendations are a drastic departure from Canada's current marijuana policy. Their significance is highlighted by the fact that drug use is such a politically volatile issue that divides the Canadian public almost in half.[139] Taking bold stances on controversial issues is a difficult thing for politicians to do, which seems to lend some political genuineness to the Senate Committee's policy recommendations.

1. Changes in Recreational Use Policy

Since its unexplained addition to the Opium Act in 1923,[140] recreational use of marijuana has been illegal in Canada, and the CDSA prohibition of this type of use is fairly typical when compared with the United States policies against possession.[141] The Senate Committee has recommended sweeping amendments to the CDSA that would permit Canadian citizens over sixteen years of age to obtain marijuana.[142]

Believing the CDSA lacks a basic objective, the Senate Committee first recommended amending the law to include a "general aims" section.[143] The primary aim should be "[t]o reduce the injurious effects of the criminalization of the use and possession of cannabis and its derivatives."[144] Another aim of the bill, contrary to the implied aim of the current CDSA, would be to permit persons over sixteen years old to obtain marijuana at licensed distribution centers.[145] A final aim would be to recognize the mental and physical risks of excessive marijuana use and to regulate the production and use of marijuana to prevent excessive use.[146]

The first substantive amendments suggested include the granting of licenses to allow Canadian residents to distribute marijuana with several

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138. *See* Summary Report, *supra* note 130, at 27.

139. *See* Bertrame, *supra* note 6.

140. *See Cannabis Report*, *supra* note 5, at 256.

141. *See* 21 U.S.C. § 844 (2003) (prohibiting the possession of a controlled substance).

142. *See* Summary Report, *supra* note 130, at 52.

143. *See id.*

144. *Id.* The consequences referred to here are the arrests of over 20,000 Canadians for marijuana possession, the profits made by organized crime as a result of illegal cannabis trafficking, and others. *See Cannabis Report*, *supra* note 5, at 617.

145. *See* Summary Report, *supra* note 130, at 52. The Committee proposed that consumption in public places frequented by children under 16 years of age should not be permitted. *See id.* at 53.

146. *See id.* at 52.

restrictions. Distributors must not sell to individuals under sixteen years old and would be forbidden from advertising their product in any way, including displays.[147] Those seeking distributors' licenses must not have criminal records, and they may only obtain marijuana from licensed producers.[148]

The Senate Committee also recommended that Canadian residents be able to obtain licenses to produce cannabis, both for sale to licensed distributors and personal use.[149] It suggested amending the CDSA to allow for an exemption to permit cannabis cultivation in small quantities[150] for personal use on the condition that it cannot be exchanged for consideration, monetary or otherwise, or promoted by the grower in any other way.[151] A license to produce for sale would also be permitted, as long as the grower keeps detailed records of sales, THC quantities, and production conditions.[152] Tobacco companies would be forbidden from obtaining these licenses, and licensed growers would not be allowed to advertise.[153]

These changes, obviously, would transform the CDSA into a law designed to expressly permit what it previously forbade. Marijuana would essentially be sold in a way quite similar to tobacco in the United States, complete with restrictions on advertising and other substantial government regulations.[154]

2. *Changes in Medical Use Policy*

Since 1996, the Canadian government has allowed the use of marijuana for therapeutic purposes, but only after the adoption of the Marihuana Medical Access Regulations has the Department of Health actually started to grant permits to use medical marijuana.[155] The Regulations have provided Canadians with grave illnesses the opportunity to petition the government for permits to use marijuana.[156] Despite this, the Senate Committee does not think

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147. *See id.* at 53.

148. *See id.* at 52.

149. *See id.* at 53.

150. *See* Summary Report, *supra* note 130, at 53. The Committee did not suggest a specific amount of marijuana that would be acceptable to grow. *See id.*

151. *See id.*

152. *See id.* THC is short for "delta-9-tetrahydrocannabinol." *See As a Matter of Fact: Marijuana*, Well.com, *at* http://www.well.com/user/woa/fspot.htm (last visited Oct. 27, 2003). THC is the primary psychoactive ingredient in marijuana, and the level of THC indicates the strength of the marijuana. *See id.* The Committee recommended THC content of thirteen percent or less. *See* Summary Report, *supra* note 130, at 53.

153. Summary Report, *supra* note 130, at 53. The Committee did not provide any specific reasoning behind these restrictions. *See Cannabis Report*, *supra* note 5, at 617.

154. *See* Edward J. Schoen et al., *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech-Now You See it, Now You Don't*, 39 AM. BUS. L.J. 467, 484-88 (2002) (discussing U.S. restrictions on tobacco, specifically with regard to advertising).

155. *See* Office of Cannabis Medical Access, *supra* note 109.

156. *See* discussion *supra* Part I.D.2.

the current Regulations extend far enough to make marijuana accessible to the average person in need.[157]

The amendments to the Regulations recommended by the Senate Committee are designed to make access much easier and broaden the class of those eligible to benefit from marijuana's therapeutic properties. For example, the Senate Committee would include those who suffer from chronic accident-related pain, migraines, and chronic headaches, along with those currently eligible.[158] It would eliminate the "last resort" provision in the current Regulations, which states that all conventional therapies must have been tried or considered before marijuana use would be permitted.[159] It would eliminate the current "category" system and simply enumerate the medical conditions and symptoms for which marijuana can be used.[160] The Senate Committee proposes that the patient be able to buy the marijuana from distributors instead of having to grow it himself or find a third party to do so.[161] Current Regulations allow only dried marijuana to be used,[162] but the Senate Committee's proposal would broaden that to include all cannabis derivatives with the dosage to be determined by the patient in consultation with the distribution center, as opposed to the doctor setting the dosage under the current Regulations.[163]

Similar to the provisions for recreational distribution, the Senate Committee recommends that a Canadian resident be able to obtain a license to distribute marijuana for medical purposes.[164] The only differences between the medical distribution license and the recreational distribution license is that the medical distributor must keep records on buyers' medical conditions and side effects and take steps to ensure the product's safety for medical use.[165] Licenses to produce cannabis for medical purposes would operate in a similar manner to those for recreational use, under the restrictions set forth by the

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157. *See Cannabis Report*, *supra* note 5, at 308. "[I]t is apparent that the MMAR have become a barrier to access." *Id.* "Rather than providing a compassionate framework, the regulations are unduly restricting the availability of cannabis to those who may receive health benefit from its use." *Id.* This would be in direct conflict with the primary purpose of the Regulations themselves. *See id.*

158. *See* Summary Report, *supra* note 130, at 51.

159. *See Cannabis Report*, *supra* note 5, at 317. Currently the Regulations state that when a person applies to the Office of Cannabis Medical Access, a physician must recommend marijuana and contend that "all conventional treatments for the symptom have been tried, or have at least been considered." CDSA, *supra* note 9, § 6(3)(b). The applicant must also demonstrate that these conventional treatments were or would be ineffective. *See id.*

160. *See Cannabis Report*, *supra* note 5, at 317.

161. *See id.*

162. *See* MMAR, *supra* note 110. Section One defines "authorization to possess as" permission to possess dried marijuana. *See id.*

163. *See Cannabis Report*, *supra* note 5, at 317.

164. *See* Summary Report, *supra* note 130, at 51.

165. *See id.* at 51-52.

Senate Committee.[166] The only difference is that if a producer sells recreational cannabis to distributors, it may not also sell medical cannabis.[167]

The Senate Committee concluded that the low participation in the medical marijuana program shows that the current Regulations fail to grant the kind of access they were intended to provide.[168] While this may be true, the low participation rate could just as easily be due to other factors to which the Senate Committee gives little weight. Specifically, marijuana is not an approved drug product.[169] Scientific evidence is inconclusive as to its therapeutic benefits.[170] Doctors who recommend marijuana to patients may be in derogation of professional rules relating to alternative medicines.[171] And finally, smoking marijuana is an unhealthy delivery mechanism.[172] It is unclear why these factors were dismissed as likely causes of low participation among mainstream society. The fact that medical marijuana can be obtained illegally from Canadian "compassion clubs" is also dismissed.[173] The Senate Committee suggests that these clubs would still play a crucial role, under their proposed scheme, either as licensed distributors or producers.[174]

All factors considered, the Senate Committee's recommendations regarding medical marijuana are far less radical than the ones suggested for recreational use. The Senate Committee appears to be focusing more on expanding eligibility to receive medical marijuana than completely eradicating the current regulatory regime. Although scientific evidence is inconclusive about the actual benefits of marijuana as a medicine, the Canadian government has already made a qualified commitment to provide it to those who believe

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166. *See id.*

167. *See id.* at 51.

168. *See Cannabis Report*, *supra* note 5, at 308. Health Canada informed the Committee that as of May 2002, 498 applications have been received, and 255 were granted. *See id.* The Regulations were designed to improve upon the Section 56 exemption under the CDSA. *See* CDSA, *supra* note 9. Under § 56, 658 exemptions were granted; 501 were still active as of May 2002. *See Cannabis Report*, *supra* note 5, at 308.

169. *Cannabis Report*, *supra* note 5, at 309.

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.* at 313. Although the clubs do engage in activity that is technically criminal under the CDSA, some judges have been unwilling to crack down on employee defendants. *See, e.g.*, R. v. Lucas, File No: 113701C (Provincial Court of B.C., Victoria, July 5, 2002), *at* http://www.johnconroy.com/lucas.pdf (last visited Oct. 27, 2003). After Lucas pled guilty to possession for the purposes of trafficking, the judge did not impose a jail sentence, stating, "[T]he federal government has so far been unable to ensure any legal supply of marijuana . . . This is a particular hardship for those who cannot grow it." *Id.* at 19. Similar clubs exist in the United States as well, mainly on the West Coast. *See* Katrina Onstand, *Rx: Marijuana*, CHATELAINE, Nov. 1997, at 164. Many of the clubs in the U. S. have been raided and shut down by the state and federal police. *See* Pete Brady, *California War Heats Up*, CANNABIS CULTURE MAGAZINE, *at* http://www.cannabisculture.com/articles/2571.html (last visited Oct. 27, 2003).

174. *See Cannabis Report*, *supra* note 5, at 315.

it will alleviate their suffering.[175] The Senate Committee's goal of refining this commitment is reasonable, and at least one Canadian judge agrees, stating that "federal regulations . . . made it extremely difficult for applicants to obtain approval to use marijuana."[176]

3. Prevention and Harm Reduction

The Senate Committee concedes that the war on marijuana is one that cannot be won, calling the goal of cannabis policy to reduce supply and consumption a "complete failure."[177] This conclusion leads to a fork in the road: down one road is the policy of decriminalization, and down the other road is the policy of legalization.[178] The Senate Committee chose the latter, feeling that decriminalization would cause the government, from a policy standpoint, to ignore the potential problems marijuana presents.[179] Canada's proposed legalization scheme, obviously, will increase the availability of marijuana. The Senate Committee also focused its attention on how to prevent abuse and minimize the social and health problems caused by marijuana abuse, not only through the regulations described above, but through prevention and harm reduction programs.[180] Although the Senate Committee did not identify and develop these programs itself, it made important observations to guide legislators.[181]

Most importantly, it stated that prevention should not be designed to control and manipulate young people through inflammatory statements about marijuana but to give them the knowledge to make informed decisions.[182] The Senate Committee believes that "alarmist rhetoric" on the effects of marijuana is counterproductive.[183] Such propaganda is quickly undermined when young people see their friends smoking marijuana at parties without "frying their brains."[184]

The Senate Committee, as a way to fight the damaging effects of marijuana use, also suggested using the technique of harm reduction.[185] Harm reduction programs are different from prevention programs because their goal is not to discourage use, but to encourage responsible use, resulting in a

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175. *See supra* Part I(D)(1).
176. R. v. Lucas, File No: 113701C.
177. *See* Summary Report, *supra* note 130, at 33-4.
178. *See id.*
179. *See* Summary Report, *supra* note 130, at 34.
180. *See id.* at 15-16. Chapter Seven of the Summary Report contains a good encapsulation of the Committee's findings with respect to the harms caused by marijuana. *See id.* at 15-17.
181. *See id.* at 26.
182. *See id.*
183. *See Cannabis Report*, *supra* note 5, at 398.
184. *See id.*
185. *See id.* at 412.

minimization of harm to the individual and society.[186] In reference to marijuana, these programs would take the form of discouraging certain types of abuse, such as driving while under the influence of marijuana and smoking in ways more damaging to health.[187]

Because these programs seem to implicitly encourage use, or at least end government disapproval of use, they would be likely to meet public resistance, similar to programs that distribute free needles to drug addicts or condoms to students.[188] Nevertheless, they are probably necessary steps to prevent a new class of users from turning into abusers.

4. International Issues

As a major economic power, Canada is a participant in many international drug treaties, including the Single Convention on Narcotic Drugs,[189] the Convention on Psychotropic Substances,[190] and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[191] These treaties impose obligations on member nations, and the Senate Committee believes these obligations to be "utterly irrational" and having "nothing to do with scientific or public health considerations."[192] The Senate Committee's policy suggestions would violate Canada's obligations to create criminal penalties for drug offenses, including possession, distribution, and cultivation of cannabis.[193]

The Senate Committee recommended that Canada notify the international community of its intent to request that cannabis be removed from the

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186. *See id.* at 410. A classic example of a harm reduction would be needle exchange programs for heroin users. *See id.* These programs were designed to prevent intravenous drug users from sharing needles and thus transmitting the HIV virus. *See id.* at 411. While they do not discourage heroin use, they minimize a harmful side effect: the spread of AIDS. *Id.*

187. *See id.* Although the Committee did not recommend making it illegal, driving while under the influence of marijuana would be treated cautiously, despite the finding that cannabis alone has little impact on driving skills. *See* Summary Report, *supra* note 130, at 17. "Deep inhalation," which increases damage to the respiratory system, would also be discouraged under possible harm reduction programs. *See Cannabis Report*, *supra* note 5, at 411.

188. *Cannabis Report*, *supra* note 5, at 411.

189. *See* Single Convention on Narcotic Drugs, Mar. 30, 1961, pmbl., 18 U.S.T. 1407 [hereinafter Single Convention]. Much like the CDSA, the Single Convention divides drugs into schedules, with cannabis placed among heroin and cocaine on the most dangerous list. *See id.* App. Under the treaty, member nations must adopt criminal penalties for drug crimes, with imprisonment preferred. *See id.* art. 36. The treaty took effect in Canada in 1964. *See Cannabis Report*, *supra* note 5, at 439 n.1.

190. *See* Convention on Psychotropic Substances, Feb. 21, 1971, pmbl., 32 U.S.T. 543. This treaty took effect in Canada in 1988. *See Cannabis Report*, *supra* note 5, at 439 n.2.

191. *See* Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, pmbl., 28 I.L.M. 493. This treaty took effect in Canada in 1990. *See Cannabis Report*, *supra* note 5, at 439 n.3.

192. *Cannabis Report*, *supra* note 5, at 439.

193. *See* Single Convention, *supra* note 189, art. 2.

schedules of drug treaties, effectively declassifying it.[194] Canada would then have to choose whether to remain in contravention of those treaties until the amendment is made or temporarily withdraw from the treaties.[195] The Senate Committee suggested the latter because it would enable Canada to more effectively lobby for the exclusion of cannabis from the schedules of these treaties.[196]

Aside from violations of these agreements, the Senate Committee had to consider the impact of a policy change on relations with its southern neighbor, the United States. Exporting cannabis from Canada and selling marijuana to non-Canadian residents would remain illegal.[197] These two provisions were designed to prevent Canada's policy choices from spilling over into the United States.[198] Nevertheless, this may be an unavoidable side effect, as it was during the era of Prohibition in the 1920's.[199]

Relations with the United States have already been tested over the issue of medical marijuana. When Canada began its program, the government attempted to buy cannabis seeds from the United States National Institute on Drug Abuse[200] to establish a farm.[201] Their offer was rejected, and the government was forced to use seeds confiscated from criminals.[202] The medical program has also inspired some Americans to cross the border to obtain medical marijuana without fear of punishment.[203] A more indirect problem was recognized by former U.S. Drug Enforcement Agency head Asa Hutchinson,[204] who indicated that mere talk of legalization "increases the

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194. *See Cannabis Report*, *supra* note 5, at 467-68.

195. *See* Summary Report, *supra* note 130, at 49.

196. *See id.*

197. *See id.*

198. *See id.* Restricting sale to Canadian residents only was recommended to avoid the problem of "drug tourism." *See* Korf, *supra* note 12, at 119.

199. *See* Nate Hendley, *Northern Lights: Canada Ponders Pot Decriminalization as America Fumes*, IN THESE TIMES, Sept. 2, 2002, at 4. During alcohol prohibition in the 1920's, bootleggers in Canada made a living exporting alcohol to America. *See id.*

200. *See About NIDA*, National Institute on Drug Abuse, *at* http://www.drugabuse.gov/about/aboutNIDA.html (last visited Oct. 27, 2003). The NIDA's mission is to "lead the Nation in bringing the power of science to bear on drug abuse and addiction." *Id.*

201. *See* Hendley, *supra* note 199, at 4.

202. *See id.*

203. *See* Clifford Krauss, *Ill Americans Seek Marijuana's Relief in Canada*, N.Y. TIMES, Sept. 8, 2002, at 1-4. Some who face drug charges in the U. S. have applied for asylum in Canada, like former California gubernatorial candidate Steve Kubby. *See id.* Kubby has adrenal cancer and believes that without marijuana his blood pressure would soar, causing a heart attack. *See id.* Others move "from couch to couch" at the homes of medical marijuana advocates. *Id.*

204. *See DHS Organization*, U. S. Dept. of Homeland Security, *at* http://www.dhs.gov/dhspublic/display?theme=11&content=583 (last visited Oct. 27, 2003). After leaving the DEA, Hutchinson was appointed by President George W. Bush to a leadership position in the new Department of Homeland Security. *See id.* Hutchinson now serves as Secretary for Border and Transportation Security. *See id.*

rumblings in [the United States] that we ought to reexamine our policy. It is a distraction from a firm policy on drug use."[205] The Senate Committee, however, believes that Canada should be a leader in North American drug policy and inciting a reexamination of United States marijuana policy is viewed as a positive step in their eyes, not a "distraction."[206]

III. THE PAST AND PRESENT OF DUTCH MARIJUANA POLICY

Due to its drug policies, the Netherlands has been called everything from "a markedly relevant example to the world"[207] to "[a] latter-day Sodom and Gomorrah."[208] Like any other policy, the Netherlands' policy on marijuana developed in a historical context that is completely unique. In order to understand the policy, that context must be briefly explored.

A. The Modern History of Marijuana in the Netherlands

Marijuana use in the Netherlands was almost nonexistent before World War II.[209] Immediately following the war, marijuana use appeared to be isolated to artists and writers.[210] At this point, authorities were powerless to prosecute these people because marijuana was not yet prohibited.[211] When marijuana was banned in 1953, enforcement of the new law was concentrated primarily on American soldiers stationed in Germany and visiting the Netherlands while on leave.[212] Dutch citizens obtained marijuana from sailors and then sold it to the soldiers.[213] These Dutch smugglers and American soldiers comprised most of the arrests for marijuana offenses in this early period.[214] Sentences for possession were rather light.[215] For example, a painter arrested with two marijuana cigarettes was convicted and sentenced to a three-month suspended sentence.[216]

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205. Hendley, *supra* note 199, at 4.

206. *See* Summary Report, *supra* note 130, at 49.

207. J.P. Grund et al., *Is Dutch Drug Policy an Example to the World?*, *in* BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY 311 (Ed Leuw ed., 1996).

208. Dickey & Endt, *supra* note 7, at 18.

209. *See* Marcel de Kort, *A Short History of Drugs in the Netherlands*, *in* BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY 3-15 (Ed Leuw ed., 1996) (describing the pre-World War II history of drugs in the Netherlands).

210. *See id.* at 16.

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.*

215. *See* De Kort, *supra* note 209, at 16.

216. *See id.*

This more tolerant attitude changed in the 1960's, when a much broader base of individuals began to use marijuana more visibly.[217] These users found themselves subjected to harsher penalties, with authorities handing down sentences of a few months for possession of even small amounts of marijuana.[218] This new approach immediately proved ineffective, as marijuana use increased with the rise of Sixties youth culture.[219] "Non-deviant" groups began to regularly smoke marijuana and use other drugs like LSD,[220] and their prosecution resulted in the criminalization of otherwise law-abiding citizens.[221] Political reaction to this increase may have been the first real indicator of the uniqueness of Dutch government. Rather than cracking down harder on those who defied the law, the Dutch government "felt compelled to negotiate rather than to give orders . . . ."[222]

This progressive philosophy eventually resulted in the formation of the Baan Commission, an official group formed by the Dutch government to reevaluate its drug strategies in 1968.[223] The Commission issued its official report in 1972.[224] Their conclusions were not significantly different from those of the Canadian Senate Committee. It found that the criminalization of marijuana stigmatized youths who used the drug and led to a continuing spiral of antisocial behavior.[225] It also pointed out that criminalization drives availability underground, and in order to obtain marijuana, young people forcibly came into contact with users and suppliers of hard drugs.[226] Preventing marijuana users from coming into contact with hard drugs became an essential

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217. *See id.*

218. *See id.* Authorities would "hunt intensively" for even a few grams of marijuana during the 1960's. *See id.*

219. *See id.*

220. *See Drug Facts: LSD*, Office of National Drug Control Policy, *at* http://www.whitehousedrugpolicy.gov/drugfact/lsd/ (last visited Oct. 27, 2003). LSD stands for lysergic acid diethylamide and is commonly referred to as "acid." *See id.* LSD is a hallucinogenic substance that has varying effects that depend on the amount taken. *See id.*

221. *See* Henk Jan van Vliet, *A Symposium on Drug Decriminalization: The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 HOFSTRA L. REV. 717, 722 (1990).

222. *Id.* at 720. The most recognized detractors of marijuana laws were a group of loosely organized individuals called "Provos." *See* Ed Leuw, *Initial Construction and Development of the Official Dutch Drug Policy*, *in* BETWEEN PROHIBITION AND LEGALIZATION: THE DUTCH EXPERIMENT IN DRUG POLICY 23, 25 (Ed Leuw ed., 1996). The Provos were mainly a presence in Amsterdam and would publicly smoke marijuana in the presence of city officials to "provoke" them. *See id.* Public sentiment was generally in agreement with the Provos, and government overreaction to some of these demonstrations led to the dismissal of the mayor and police commissioner of Amsterdam. *See id.* Some Provos formed a political party and won a few seats on the city council, openly smoking marijuana at meetings. *See id.*

223. *See* De Kort, *supra* note 209, at 19.

224. *See Cannabis Report*, *supra* note 5, at 489.

225. *See id.*

226. *See id.* Whereas "hard" drugs generally include cocaine, heroin, opium, and similar drugs, while marijuana is considered a "soft" drug. *See id.* at 489.

goal of Dutch drug policy, a phenomenon known as "separation of the markets."[227]

The Baan Commission led to eventual reforms of the Opium Act in 1976 which resulted in the decriminalization of marijuana.[228] Being a member of the Single Convention on Narcotic Drugs, the Netherlands was not permitted to legalize marijuana, instead treating it similarly to tobacco and alcohol.[229] In order to accomplish its "separation of the markets" goal, the Netherlands resorted to a policy of *de facto* decriminalization, in which marijuana crimes were still illegal but, through an administrative mandate, were not prosecuted.[230] The Netherlands chose this route, and the policy remains in effect today.

B. The Current Policy

Similar to the CDSA, the Opium Act separates drugs into schedules based on the relative harms they cause.[231] Hard drugs like cocaine, heroin, LSD, and amphetamines are placed on Schedule I, whereas cannabis and its derivatives are placed on Schedule II.[232] Due to the "expediency principle,"[233] possession, trafficking, manufacturing, and importing and exporting substances in either Schedule remain illegal under the Opium Act, but, in practice, punishments vary a great deal.

Under the expediency principle, soft drug offenses remain illegal, but the Ministry of Justice sets "Guidelines" that prioritize certain offenses, such as trafficking hard and soft drugs, over ones deemed of less importance, such as soft drug possession and consumption.[234] The Guidelines direct the Public Prosecutions Department[235] to investigate and prosecute some offenses but not others.[236] For example, possession of less than five grams of soft drugs is given the lowest priority.[237] As a practical matter, possession of less than

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227. *See* Strategy Report, *supra* note 7, at 438. *See also Cannabis Report*, *supra* note 5, at 490.

228. *See* van Vliet, *supra* note 221, at 724.

229. *See id.* at 723.

230. *See Cannabis Report*, *supra* note 5, at 276-77.

231. *See Fact Sheet Drug Policy*, Netherlands Institute of Mental Health and Addiction, *at* http://trimbos.nl/Downloads/Producten/A5%20download%20engels%2013%2008%202003.pdf (last visited Oct. 27, 2003).

232. *See id.*

233. Eric Thomas Berkman, *Sacrificed Sovereignty?: Dutch Soft Drug Policy in the Spectre of Europe Without Borders*, 19 B.C. INT'L & COMP. L. REV. 173, 179 (1996).

234. *See id.*

235. *See About the Public Prosecutions Service*, Het Openbaar Ministerie, *at* http://www.openbaarministerie.nl/english/engl_frm.htm (last visited Sept. 24, 2003) (copy on file with the author). The Public Prosecution Department has sole discretion over which criminal cases go to court. *See id.*

236. *See* van Vliet, *supra* note 221, at 731.

237. *See Fact Sheet Drug Policy*, *supra* note 231.

thirty grams of marijuana is not even investigated, much less prosecuted.[238] This unique policy effectively maintains the Netherlands' compliance with the Single Convention, while at the same time permitting marijuana use.[239]

The "separation of the markets" concept would be completely ineffective if Dutch citizens were not able to grow or purchase marijuana legally, even if possession had been decriminalized. They would have been forced to purchase from the same dealers that sold marijuana before decriminalization, thus exposing themselves to hard drugs in the process. For this reason, the Guidelines exempt certain types of drug dealers, "coffee shop" owners, from criminal prosecution.[240] The Guidelines state that such a dealer will be prosecuted only when he "publicly projects himself as a dealer or runs his business provokingly in other ways," namely through advertising.[241] But the retail marijuana trade became so established, especially in Amsterdam,[242] that coffee shops no longer needed to advertise at all.[243] The AHJO-G criteria[244] also govern the coffee shops,[245] forbidding the shops from advertising, selling to children under eighteen years of age, selling more than five grams of soft drugs, and selling any amount of hard drugs.[246]

The market separation theory has been very effective.[247] Asking for hard drugs in an Amsterdam coffee shop has been called as absurd as it is to ask "an average butcher's shop . . . for a zebra steak."[248] However, in recent years, the number of coffee shops has declined significantly.[249]

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238. *See* Berkman, *supra* note 233, at 179.

239. *See* van Vliet, *supra* note 221, at 724.

240. *See id.* at 724, 734.

241. *Id.* at 732. While the coffee shops are normally left alone, some have been deemed, to have violated the Guidelines through the use of signs depicting cannabis leaves or suggestive names like "Stoneage," "Outer Limits," "Grasshopper," and "Just-a-Puff." *Id.* at 735. Selling hard drugs within the coffee shop was also a way to quickly invite prosecution. *See id.* at 734.

242. *See Map of the Netherlands*, WorldAtlas.Com, *at* http://www.worldatlas.com/webimage/countrys/europe/ciamaps/nl.htm (last visited Oct. 27, 2003). Amsterdam, the capitol of the Netherlands, is located near the center of the country and is less than fifty miles from the North Sea. *See id.*

243. *See* van Vliet, *supra* note 221, at 734.

244. *See Fact Sheet: Cannabis Policy Update 2002*, Netherlands Institute of Mental Health and Addiction, *at* http://trimbos.nl/default.asp?id=3827&back=1 (last visited Oct. 27, 2003). "AHJO-G" is a Dutch acronym, standing for (A) "no advertising," (H) "no sale of hard drugs," (J) "no admission to coffee shops for minors," (O) "no nuisance," and (G) "no sale of large quantities." *Id.*

245. *See id.*

246. *See Fact Sheet Drug Policy*, *supra* note 231.

247. *See id.*

248. [V]an Vliet, *supra* note 221, at 731.

249. *See Progress Report on the Drug Policy in the Netherlands*, Ministry of Health Welfare and Support 27, *available at* http://www.minvws.nl/documents/gvm/Rapport/drugs-progress-eng.pdf (last visited Oct. 10, 2003). Municipalities are permitted to regulate coffee shops and eighty-one percent had banned them outright by August of 2001. *See* J.F.O. McAllister, *Europe Goes to Pot*, TIME, Aug. 20, 2001, at 60. Also, municipal governments are permitted to prohibit coffee shops altogether; some "border towns" use that authority to combat drug trafficking. *See Fact Sheet: Cannabis Policy Update 2002*, *supra* note 243. The recent

C. *Effectiveness of Dutch Decriminalization*

Unlike the Americans or Canadians, the Dutch never viewed marijuana as a social evil that should be eradicated.[250] While American and Canadian policy viewed marijuana, and drugs in general, as a character flaw that could be eliminated through deterrence and supply control, the Dutch have never subscribed to this philosophy.[251] Given that the goal of Dutch policy since 1976 has been to limit the harms caused by marijuana and prevent users from exposure to more dangerous drugs, its effectiveness cannot be analyzed by examining the volume of users, which is the traditional American or Canadian measuring sticks for successful policy.

With this in mind, it is certainly a curious phenomenon that the number of marijuana users in the Netherlands has stabilized since decriminalization in 1976, as opposed to the obvious prediction of a steady increase in use.[252] Despite greater availability of marijuana in the Netherlands, use has neither declined nor increased when compared with the United States.[253]

The real success of the Dutch marijuana policy lies in the separation of hard drug markets from soft drug markets.[254] By integrating marijuana use into societal norms, the Netherlands has prevented the multitude of casual experimenters from thrusting themselves into criminal drug dealing circles.[255]

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movements to reduce the number of coffee shops is due primarily to the nuisance created by large numbers of shops and an increased willingness to strictly enforce the AHJO-G criteria. *See id.*

250. *See* Leuw, *supra* note 1, at xiii.

251. *See id.*

252. *See Cannabis 2002 Report*, Ministry of Public Health of Belgium, at 16, *available at* http://trimbos.nl/Downloads/English_General//Cannabis2002_Report.pdf (last visited Oct. 27, 2003) [hereinafter Belgian Report]. This report is the result of a joint effort among Health Ministries of Belgium, France, Germany, the Netherlands, and Switzerland to scientifically analyze marijuana and the impact of drug legislation. *See id.* at 4. One study analyzed the prevalence of marijuana use among high school students, the most likely group to begin using the drug, and found that twenty-nine percent had used marijuana at least once in 1995, while twenty-eight percent had used at least once in 1999. *See id.* at 16. Over the same period in the United States, that statistic increased from thirty-four percent to forty-one percent. *See id.* In the Netherlands in 1995, fifteen percent had used in the previous month, compared with fourteen percent in 1999. *See id.* Identical use in the United States increased from sixteen percent to nineteen percent. *See id.* In the Netherlands in 1995, six percent of students used marijuana six or more times in the last month, and that number decreased to five percent in 1999. *See id.* Over the same period, U.S. figures increased from seven percent to nine percent. *See id. See also* Dirk J. Korf, *Trends and Patterns in Cannabis Use in the Netherlands*, Senate Special Committee on Illegal Drugs, *at* http://parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/presentation-e/korf-e.htm. (last visited Sept 25, 2003) (copy on file with the author). This report contained similar statistics from a similar study to the Canadian Senate Committee. *See id.*

253. *See* Korf, *supra* note 252.

254. *See* Strategy Report, *supra* note 7, at 438. *See also Cannabis Report*, *supra* note 5, at 490.

255. *See* van Vliet, *supra* note 221, at 728.

This led to a demand reduction for drugs that are universally recognized as harmful, specifically heroin.[256] Thus, as marijuana becomes the exclusive drug of choice for young people, fewer are turning to heroin.[257]

IV. COMPARISON OF THE CANADIAN PROPOSAL TO CURRENT DUTCH POLICY

If the Canadian proposal and the Dutch policy illustrate anything, it is that different cultures and different times breed vastly different policies. The policies themselves have different goals and contain different legal mechanisms, but they are intended to operate in similar manners and have similar effects on their respective societies.

A. Philosophy and Context

The Canadian proposal sprung from very different roots and for very different reasons than its Dutch counterpart. The Canadian initiative began at the urging of government officials themselves.[258] While a growing number of Canadians increasingly support the relaxation of marijuana laws, this group is not yet a majority.[259] This lack of solidarity among the people may result in resistance if the policy is implemented. Conversely, the Dutch changed their policy in a time of and in response to social rebellion by its youth, which would certainly make the policy change more palatable to citizens.[260] Also, drug abuse was not considered a major problem in the Netherlands, whereas Canada faces the same types of problems that exist in the United States.[261]

The primary goal of the Dutch policy was to separate hard drug markets from soft drug markets, resulting in a reduction of the harms caused to the individual and society.[262] In essence, their policy was enacted to achieve that effect.

The Canadian policy initiative comes from a much different background. Unlike the Netherlands in 1976, Canada has a long tradition of marijuana prohibition, despite the policy's mysterious origin.[263] Canada's proposal is also based on a different goal. As opposed to achieving desired effects like

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256. *See* McAllister, *supra* note 249, at 60.

257. *See id.* The average age for a heroin addict in the Netherlands is forty, a number that has steadily risen since decriminalization. *See id.* The Netherlands has even established a retirement home for heroin addicts. *See id.*

258. *See generally Cannabis Report*, *supra* note 5.

259. *See* Beltrame, *supra* note 6, at 22. Current polls indicate that forty-seven percent of Canadians favor a change in marijuana policy. *See id.*

260. *See supra* Part III.A. This refers primarily to the Provo movement that created unrest in the 1960's. *See* de Kort, *supra* note 209, at 16.

261. *See* Leuw, *supra* note 1, at xviii.

262. *See supra* Part III.B.

263. *See Cannabis Report*, *supra* note 5, at 253.

separation of the markets, the Canadian proposal is designed to update the law to better reflect a modern scientific understanding of marijuana.[264] It also indicates a fundamental change in how criminal law should be viewed, believing in protecting people from hurting each other, not from hurting themselves.[265]

B. Legal Mechanisms

The legal and political systems in Canada and the Netherlands are obviously different, and each is tailored for a specific kind of liberal drug policy. The Netherlands' desire to remain in compliance with the Single Convention led it to the policy of *de facto* decriminalization, while Canada's desire to encourage others to reconsider restrictive marijuana policies is better suited for a policy of legalization.[266]

The Dutch chose to keep marijuana technically illegal to remain in compliance with their international obligations.[267] Their criminal justice system is structured in a way that would be in conflict with the common practice of the judicial system in Canada.[268] The Executive can instruct prosecutors to not enforce certain provisions of the law, in this case, certain marijuana offenses[269] through the official Guidelines, as opposed to informal practice.[270]

Aside from the fact that Canada wants to bring international attention to the marijuana issue and that provisions similar to the Dutch "Guidelines" do not exist in Canadian law, the system of *de facto* decriminalization would not reflect their core philosophy: that marijuana is simply not harmful enough to be prohibited by law, and criminal law should not attempt to protect man from himself.[271]

C. Policies in Practice

The Dutch have successfully maintained their institution of decriminalization for over twenty-five years and have seen some positive impacts.[272] Still viewed as extremely liberal, the Dutch policy seems almost restrictive when

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264. *See id.* at 365.

265. *See* Summary Report, *supra* note 130, at 12.

266. *See Cannabis Report, supra* note 5, at 276-77.

267. *See* van Vliet, *supra* note 221, at 724.

268. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 974 (1983). In Canada, prosecutors tend to dispose of cases through plea bargaining. *See id.*

269. *See* van Vliet, *supra* note 221, at 731.

270. *See id.*

271. *See* Summary Report, *supra* note 130, at 12.

272. *See supra* Part III.C.

viewed in light of the Canadian proposal; the Dutch policy is facially more stringent because marijuana technically is still illegal.[273]

The two major differences are that, unlike in the Netherlands, Canadians would be allowed to grow their own marijuana, whereas non-residents of the Netherlands can purchase marijuana in the coffee shops.[274] Similar to the coffee shop system, Canadian consumers would primarily purchase their marijuana from licensed distributors, who must meet criteria similar to the restrictions, like the advertising prohibition imposed upon the coffee shops.[275] Both countries disapprove of smoking in public areas where underage citizens might be exposed prematurely to marijuana.[276]

The exact shape the Canadian policy would take is unclear. The Netherlands' policy manifested itself through the network of coffee shops, but the Canadian proposal could just as easily take a different form. It is conceivable that legitimate businessmen would apply to be licensed distributors, but some may fear the public relations ramifications that may ensue. The Senate Committee has attempted to avoid the problem of drug dealers surfacing as licensed distributors by placing limits on potential distributors to those who have not been convicted of a prior offense.[277]

CONCLUSION

The Canadian Senate's recommendations are the synthesis of extensive scientific research, sociological data, and self-examination.[278] After an examination of this evidence, it became clear to the Senate Committee that Canada was on the wrong legislative path and had been for seventy-five years. Their original marijuana policy was based on myth and rumor, and those who made the decision had no understanding of the dangers of marijuana.[279] The current proposal is based on scientific evidence, empirical data that demonstrates a much fuller understanding of marijuana and its impact on human physiology, and society in general.[280]

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273. *See supra* Part III.B.

274. *See Fact Sheet: Cannabis Policy Update 2002, supra* note 243. Selling to non-residents is not one of the AHJO-G criteria used to close down coffee shops. *See id.*

275. *See supra* Part II.C.1.

276. *See* Summary Report, *supra* note 130, at 53. In Canada, users must stay in their homes or go to licensed distribution centers. *See id.* Similarly, in the Netherlands users must travel to a coffee shop to use marijuana. *See* Benjamin Dolin, *National Drug Policy: The Netherlands*, Senate Special Committee On Illegal Drugs, *at* http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/ille-e/library-e/dolin1-e.htm (last visited Oct. 27, 2003).

277. *See* Summary Report, *supra* note 130, at 52. It should be noted that those convicted of marijuana offenses under prior legislation would be granted amnesty and would be permitted to apply for distribution and production permits. *See id.*

278. *See Cannabis Report, supra* note 5, at 16-18.

279. *See id.* at 257.

280. *See generally Cannabis Report, supra* note 5.

Many questions remain. Will its proposal, in full or in part, be translated into actual legislation? This is difficult to determine, but conventional wisdom regarding republican democracy and highly controversial issues would suggest that a policy change this extreme will not happen soon.[281] The issue of strict enforcement of anti-drug laws serves to "boost politicians' popularity by providing them with uncontroversial and gratuitous rallying themes and election platforms."[282] The willingness to reexamine an institution as old as drug prohibition is an indicator of a change in thinking of top government officials in a modern industrialized nation. That alone is a significant step toward legalization.

The Senate Committee's data indicates that marijuana is no more harmful than alcohol or tobacco and that it was banned because of a lack of understanding of its true nature. Nevertheless, the Senate Committee neglected to ask itself one important question: if scientists knew then what they know now about the harmful physical and social effects of alcohol and tobacco, would they have been prohibited as well? This question, too, has no definitive answer, but if alcohol and tobacco had been permanently banned due to their harmful effects, perhaps the Senate Committee's report would include recommendations that they be legalized as well.

Data from the Netherlands seems to indicate that a liberal marijuana policy has little impact on use itself.[283] Data from the United States certainly does not contradict this proposition.[284] Despite spending millions to reduce supply and demand for marijuana, its use remains steady in the United States.[285] This seems to indicate that, whether legal or illegal, a certain percentage of the population will use marijuana. While this may be true, it does not automatically follow that marijuana should be legalized or decriminalized. A certain percentage of people will similarly use cocaine or heroin, regardless of their illegality. The crucial policy decision, therefore, should be based on the degree of harm caused by marijuana. If, through scientific and sociological research, marijuana proves to be less harmful than other legal substances, like tobacco and alcohol, it would seem difficult to justify a prohibitionist policy. This justification seems even more difficult when viewed in light of Dutch data suggesting that the penumbra of harms caused by marijuana use can be minimized.[286] If, however, a legislature objectively

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281. *See id.* at 283-84. Previous reforms, suggested by the Le Dain Commission, similar to those recommended by the Committee were discussed but never passed. *See supra* text accompanying notes 80-84. The Institute of Medicine, at the request of the White House, drafted a report noting the benefits of marijuana in the treatment of disease, but no action has been taken on this recommendation. *See* Institute of Medicine, *supra* note 8, at 177.

282. Leuw, *supra* note 1, at xvi.

283. *See* Belgian Report, *supra* note 252, at 16.

284. *See id.*

285. *See id.*

286. *See* McAllister, *supra* note 249, at 728.

determines that marijuana use presents an unacceptable risk of harm to the individual and society, prohibition would certainly be appropriate.

The Senate Committee has determined that marijuana is not as harmful to the individual or society as other legal drugs, like alcohol and tobacco.[287] Embracing this conclusion led to the Senate Committee's philosophical shift in perspective on criminal law, believing that "only offenes [sic] involving significant direct danger to others should be matters of criminal law."[288] The Senate Committee has endorsed the idea that criminal law should protect man from harm caused by others, not himself. This proposition certainly has some merit. Whether a large industrialized nation like Canada is capable of implementing such a drastic policy change remains to be seen.

287. *See Cannabis Report*, *supra* note 5, at 365.
288. Summary Report, *supra* note 130, at 12.

FOOD FOR THE TWENTY-FIRST CENTURY: AN ANALYSIS OF REGULATIONS FOR GENETICALLY ENGINEERED FOOD IN THE UNITED STATES, CANADA, AND THE EUROPEAN UNION

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I. INTRODUCTION

Imagine being able to eat a pork chop while getting the health benefit of spinach.[1] Soon, this might be possible as Japanese researchers claim to have implanted a plant gene, specifically that of spinach, into pigs, creating a pig that is healthier to eat.[2] Is this a hoax? Is it possible, that the human race has advanced into the realm of science fiction? Could there really be an attack of killer tomatoes?[3] In reality, scientists are actually able to implant genes from one species of a plant or animal into another species in order to "create" a new plant or animal with desired traits.[4] Such biotechnological advances are already used in the fields of pharmaceutical research, manufacturing, and crop plant modification.[5] Scientists currently can manufacture protein-based drugs from the milk-producing animals, including cows and goats.[6] Also, scientists

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1. *See* Emma Young, *GM Pigs are Both Meat and Veg*, NEW SCIENTIST, Jan. 25, 2002, *available at* http://www.newscientist.com/hottopics/gm (last visited Oct. 31, 2003).

2. *See id.*

3. Bad reference to the 1980 movie ATTACK OF KILLER TOMATOES (Media/Fox Video 1980). However, it should be pointed out that the first genetically modified food approved for sale in the marketplace was the Flavr Savr brand of tomatoes, introduced by Calgene, Inc. *See* Food and Agric. Org. of the United Nations, FAO Ethics Series 2, Genetically Modified Organisms, Consumers, Food Safety and the Environment (2001), *at* http://www.fao.org/DOCREP/003/X9602E/x9602e05.htm (last visited Oct. 31, 2003) [hereinafter FAO Ethics]. Flavr Savr tomatoes were "modified to delay ripening and they therefore had a prolonged shelf-life." *Id.* However, consumers noted that Flavr Savr tomatoes were more expensive than traditional tomatoes, had soft skin and a strange taste. *See id.*

4. *See generally* FAO Ethics, *supra* note 3.

5. *See* Carol Lewis, *A New Kind of Fish Story: The Coming of Biotech Animals*, FDA CONSUMER MAG., Jan.—Feb. 2001, *available at* http://www.cfsan.fda.gov/~dms/fdbiofsh.html (last visited Oct. 31, 2003).

6. *See id.* Pharmaceutical products produced by genetic engineering that are either available or are in clinical testing include products to treat diabetes (insulin), cancer (interleukin-2, gamma interferon), hepatitis (Hepatitis B vaccine), burns, anemia, dwarfism, and hemophilia. *See* WILLIAM S. KLUG & MICHAEL R. CUMMINGS, CONCEPTS OF GENETICS 432 (4th ed. 1994).

using one specific form of modern biotechnology,[7] are able to "create" crop plants modified to contain desired traits.[8] This type of biotechnology has already been introduced into the human food chain in many countries around the world.[9]

Genetic engineering[10] is being used to create food products that are beneficial to producers and to consumers.[11] Technology enables scientists to create tomatoes that delay ripening, thus enhancing their shelf life.[12] Scientists also have created herbicide tolerant corn and pest resistant cotton.[13] Genetic engineering can also modify food to include specific nutrients, such as rice that has been modified to contain vitamin A.[14] This type of modification can be particularly beneficial in third world nations where there is a shortage of food and many people are nutrient deprived.[15] However, this same technology has been criticized for primarily benefiting the rich, while the poor and hungry suffer without the benefit of biotechnology.[16]

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7. *See* Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, art. 3(i), 39 I.L.M. 1027. The Cartagena Protocol on Biosafety defines "modern biotechnology" as applying the following techniques:

> a. In vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) and direct injection of nucleic acid into cells or organelles, or
>
> b. Fusion of cells beyond the taxonomic family, that overcome natural physiological reproductive or recombination barriers and that are not techniques used in traditional breeding and selection.

Id.

8. *See* KLUG & CUMMINGS, *supra* note 6, at 432. Herbicide-resistant plants are a modification that scientists create using genetic engineering. *See id.*

9. *See* Douglas Herbert, *Science Bakes a GM Baguette*, CNN, Jan. 16, 2001, *available at* http://www.cnn.com/2001/WORLD/europe/01/15/genetic.bread/index.html (last visited Oct. 31, 2003). Countries with GM food products include Australia, South Africa, Mexico, Spain, France, Portugal, Romania, and the Ukraine. *See id.* As of Jan. 16, 2001, Brazil did not allow, "the sowing of GM crops." *Id.* The United States, Canada, Argentina, and China are the world's top four countries for plant biotechnology research. *See* FRED GALE ET AL., U.S. DEP'T OF AGRIC., IS BIOTECHNOLOGY IN CHINA'S FUTURE? 34 (2002).

10. *See* KLUG & CUMMINGS, *supra* note 6, app. B-8. Genetic engineering is defined as "The technique of altering the genetic constitution of cells or individuals by the selective removal, insertion, or modification of individual genes or gene sets." *Id.* Food produced through such technology can be called a variety of names, including genetically engineered, genetically modified, genetically modified organism (GMO), modern biotechnology, and foods derived through recombinant DNA techniques. *See* CTR. FOR FOOD SAFETY AND APPLIED NUTRITION, U.S. FOOD AND DRUG ADMIN., REPORT ON CONSUMER FOCUS GROUPS ON BIOTECHNOLOGY, *at* http://vm.csfan.fda.gov/~comm/biorpt.html (last visited Oct. 31, 2003).

11. *See generally* FAO Ethics, *supra* note 3.

12. *See id.*

13. *See* U.S. Food and Drug Administration Center for Food Safety & Applied Nutrition, List of Completed Consultations on Bioengineered Foods (2002), *at* http://www.cfsan.fda.gov/~lrd/biocon.html (last visited Oct. 31, 2003) [hereinafter Completed Consultations].

14. *See* FAO Ethics, *supra* note 3.

15. *See id.*

16. *See id.*

This Note examines and compares the regulations of Canada, the United States, and the European Union concerning environmental protection and food safety issues of genetically modified foods, including specific issues pertaining to transgenic animals.[17] Additionally, this Note analyzes consumer acceptance of genetically engineered foods in Canada, the United States, and the European Union. Part II of the Note provides some information on genetic engineering of both plants and animals. Part III of the Note explores Canada's regulatory processes concerning products produced through genetic engineering. Specifically, this section examines how Canada regulates these processes for food safety, the environment, and transgenic animals. Part IV addresses the United States approach to products produced from genetic engineering, again focusing on food safety, environmental concerns, and transgenic animals. Part V of the Note examines the European Union's regulatory scheme for genetically engineered products, again focusing on their relation to food safety, environmental concerns, and transgenic animals. Part VI of the Note compares the three governments' approaches to products produced via genetic engineering and attempt to find similarities between the approaches.

II. GENETIC ENGINEERING

A. General Overview

In the not so distant future, perhaps even tonight, when you go to the grocery store, you will find novel food[18] products produced through a

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17. *See* Office of Biotechnology, Canadian Food Inspection Agency, How Many Genetically Modified Food Products are Permitted in Canada, *at* http://www.inspection.gc.ca/english/sci/biotech/safsal/novalie.shtml (last visited Oct. 31, 2003) [hereinafter Canada's GMOs]. *See also* Transgenic Fish, *infra* note 205; EU Questions, *infra* note 228. A transgenic organism is defined as, "An organism formed by the insertion of foreign genetic material into the germ line cells of organisms. Recombinant DNA techniques are commonly used to produce transgenic organisms." Industry Canada, Life Sciences Branch, *Glossary* (2002), *at* http://strategis.ic.gc.ca/SSG/bv00373e.html (last visited Oct. 31, 2003) [hereinafter *Glossary*].

18. *See Glossary*, *supra* note 17. This paper focuses on novel food products that contain a genetically modified organism (GMO) which are also called "living modified organism (LMO) or transgenic organism." *Id.*
Canada defines novel food as:

a) [A] substance, including a microorganism, that does not have a history of safe use as a food;
b) a food that has been manufactured, prepared, preserved or packaged by a process that
   1. has not been previously applied to that food, and
   2. causes the food to undergo a major change; and
c) a food that is derived from a plant, animal or microorganism that has been genetically modified such that
   1. the plant, animal or microorganism exhibits characteristics that were not previously observed in that plant, animal or microorganism,
   2. the plant, animal or microorganisms no longer exhibits characteristics that

scientific process to contain enviable traits or created to exclude some undesirable qualities.[19] Thus, sharing the shelf space with traditional items such as corn, lettuce, and broccoli will be such items as "[i]nsect-resistant apples, long-lasting raspberries, and potatoes that absorb less fat."[20] These novel products are the results of advances in biotechnology, specifically genetic engineering.[21]

Genetic engineering is a process that allows scientists "to modify the genetic makeup" of an organism "precisely and predictably, creating improved varieties faster and easier than can be done using more traditional . . . techniques."[22] Genetic engineering uses a process called "recombinant DNA [rDNA] technology."[23] This process allows researchers to "isolate a known trait from any living species—plant, animal or microbe—and incorporate it into another species."[24]

B. History of Modifying Plants to Display Desired Characteristics

Although genetic engineering sounds like a new or futuristic idea, it has existed for years.[25] In the 1800s, Gregor Mendel[26] began to experiment with hybridization[27] in garden pea plants.[28] Mendel is credited with discovering

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were previously observed in that plant, animal or microorganism, or

3. one or more characteristics of the plant, animal or microorganism no longer fall within the anticipated range for that plant, animal, or microorganism.

Novel Foods Regulations, C.R.C., ch. 870, § B.28.001 (1999) (Can.).

19. *See* John Henkel, *Genetic Engineering Fast Forwarding to the Future*, FDA CONSUMER MAG, Feb. 1998, *at* http://www.fda.gov/bbs/topics/CONSUMER/geneng.html (last visited Oct. 31, 2003).

20. *Id.* Other types of GM food products include cotton, rice, wheat, corn, soybean, rapeseed, tobacco, peanut, cabbage, tomato, sweet pepper, and petunia. *See* GALE, *supra* note 9, at 34.

21. *See* Henkel, *supra* note 19.

22. *Id.*

23. *Id.*

24. *Id.* Traits are contained in genes, which are segments of deoxyribonucleic acid (DNA). *See id.* DNA is "found in all living cells." *Id.*

25. *See id.*

26. *See* KLUG & CUMMINGS, *supra* note 6, at 51. Gregor Mendel was born in 1822 in what is now the Czech Republic. *See id.* He studied philosophy before attending the University of Vienna to study physics and botany. *See id.* Mendel researched genetics until he left research to fulfill his elected post as abbot of a monastery. *See id.* Mendel's research succeeded where other researchers had failed in part because he "restricted his examination to one or very few pairs of contrasting traits in each experiment." *Id.* at 52.

27. *See* Larry Thompson, *Are Bioengineered Foods Safe?*, FDA CONSUMER MAG., Jan.—Feb. 2000, *available at* http://www.fda.gov/fdac/features/2000/100_bio.html (last visited Oct. 31, 2003). Hybridization is a process "in which two related plants were cross-fertilized and the resulting offspring had characteristics of both parent plants. Breeders then selected and reproduced the offspring that had desired traits." *Id.*

28. *See* KLUG &CUMMINGS, *supra* note 6, at 51.

"the basis for the transmission of hereditary traits."[29] Indeed, the process of gene selection has existed since ancient times.[30] Ancient farmers practiced a crude form of gene selection by saving seeds from the plants that were the "hardiest and most resistant to disease."[31] These ancient farmers "'engineered' new combinations of genes, ones that would produce superior plant stock."[32] They engineered these superior plants "[b]y selecting which plants they would breed."[33] As should be expected, modern day genetic engineering offers scientists a more predictable and faster way of trait selection.[34]

C. Potential Benefits & Detriments of Genetically Modified (GM) Products

1. GM Benefits

"To feed 10.8 billion people by 2050 will require us to convert 15 million square miles of virgin forest, wilderness and marginal land into agrochemical-dependent arable land. GM crops hold the most important key to solve future problems in feeding 5 billion mouths over the next 50 years."[35] As noted earlier, genetic engineering can create crop plants that are pest resistant and herbicide tolerant, and fish capable of growing faster than traditional fish.[36] These technological advances can be beneficial in feeding a vast and growing society.[37] In fact, GM crops can be modified to carry specific vitamins, such as vitamin A.[38] Consequently, GM crops modified to carry vitamin A can potentially reduce malnutrition in countries that have a high rate of occurrence of vitamin A deficiency.[39]

Genetic engineering is a beneficial tool in crop production.[40] For example, the herbicide glycophosate effectively controls weeds; however, it cannot be used where crops are located because it will kill both crops and

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29. *Id.* at 52. The world did not recognize the "significance of Mendel's experiments" until the twentieth century, years after he performed his experiments. *Id.* "Once Mendel's publications were rediscovered by geneticists investigating the function and behavior of chromosomes, the implications of his postulates were immediately apparent. He had discovered the basis for the transmission of hereditary traits!" *Id.*

30. *See* Henkel, *supra* note 19.

31. *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. FAO Ethics, *supra* note 3, at 9.

36. *See id.* at 3.

37. *See generally id.*

38. *See id.* at 24. This procedure was done to rice to make the rice grains "produce beta-carotene, which can be converted into vitamin A in the body." *Id.*

39. *See* FAO Ethics, *supra* note 3, at 24. GM crops are not the only answer to malnutrition and vitamin A deficiency, it is just one of the possibilities. *See id.* Other possibilities include promoting food that is naturally high in vitamin A or food that has been fortified with vitamin A. *See id.*

40. *See* KLUG & CUMMINGS, *supra* note 6, at 432.

weeds.[41] Genetic engineering enables scientists to transfer herbicide resistance traits to plants so that plants exposed to herbicides, such as glycophosate, will survive and only the weeds will die.[42]

2. GM Detriments

Although, there are many potential benefits to genetic engineering, the process also has some potential detriments.[43] It is feared that while genetic engineering could greatly help mitigate issues such as world hunger and malnutrition, those in most need of the technology will not have access.[44] In fact, the science and technology behind the creation of GM crops is tightly held by a few companies holding the patents and licenses.[45] Additionally, there is concern about the impact GM products will have on the environment, specifically the effect GM plants will have on native plants.[46] The safety of consuming GM food products is also a concern for the fear that the GM food product may contain allergens or toxins.[47]

D. The Coming Attraction - Transgenic Animals

One of the newest, and perhaps the most controversial form of genetic engineering is the creation of transgenic animals.[48] Genetic engineering offers the benefit of producing "more and better crops and food animals to feed a continuously growing world population."[49] While traditional breeding techniques can take years to develop a desired animal with a specific trait, genetic engineering can take far less time.[50] However, the creation behind transgenic animals is not a perfect science.[51]

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41. *See id.*
42. *See id.*
43. *See* FAO Ethics, *supra* note 3, at 14.
44. *See id.* at 17.
45. *See id.* at 14.
46. *See id.*
47. *See id.*
48. *See Glossary*, *supra* note 17. Discussion of transgenic animals does not necessarily include a discussion of cloned animals as they are not the same thing. *See id.* A clone is defined as "[a] group of genes, cells, or organisms derived from a common ancestor. Because there is no combining of genetic material (as in sexual reproduction), the members of the clone are genetically identical to the parent." *Id.* However, some scientists have turned to cloning "as a way to expand the herd of transgenic animals." Lewis, *supra* note 5. Researchers that do this will first create the transgenic animal and then use cloning technique "to create replicas of the transgenic animal." *Id.* This is done because large mammals do not "multiply as plentifully or as rapidly as fish." *Id.* The transgenic techniques are used to obtain the "desired characteristic in the animal" and cloning is used to "produce a core breeding herd." *Id.*
49. Lewis, *supra* note 5.
50. *See id.*
51. *See id.*

To "create" a transgenic animal, scientists first must isolate the specific gene for the trait they want the animal to possess.[52] In one approach, a scientist will actually inject the transplanted gene into a fertilized egg.[53] If the egg survives, it is then implanted into a surrogate mother.[54] However, this process does not guarantee that the offspring will manifest the desired trait.[55] In fact, only a few of the offspring that live until birth will actually "carry the new gene integrated in such a way that it actually functions."[56] The success rate of gene transfer in animals is low—"usually one or two per cent."[57]

In addition to the low success rate of gene transfer, there are other problems with transgenic animals.[58] For example, it is difficult to predict when and where the gene will be expressed on the animal.[59] The process of creating transgenic animals is also costly.[60] In fact, traditional breeding selection programs promote productivity[61] or cost reduction[62] where "measurement and recording in herds/flocks is feasible."[63] The production of transgenic animals, and even genetically modified plants, has caused concern about "potential danger from narrowing of genetic variation" in plants and animals and "decreased resilience in the face of disease . . . ."[64]

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52. *See id.* The next step after isolating the gene is to create a "molecular vehicle . . . that will carry the gene into the nucleus of the cell and permanently integrate it into the chromosome." *Id.* Chromosomes carry the genes of an organism. *See Glossary*, *supra* note 17. The science behind transgenic fish was discovered by mistake some twenty years ago in Canada when a researcher accidentally froze a fish tank containing flounder. *See* Lewis, *supra* note 5. When the tank was finally thawed, the flounder were still alive. *See id.* The species of flounder in the tank contained a protein with an "on-switch" that acted similar to the way anti-freeze works in a car. *See id.* Researchers isolated the gene containing the on-switch protein and inserted it into fertilized eggs from a species of "salmon that produces a growth-stimulating hormone." *Id.* This produced salmon that grew faster than the traditional salmon of that species. *See id.*

53. *See* Lewis, *supra* note 5.

54. *See id.*

55. *See id.*

56. *Id.* Those offspring that actually carry a functioning gene can be "multiplied by conventional breeding." *Id.* Additionally, an animal that carries a functioning gene can become very valuable. *See id.* For example, the Genzyme Transgenics Corporation in Massachusetts "created a goat that carries the gene for antithrombin III, a blood protein that can prevent blood clotting in people." *Id.*

57. E.P. CUNNINGHAM, COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE, RECENT DEVELOPMENTS IN BIOTECHNOLOGY AS THEY RELATE TO ANIMAL GENETIC RESOURCES FOR FOOD AND AGRICULTURE at 12, U.N. Doc. CGRFA-8/99/Inf.9 (1999). The low success rate causes great expense for large mammals, such as cows. *See id.* Therefore, "most work has been done in mice, pigs and sheep." *Id.*

58. *See id.*

59. *See id.*

60. *See* CUNNINGHAM, *supra* note 57, at 12.

61. *See id.* Genes promoting productivity include genes that promote meat and milk. *See id.*

62. *See id.* Disease resistance is an example of cost reduction genes. *See id.*

63. *Id.*

64. *Id.* at 21.

Moreover, the general public appears skeptical about accepting genetically modified animals as a potential food source.[65] "Experimenting with and altering animals is a less acceptable practice" than experimenting with plants.[66] This is partially because there are cultural and religious beliefs that prevent some people from consuming food derived from animals.[67] There is also concern about the ethical issues involved with modifying animals.[68] Whether or not transgenic animals ultimately enter the marketplace will depend on the individual country and consumer acceptance of novel foods.[69]

III. THE CANADIAN APPROACH

A. Regulatory Overview

Canada's regulatory approach to genetically modified organisms (GMOs) "provides for the risk assessment and management of biotechnology products from a sustainable development perspective."[70] In 1993, Canada issued the *Federal Regulatory Framework for Biotechnology* (*Framework*),[71] which was created to form an "efficient" and "effective" regulatory approach towards biotechnology based on six principles.[72] These six principles balance the benefits of biotechnology "with the need to protect human health, animal health and the environment."[73] The *Framework* provides that novel products

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65. *See* FAO Ethics, *supra* note 3, at 19-20.

66. *Id.* at 20.

67. *See id.*

68. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, OPINION ON ETHICAL QUESTIONS ARISING FROM THE COMMISSION PROPOSAL FOR A COUNCIL DIRECTIVE ON LEGAL PROTECTION FOR BIOTECHNOLOGICAL INVENTIONS, 1993, *at* http://europa.eu.int/comm/european_group_ethics/gaieb/en/opinion3.pdf (last visited Oct. 31, 2003).

69. *See* Canada's GMOs, *supra* note 17. *See also* Transgenic Fish, *infra* note 205; EU Questions, *infra* note 228.

70. Gov't of Canada, Response of the Fed. Dep'ts and Agencies to the Petition Filed May 9, 2000 by the Sierra Legal Defence Fund Under the Auditor General Act: Review of Federal Laws, Regulations and Policies on Genetically Modified Organisms (2000), ¶ 9, *at* http://www.inspection.gc.ca/English/sci/biotech/enviro/sierrae.shtml (last visited Oct. 31, 2003) [hereinafter Response].

71. *See generally id.* The *Federal Regulatory Framework for Biotechnology* defines biotechnology as "the application of science and engineering in the direct or indirect use of living organisms in their natural or modified forms." *Id.* ¶ 15. The *Framework* finds that "[b]iotechnology is a series of techniques, not a type or class of product." *Id.* This definition applies to both traditional food products and those products that are developed from "molecular techniques" including genetic engineering. *Id.*

72. *See id.*

73. *Id.* ¶ 16. The six principles of the *Framework*:

a. Maintains Canada's high standards for the protection of the health of workers, the general public and the environment;
b. Uses existing legislation and regulatory institutions to clarify responsibilities and avoid duplication;
c. Continues to develop clear guidelines for evaluating products of biotechnology which are in harmony with national priorities and international

will be regulated under the same regulations as traditional products.[74] Further, it provides that existing regulations would govern novel products rather than creating new regulations.[75] It also works to avoid duplication amongst regulatory agencies.[76] The government regulates these products "in order to protect human, animal and environmental health and to protect consumers against fraud."[77] The regulations set forth by the Canadian government also work to "maintain international quality and safety standards that facilitate trade."[78]

Canada allocates the "legislative and regulatory responsibility for health and environmental assessment of biotechnology products"[79] between the following four agencies: Health Canada,[80] the Canadian Food Inspection Agency (CFIA),[81] the Department of Fisheries and Oceans (DFO),[82] and Environment Canada.[83]

Health Canada assesses novel food safety.[84] CFIA enforces the regulations created by Health Canada.[85] DFO is responsible for maintaining policies and programs concerning Canada's oceans and bodies of freshwater.[86] Finally, Environment Canada and Health Canada jointly share responsibilities

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standards;

d. Provides a sound scientific database on which to assess risk and evaluate products;

e. Assures both the development and enforcement of Canadian biotechnology regulations are open and include consultation; and

f. Contributes to the prosperity and well-being of Canadians by fostering a favourable climate for investment, development, innovation and adoption of sustainable Canadian biotechnology products and processes.

Id.

74. *See* Canadian Food Inspection Agency Office of Biotechnology, Regulating Agricultural Biotechnology in Canada: An Overview (2001), *at* http://www.inspection.gc.ca/english/sci/biotech/reg/bioage.shtml (last visited Oct. 31, 2003) [hereinafter CFIA Overview].

75. *See id.*

76. *See* Response, *supra* note 70, ¶ 19.

77. CFIA Overview, *supra* note 74.

78. *Id.*

79. Response, *supra* note 70, ¶ 28.

80. *See generally* Response, *supra* note 70, ¶¶ 29-32.

81. *See generally id.* ¶¶ 33-34.

82. *See generally id.* ¶¶ 35-36.

83. *See generally id.* ¶ 37-39. "Pest control products are regulated under the *Pest Control Products Act* by the Pest Management Regulatory Agency." CFIA OVERVIEW, *supra* note 74. Canada also has three agencies, Industry Canada, Agriculture and Agri-Food Canada, and Natural Resources Canada, which do not have regulatory power regarding products produced from biotechnology, but play important advisory functions in policy development. *See* Response, *supra* note 70, at tbl. 1.

84. *See generally* Food and Drugs Act, C.R.C., ch. 870, (2002) (Can.).

85. *See generally* Office of Biotechnology, Canadian Food Inspection Agency, Regulating Agricultural Biotechnology in Canada: Environmental Questions (2001), *at* http://www.inspection.gc.ca/english/sci/biotech/enviro/envrege.shtml (last visited Oct. 31, 2003) [hereinafter CFIA Envtl. Questions].

86. *See* Response, *supra* note 70, ¶ 35.

to determine whether a substance is or may become toxic before it can be manufactured or imported into Canada.[87]

B. Food Safety Concerns

Health Canada and CFIA are closely related regulatory agencies.[88] The CFIA is the primary agency "for regulating agricultural products to assess whether new products are safe to humans, animals and the environment."[89] Whereas, Health Canada is responsible for "food safety assessment of novel plants that are developed for use as food, or as animal feed if the modified feed has the potential to introduce harmful components into the portion of the animal being consumed as food."[90]

Health Canada derives its regulatory authority for enforcing food safety and nutritional issues from the Food and Drugs Act.[91] Genetically engineered foods fall under the definition of novel foods in Canada.[92] In 1999, Health Canada amended the Food and Drugs Act to require pre-market notification[93] of novel foods.[94] Pre-market notification allows Health Canada to assess the safety of a novel food prior to the food's introduction in the market place.[95] Companies wanting to sell a novel food product in Canada must submit information about the novel product to Health Canada.[96] Health Canada uses this information to determine the safety of the food item.[97] A company seeking approval of a novel product is not allowed to advertise or sell the product until it has been approved by Health Canada.[98] Such a regulation helps to protect consumers by preventing novel foods from the marketplace until after a thorough scientific examination is completed.[99]

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87. *See id.* ¶ 37.

88. *See id.* ¶ 33. "CFIA is responsible for enforcing policies with respect to safety and nutritional quality of food sold in Canada, Health Canada is responsible for establishing the standards for these policies and for assessing the effectiveness of the Agency's activities." *Id.*

89. CFIA Envtl. Questions, *supra* note 85.

90. Health Canada, Regulatory Impact Analysis Statement (1999), *at* http://www.hc-sc.gc.ca/food-aliment/mh-dm/ofb-bba/nfi-ani/e_regulatory_impact.html (last visited Oct. 31, 2003) [hereinafter Reg Impact Stmt].

91. *See generally* Food and Drugs Act, C.R.C., ch. 870 (2002) (Can.).

92. *See generally* Novel Foods Regulations, C.R.C., ch. 870, § B.28.001 (1999) (Can.).

93. *See generally id.* The pre-market notification requirement is similar to regulations found in the European Union and the United States. *See* Reg Impact Stmt, *supra* note 90. As of 1999, the Australia New Zealand Food Authority had also proposed a similar regulation. *See id.*

94. *See* Reg Impact Stmt, *supra* note 90.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*

Health Canada considers numerous factors in assessing the safety of a novel food product,[100] including an "evaluation of the process used to develop [the novel food]; the comparison of its characteristics to that of the traditional counterpart; the nutritional quality and the potential for the presence of any toxicants or anti-nutrients; and the potential allergenicity resulting from any proteins introduced into the food."[101] The goal of the safety assessment is to ensure that the novel food is as safe as other foods found in the market place.[102] As soon as Health Canada approves a novel food product, that product is eligible to be sold in the market.[103] The product will then be subjected to the same post-market standards as all food, traditional or novel.[104] Between 1994 and December of 2000, Health Canada notified the manufacturers of forty-two genetically engineered products that they could release their products into the marketplace.[105] The majority of the approved genetically engineered products were crop plants "that have been genetically modified to improve agronomic characteristics such as crop yield, hardiness and uniformity, insect and virus resistance; and herbicide tolerance."[106]

C. Environmental Contamination and Concerns

The Canadian Food Inspection Agency (CFIA) is responsible for federal food inspections, quarantine services, and "plant protection and animal health programs."[107] CFIA's regulatory authority comes from five different acts, "the *Seeds Act*, the *Feeds Act*, the *Fertilizers Act*, the *Health of Animals Act* and the *Plant Protection Act*."[108] Like Health Canada, CFIA also performs safety assessments on novel products before they can be used.[109] This assessment

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100. *See* Health Canada, Question and Answers Food and Drug Amendment—Schedule No. 948, Regulatory Impact Analysis Statement (2000), *available at* http://www.hc-sc.gc.ca/food-aliment/mh-dm/ofb-bba/nfi-ani/e_qa_modification_e.html (last visited Oct. 31, 2003) [hereinafter Schedule No. 948].

101. *Id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. Schedule No. 948, *supra* note 100. Included in the approved crop plants were "corn, canola, potatoes, and soybean." *Id.*

107. Response, *supra* note 70, ¶ 85. CFIA was created in April of 1997 by *The Canadian Food Inspection Act*. *See id.* ¶ 33. It is stressed that CFIA has been organizationally separated "from any part of the government involved in research and development of biotechnology products." *Id.*

108. CFIA Envtl. Questions, *supra* note 85. In February 2001, the Canadian government was working to develop new regulatory requirements for four of the Acts (the Seeds Act, the Feeds Act, the Fertilizer Act, and the Health of Animals Act) so that the acts would specifically "address the safety of organisms developed through genetic engineering in the environment." *Id.*

109. *See id.* CFIA assesses products such as plants containing novel traits, biofertilizers, livestock feeds and veterinary biologics. *See id.*

considers human occupational and food safety as well as "animal and environmental safety."[110] Occasionally, CFIA will also consider the effectiveness of the novel product.[111] The assessment, like the Health Canada assessment, uses information provided by the developer to identify safety concerns.[112] An environmental risk assessment is required for "confined field trials" for "plants with novel traits."[113] A second environmental assessment "is then required for unconfined release, and if it is to be used as a food or [animal] feed it must then undergo a further safety assessment by Health Canada or CFIA's Feed Section before it may be used for commercial production."[114] Once CFIA deems a novel product safe, in light of the assessment and as compared to its traditional counterpart, the novel product can be released into the environment.[115]

A major concern with genetically engineered agricultural products is outcrossing to a wild species.[116] Outcrossing is "the potential for genes to move from a genetically engineered plant to a wild relative."[117] The safety assessment required for plants containing novel traits includes an assessment for the potential for the novel trait to "flow"[118] to a wild relative.[119] Most of the plants containing novel traits "that have been approved for release in Canada do not have wild relatives."[120] However, Canada has approved canola plants for commercial release even though they are "known to outcross with other plants of the same species, and can cross with a few related plants of

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110. *Id.*

111. *See id.*

112. *See* CFIA Envtl. Questions, *supra* note 85. In performing the environmental safety assessment, CFIA will take into account the following questions:

- Does the plant have the potential to become a weed of agriculture or to be invasive of natural habitats?
- Is there potential for gene flow to wild relatives whose hybrid offspring may become more weedy or invasive?
- Does the plant have the potential to become a plant pest?
- Is there a potential impact on non-target organisms?
- Is there a potential impact on biodiversity?
- Is there a potential for the development of resistance as a result of the release of this plant?

Id.

113. *Id.*

114. *Id.*

115. *See id.*

116. *See* Canadian Food Inspection Agency Office of Biotechnology, Outcrossing to Wild Species (2001), *at* http:// www.inspection.gc.ca/english/sci/biotech/enviro/transfe.shtml (last visited Oct. 31, 2003) [hereinafter Outcrossing].

117. *Id.*

118. *See Glossary*, *supra* note 17. Gene flow is defined as "[t]he movement of genes from one population of a species to another by interbreeding." *Id.*

119. *See* Outcrossing, *supra* note 116. This assessment includes "(1) the potential for gene flow, and (2) the potential impact of gene flow should it occur." *Id.*

120. *Id.*

other species . . . ."[121] CFIA has concluded that gene flow of canola plants is possible, but that it would likely "not result in increased weediness or invasiveness of wild relatives."[122]

However, it should be noted, that Canadian courts will not allow outcrossing to be an excuse if genetically modified plants belonging to another person are found growing in someone else's fields.[123] Specifically, a Canadian court decided a case involving a farmer who had genetically modified canola plants growing in his field.[124] The farmer had not purchased the genetically modified seeds.[125] In fact, the farmer argued that the seeds for the genetically modified plants must have been accidentally mixed with the seeds he planted.[126] He speculated that the seeds "probably blew off a passing truck into one field . . . ."[127] A Canadian court held that a farmer must pay for the genetically modified plants that were found growing in his field.[128] The judge found that it does not matter how the crops entered the field, the farmer must pay the producer of the plants for the crops.[129] Even though the judge was not convinced by the farmer's story, he noted that even if the plants entered the farmer's property by accident, the farmer bore the duty to destroy the plants once he realized that they were a genetically modified strain of the plant.[130]

The Department of Fisheries and Oceans (DFO) controls regulations and policies relating to the oceans and freshwater of Canada.[131] The agency conducts risk assessments concerning applications to grow transgenic fish outside of a "secure containment facility."[132] DFO also conducts "research on transgenic aquatic organisms" in an effort to "understand the technology and

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121. *Id.* An example of a plant that canola plants can cross with is Brassica rapa. *See id.* In canola plants that are herbicide tolerant, "any tolerance genes transferred to wild relatives," the resulting offspring "would only gain a competitive advantage in areas where the herbicide was being used to control weeds." *Id.* These plants could be controlled by other means than herbicides. *See* Outcrossing, *supra* note 116.

122. *Id.* CFIA has determined that although these particular canola plants may have gene flow, it is unlikely that the gene flow will cause an increase in weeds because there are ways to control these plants. *See id.*

123. *See generally* Kurt Kleiner, *Victory for Monsanto: If Modified Plants Contaminate Your Crops it Could Cost You Dear,* NEW SCIENTIST, Apr. 7, 2001, *available at* http://www.newscientist.com/hottopics/gm (last visited Oct. 31, 2003).

124. *See id.* Remember, canola plants were approved for release even though gene flow is possible with the plants. Outcrossing, *supra* note 116.

125. *See* Kleiner, *supra* note 123.

126. *See id.*

127. *Id.*

128. *See id. See* Monsanto Canada Inc. v. Schmeiser, [2001] 3 F.C. 35.

129. *See* Kleiner, *supra* note 123. The judge ordered the farmer to pay Monsanto 15,450 Canadian dollars for the crops that were found growing in his fields. *See id.*

130. *See id.* The farmer has counter-sued Monsanto, claiming that environmental contamination from their genetically modified plants forced him to destroy a plant variety that he had been developing for years. *See id.*

131. *See* Response, *supra* note 70, ¶ 35.

132. *Id.* ¶ 36.

to forecast potential environmental impacts."[133] However, no transgenic aquatic organisms currently grow outside of secured containment facilities.[134] Until the DFO creates regulations for genetically engineered aquatic organisms, "all applications for research or commercial development of transgenic fish [aquatic organisms] will be assessed under the New Substance Notification Regulations of the Canadian Environmental Protection Act, and be subjected to the time provisions of these regulations."[135] The DFO also "supports research gene banking for populations that are considered valuable."[136]

Environment Canada shares responsibility with Health Canada in "assuring that the determination of whether a substance is 'toxic' or capable of becoming 'toxic' occurs from both a human health and environmental point of view before the substance can be manufactured or imported into Canada."[137] Environment Canada obtains its regulatory authority from the Canadian Environmental Protection Act, 1999 (CEPA).[138] The CEPA "is the key authority for the government to ensure that all new substances are assessed for their potential to harm human health or the environment."[139] The CEPA covers all transgenic aquatic organisms.[140] Due to this, DFO and Environment Canada work together to create "a consistent regulatory framework for transgenic aquatic organisms that will meet the criteria set out in *CEPA* 1999."[141]

D. Transgenic Animals

The ethical acceptability of the application of biotechnology to animals and their use requires an assessment of the effects on the well-being of the animal in relation to potential and actual benefits which may accrue to society. Wellness is more [than] absence of illness. It is the ultimate manifestation of the integration of an animal's internal and external environments.[142]

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133. *Id.*

134. *See id.*

135. *Id.*

136. Response, *supra* note 70, ¶ 57. Gene banks preserve samples of genetic resources. *See id.* ¶ 56. Agriculture and Agri-Food Canada has "a network of crop gene banks which preserves over 110,000 samples of plant genetic resources for food and agriculture." *Id.*

137. Response, *supra* note 70, ¶ 37. Like CFIA, Environment Canada assures "clear separation of its regulatory work from activities that might create a conflict of interest." *Id.* ¶ 39.

138. *See id.* ¶ 37.

139. Env't Canada, Factsheet Regulatory Roadmap for New Substances in Canada (2001), *at* http://www.ec.gc.ca/ceparegistry/regulations/FINAL-roadmap_e.pdf (last visited Oct. 31, 2003). However, the CEPA also contains a provision exempting substances from its requirements if the substance is regulated by another act. *Id.*

140. *See* Response, *supra* note 70, ¶ 64.

141. *Id.*

142. Office of Biotechnology, Canadian Food Inspection Agency, Consultation on Regulating Livestock Animals & Fish Derived from Biotechnology (2001) ¶ 3, *at* http://www.inspection.gc.ca/english/sci/biotech/tech/aniconsulte.shtml (last visited Oct. 31, 2003) [hereinafter Transgenic Regulations].

Although, currently, no transgenic animals are available for sale in Canada,[143] the Canadian Government is working to produce regulations that would adequately address transgenic animals intended for use as food.[144] Agriculture and Agri-Food Canada has stressed the importance of considering "Canada's unique environment" and "regional livestock management practices" alongside those standards that are "being developed globally."[145] Interestingly, Health Canada stated,

> [N]umerous animals which either do not incorporate or lose the novel DNA, or do not express the desired characteristic will be propagated.[146] In order to recover some of the costs incurred during the development of this technology as well as reduce disposal costs, non-transgenic livestock and fish may be sold for food.[147]

If and when transgenic livestock and fish are approved as a food source in the future, they would be regulated by Health Canada under the Novel Food Regulations.[148]

The Canadian Government has worked to develop regulations that "are consistent with those of recognized international scientific groups and with other national governments."[149] This is done, in part, to ensure safety of novel products and to help facilitate international trade.[150] In fact, Canada has a

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143. *See generally* Canada's GMOs, *supra* note 17.

144. *See generally* Transgenic Regulations, *supra* note 142.

145. *Id.* ¶ 3.

146. *Id.* This is because "[m]ethods presently used to genetically modify livestock animals and fish are inefficient and their stability within the recipient genome is unknown." *Id.*

147. *Id.*

148. *See* Department of Fisheries and Oceans, Fisheries & Oceans Response to the Interim Report of the Standing Senate Committee on Fisheries Entitled "Aquaculture in Canada's Atlantic and Pacific Regions," *available at* http://www.dfo-mpo.gc.ca/communic/reports/aquaculture/response-reponse_e.htm (last visited Oct. 31, 2003). Under the Food and Drug Act, anyone who wants to sell or advertise transgenic animals for food use will have to follow the pre-market notification requirements as required under the Novel Food Regulations. *See* Transgenic Regulations, *supra* note 142.

149. Canadian Food Inspection Agency Office of Biotechnology; Biotechnology, Agriculture and Regulation (2001), *at* http://www.inspection.gc.ca/english/sci/biotech/reg/bare.shtml (last visited Oct. 31, 2003).

150. *See id.* CFIA product evaluators "developed regulatory directives that are consistent with those used by international authorities." *Id.* Included in those Canadian directives are the following principles:

1. To build on current legislation where possible, rather than creating new legislation to govern new products which are developed.
2. To focus on product characteristics, rather than the method of production. At the present time, all products developed through genetic engineering (recombinant products) are assessed for unintended effects that may result from the introduction of foreign genes or DNA sequences.

"science-based regulatory system" that "is in line with principles laid out by organizations such as the World Health Organization (WHO), the Organization for Economic Cooperation and Development (OECD), and the Food and Agriculture Organization (FAO)."[151] Canada has approved at least "fifty-one types of genetic modification in crops."[152]

IV. THE UNITED STATES APPROACH

A. *Overview*

In the United States, there are three main agencies responsible for regulating and overseeing GM food products.[153] The United States Department of Agriculture (USDA) regulates GM products including plant pests,[154] plants, and veterinary biologics.[155] The Environmental Protection Agency (EPA) regulates products that are "microbial/plant pesticides, new uses of existing pesticides, novel microorganisms."[156] Finally, the Food and Drug Administration (FDA) regulates products that are used as "food, feed, food additives, veterinary drugs, human drugs and medical devices."[157] Many GM food products will ultimately be regulated by one or more of these agencies and potentially by all three regulatory agencies.[158] For example, GM corn that is modified for herbicide tolerance will be regulated by the USDA to ensure

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3. To conduct evaluations for each product on the basis of its unique characteristics and to establish appropriate safety levels based on the best scientific information. Safety is defined, not as the complete absence of risk, but rather as the level of "acceptable risk." If the risk is not acceptable, the application will be refused.

Id.

151. Response, *supra* note 70, at Forward. Canada's regulatory system for products of biotechnology includes stiff penalties and "potential jail terms" for those that violate the regulations. *See id.* ¶ 75. Indeed, Canada considers itself a world leader determining international policy concerning genetically engineered products. *See id.* Specifically, Canada has been helping to shape international policy concerning labeling of genetically modified organisms (GMOs). *See id.*

152. Canada's GMOs, *supra* note 17. Included in the approved GM crops are corn, canola, potatoes, tomatoes, squash, soybean, flax, cottonseed oil, and sugar beet. *See id.* The different types of modifications include pest resistance, herbicide tolerance, and slow-ripening traits. *See id.*

153. *See* U.S. Department of Agriculture, United States Regulatory Oversight in Biotechnology Responsible Agencies—Overview, *at* http://www.aphis.usda.gov/brs/usregs.html (last visited Oct. 31, 2003) [hereinafter U.S. Regulatory Oversight].

154. *See id.* Included in the plant pests regulated by USDA are transgenic arthropods and transgenic invertebrates. *See* U.S. Department of Agriculture, Regulation of Transgenic Arthropods, and Other Transgenic Invertebrate Plant Pests, *at* http://www.aphis.usda.gov/brs/arthropod/ (last visited Oct. 31, 2003) [hereinafter Arthropods].

155. *See* U.S. Regulatory Oversight, *supra* note 153.

156. *Id.*

157. *Id.*

158. *See generally id.*

that the product is safe to grow.[159] The EPA will regulate the GM corn product under its pesticide law.[160] Finally, the FDA will ensure the GM corn food product is safe for human consumption.[161]

B. Food Safety

The FDA ensures that novel food products are just as safe as traditional food products.[162] The FDA's regulatory policy for biotechnology is based on existing food law.[163] The Federal Food, Drug, and Cosmetic Act (FFDCA)[164] creates a legal obligation for companies that sell any food. Whether it is a conventional food product or a novel food product, all food products offered for sale in the United States must meet the safety standards provided by the law.[165]

The FDA also has a consultative process for producers of genetic engineered foods.[166] FDA considers the consultative process important.[167] Thus, the producers work closely with the FDA in determining the safety of the bioengineered product.[168] The process allows FDA to be aware of food products containing GM organisms before the product is released commercially so that FDA can address "questions regarding the safety, labeling, or regulatory status of the food or food ingredient."[169] The consultative process requires producers to provide the FDA with documentation showing that the specific GM food product is as safe as the traditional food product.[170] The documentation will address issues with the actual gene(s) used in the GM food product, such as whether the gene(s) is from a "commonly allergic plant, the characteristics of the proteins made by the genes, their biological function, and how much of them will be found in the food."[171] FDA scientists then review

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159. *See id.*

160. *See id.*

161. *See* U.S. Regulatory Oversight, *supra* note 153.

162. *See* Henkel, *supra* note 19.

163. *See* U.S. Regulatory Oversight, *supra* note 153.

164. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 (2002). This act sets forth the requirements for food, drugs, and cosmetics in the United States. *See id.*

165. *See* Thompson, *supra* note 27.

166. *See id.* This process was voluntary at the time the Thompson article was written. *See generally id.* However, since then the FDA has proposed regulations that would mandate this process. *See* Pre-market Notice Concerning Bioengineered Foods, 66 Fed. Reg. 4706 (Jan. 18, 2001) (to be codified at 21 C.F.R. §§ 192, 592). It is interesting to note, that although this was a voluntary process, FDA believes that all genetically engineered foods available in the United States marketplace have gone through the consultative process prior to being marketed. *See id.*

167. *See* Thompson, *supra* note 27.

168. *See* 66 Fed. Reg. 4706, at 4707. This process is similar to the pre-market notification requirements found in Canada. *See generally* Novel Foods Regulations, C.R.C., ch. 870, § B.28.001 (1999) (Can.).

169. 66 Fed. Reg. 4706, at 4707. Under the proposed rule, a developer of bioengineered food must "submit a scientific and regulatory assessment of the bioengineered food 120 days before the bioengineered food is marketed." Completed Consultations, *supra* note 13.

170. *See* Thompson, *supra* note 27.

171. *Id.*

the supplied information and begin to formulate questions for the producer to answer.[172] The overall process usually takes at least one year to complete.[173]

Altering food products through biotechnology presents an array of regulatory issues for the FDA to consider.[174] FDA must consider whether the food, in its modified state, is now a food additive, adulterated, or misbranded.[175] The FDA does not consider genetically added food traits a food additive.[176] Prior to marketing, the FDA must approve all food additives,[177] unless the substance is not "generally recognized as safe (GRAS)."[178] FDA also fears that the use of rDNA technology in "plant breeding may lead to unintended changes in foods that raise adulteration or misbranding questions."[179] Adulteration is an important fear as adulterated food can cause serious health problems for people with food allergies.[180] Misbranding also raises concerns for consumers.[181] For example, biotechnology can "modify a soy plant so that the composition of oil derived from the plant would more closely resemble that of a tropical oil than that of conventional soy oil."[182] If the manufacturer labeled this food product "soy oil" it would not adequately describe the product because the modified food product is "significantly different from what is customarily understood to be 'soy oil.'"[183]

The FDA started the consultative process because people that produce food through genetic engineering have a greater potential to develop foods that present legal issues, such as misbranding and adulteration issues, than those breeders that develop food "using traditional or other breeding techniques."[184] Between August 12, 1991, and February 25, 2002, the FDA completed approximately fifty-three consultations on bioengineered foods, including corn, rice, canola, soybeans, tomatoes, potatoes, papaya, and cantaloupe.[185]

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172. *See id.*

173. *See id.*

174. *See* 66 Fed. Reg. 4706, at 4709.

175. *See id.*

176. *See* 21 C.F.R. §§ 321(s), 201(s).

177. *See id.*

178. 66 Fed. Reg. 4706, at 4709.

179. *Id.* at 4710.

180. *See* 66 Fed. Reg. 4706, at 4710. Adulterated food can be a problem for people with food allergies as they may unknowingly consume a food product containing an allergen. *See id.* Adulterated food can have an "[a]bsence, substitution, or addition of constituents." Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 342(b) (1996).

181. *See generally* 66 Fed. Reg. 4706, at 4710. A food is considered misbranded if it has a "[f]alse or misleading label . . . [o]ffer[ed] for sale under another name" or if it is an imitation of some other food product. 21 U.S.C. § 343 (2002).

182. 66 Fed. Reg. 4706, at 4710

183. *Id.*

184. *Id.* at 4711.

185. *See generally* Completed Consultations, *supra* note 13. In the context of this source, bioengineered foods are "foods derived from plant varieties that are developed using rDNA technology." *Id.* The listed foods were genetically altered for a variety of traits including herbicide tolerance, delayed ripening, fertility restorer, pest resistance, and male sterility. *See id.*

C. *Environmental Concerns*

The Animal and Plant Health Inspection Service (APHIS), a division of the USDA, is responsible for the "agricultural environmental safety of planting and field testing genetically engineered plants."[186] APHIS obtains its regulatory authority through the Federal Plant Pest Act.[187] The Federal Plant Pest Act "provide[s] procedures for obtaining a permit or for providing notification, prior to 'introducing' a regulated article in the United States."[188]

In addition, APHIS has the authority to regulate genetically engineered plants through the Genetically Engineered Organisms Regulation (GEOR).[189] The GEOR allows APHIS to regulate most genetically engineered regulated plants under a "notification procedure."[190] This regulation applies to the introduction "of genetically engineered organisms and products that are derived from known plant pests."[191] Like the Federal Plant Pest Act, the GEOR states that prior to introduction, the company wanting to introduce a regulated genetically engineered plant would either have to notify APHIS or secure a permit through APHIS.[192] A producer can petition to receive unregulated status under the Federal Plant Pest Act.[193] Once unregulated status is granted to a product, "the product (and its offspring) no longer requires APHIS review for movement or release in the U.S."[194]

The EPA works to ensure that biologically produced pesticides are safe.[195] The EPA regulates pesticide safety through the Office of Pesticide Programs, whose authority derives from the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[196] EPA also uses the FFDCA to set tolerance levels for pesticide products "on and in food and feed, or establishes an exemption from the requirement of a tolerance."[197] Additionally, the EPA can act under the authority of the Toxic Substance Control Act to regulate "microorganisms intended for commercial use that contain or express new combinations of traits."[198]

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186. Thompson, *supra* note 27.

187. *See* U.S. Regulatory Oversight, *supra* note 153.

188. *Id.*

189. *See* Genetically Engineered Organisms and Products; Simplification of Requirements and Procedures for Genetically Engineered Organisms, 7 C.F.R. § 340 (May 2, 1997).

190. *Id.*

191. *Id.*

192. *See id.*

193. *See* U.S. Regulatory Oversight, *supra* note 153.

194. *Id.*

195. *See id.* The EPA also ensures the safety of pesticides that are chemically produced. *See id.*

196. *See id. See also* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (2002).

197. U.S. Regulatory Oversight, *supra* note 153.

198. *Id.*

The Toxic Substance Control Act is designed to "ensure that [the] EPA can adequately identify and regulate risk associated with microbial products of biotechnology without unnecessarily hampering" the biotechnology industry.[199] New microorganisms[200] are subject to the "Microbial Products of Biotechnology: Final Regulations Under the Toxic Substance Control Act (Microbial Biotech Regulations)."[201] The Microbial Biotech Regulations apply to two categories.[202] The first category is "[b]iotechnology research and development activities involving commercial funds."[203] The second category is "commercial biotechnology products."[204]

D. Transgenic Animals

The United States has not approved any transgenic animals to enter the food supply.[205] However, a limited number of transgenic animals have been approved for use as components in animal feed.[206] The FDA Center for Veterinary Medicine[207] is the agency in charge of regulating, "in whole or in part, diverse animal biotechnology products."[208] The FDA Center for Veterinary Medicine obtains its regulatory authority concerning transgenic animals from the animal drug provisions of the FFDCA.[209] However, the authority of the FDA Center for Veterinary Medicine "best fit[s] transgenic animals that have

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199. U.S. Environmental Protection Agency, Microbial Products of Biotechnology: Final Regulations Under the Toxic Substances Control Act Summary (Fact Sheet), *available at* http://www.epa.gov/opptintr/biotech/fs-001.htm (last visited Oct. 31, 2003) [hereinafter EPA, Fact Sheet].

200. *See id.* New microorganisms are "those formed by deliberate combinations of genetic material from organisms classified in different taxonomic genera." Microbial Products of Biotechnology; Final Regulations Under the Toxic Substance Control Act; 40 C.F.R. §§ 700, 720, 721, 723, 725 (1997).

201. EPA, Fact Sheet, *supra* note 199. *See generally* Microbial Products of Biotechnology; Final Regulations Under the Toxic Substance Control Act; 40 C.F.R. §§ 700, 720, 721, 723, 725 (1997).

202. *See* Microbial Products of Biotechnology; Final Regulations Under the Toxic Substance Control Act; 40 C.F.R. §§ 700, 720, 721, 723, 725 (1997).

203. *Id.* Examples of this category are, "Persons conducting commercial research using intergeneric microorganisms for biofertilizers; biosensors; biotechnology reagents; commodity or specialty chemical production; energy applications; waste treatment or pollutant degradation; and other TSCA subject uses." *Id.*

204. *Id.* Examples of this category include, "Persons manufacturing, importing or processing products for commercial purposes intergeneric microorganisms for biofertilizer; biosensors; biotechnology reagents." *Id.*

205. *See* U.S. Food and Drug Administration Center for Veterinary Medicine, Information for Consumers: Questions and Answers about Transgenic Fish, *at* http://www.fda.gov/cvm/index/consumer/transgen.htm (last visited Oct. 31, 2003) [hereinafter Transgenic Fish].

206. *See id.*

207. *See id.* The Center for Veterinary Medicine "serves as a consulting group to the other FDA Centers" for all types of animals, both traditional and GM, "in the food and feed safety evaluation[s]." *Id.*

208. *Id.*

209. *See* Transgenic Fish, *supra* note 205.

agronomic traits now being investigated and developed."[210] It is possible, and indeed probable, that other transgenic animals will be modified in ways that "could be viewed as containing food additives, color additives, and vaccines."[211] The FDA will regulate transgenic animals, as either food or pharmaceuticals, just as it does any food or drug that a company wants to market.[212] This includes "clinical trials that demonstrate safety and effectiveness."[213]

Currently, many researchers are studying transgenic fish as a potential food source.[214] Thus, transgenic fish can be found in laboratories throughout the United States and the world.[215] Transgenic fish are being researched with the goal of "adding agronomically important traits, like improved growth rates and disease resistance," to common food fish species.[216] These fish would be advantageous for a fish farmer to raise, as modified fish cost less to raise than traditional fish.[217] The modified fish cost less money to raise because "it takes less feed and about half the time to produce a crop they can send to market."[218] Like other transgenic animals, transgenic fish will also have to garner premarket approval through FDA Center for Veterinary Medicine prior to being released into the marketplace.[219]

Nonetheless, there is concern about outcrossing with transgenic fish.[220] Scientists warn of possible risks to native fish populations if transgenic fish escape the laboratory and enter the wild.[221] They fear that if transgenic fish escape into the wild, they may "damage native populations, even to the point of extinction."[222]

The United States has new regulations that specifically address genetically engineered products. However, the United States in a larger part relies on existing regulations to control genetically engineered products.[223] The FDA

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210. *Id.*

211. *Id.*

212. *See* Lewis, *supra* note 5.

213. *Id.*

214. *See* Transgenic Fish, *supra* note 205.

215. *See id.* Different species of salmon and channel catfish are examples of the fish that are being researched. *See id.*

216. *Id.*

217. *See* Lewis, *supra* note 5.

218. *Id.*

219. *See* Transgenic Fish, *supra* note 205.

220. *See* Lewis, *supra* note 5.

221. *See id.* The USDA funded a study on genetically engineered fish. *See id.* The scientists involved in this study found reason to believe that transgenic fish could cause harm to native fish populations. *See id.*

222. *Id.*

223. *See generally* Arthropods, *supra* note 154. The Federal Plant Protection Act, which went into effect in June of 2000, allows for the release of transgenic organisms including transgenic arthropods, and other invertebrates. *See id.* Other examples of regulation specifically dealing with genetically modified products are: Genetically Engineered Organisms and Products; Notification Procedures for the Introduction of Certain Regulated Articles; and Petition for Nonregulated Status, 58 Fed. Reg. 17,044 (Mar. 31, 1991) (to be codified at 7 C.F.R. pt. 340), and Microbial Products of Biotechnology; Final Regulation Under the Toxic

in particular, focuses on how the new GM food product compares and meets "the same safety standards as traditional foods."[224]

V. THE EUROPEAN UNION'S APPROACH TO GM PRODUCTS

A. Regulatory Overview

The European Union (EU),[225] through the European Commission,[226] "has developed a broad legislative framework to ensure that GMOs and GMO-derived products that are grown, marketed and imported meet the highest standards of safety for the environment, as well as for human and animal health."[227] The European Union takes a more skeptical approach to genetically engineered food products and crop plants.[228] In fact, the European Union has only authorized two GM plants for use in food products.[229] Unlike Canada and the United States, the European Union is comprised of Member States.[230] The European Union enacts GMO laws and regulations, but Member States enforce them through their own regulatory agencies.[231] However, in January 2002, the European Food Safety Authority[232] was created to encourage cooperation with

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Substances Control Act, 62 Fed. Reg. 17,910 (Apr. 11, 1997) (to be codified at 40 C.F.R. pts. 700, 720, 721, 723, 725). Acts such as the Federal Food, Drug, and Cosmetic Act and the Federal Insecticide, Fungicide, and Rodenticide Act have statements of policy on how to regulate certain GM products that fall under the specific Act. *See generally* U.S. Regulatory Oversight, *supra* note 153.

224. Lewis, *supra* note 5.

225. *See generally* Europa—The European Union On-Line, the European Union at a Glance, Overview, *at* http://www.europa.eu.int/abc/index_en.htm (last visited Oct. 31, 2003) [hereinafter Europa]. Currently there are fifteen members in the EU. *See id.* The fifteen member states are Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, and the United Kingdom. *See id.* There are also several other candidate countries. *See id.*

226. *See* GMO Food and Environment Sector, *available at* http://biotech.jrc.it/home.asp (last visited Oct. 31, 2003) [hereinafter GMO Food Sector]. The European Commission "is at the core of the European Union's policy making process and has no equivalent in the U.S. government." Terence P. Stewart & David Johanson, *Policy in Flux: The European Union's Laws on Agricultural Biotechnology and Their Effects on International Trade*, 4 DRAKE J. AGRIC. L. 243, 252 (1999).

227. GMO Food Sector, *supra* note 226.

228. *See* Commission Press Room, Questions and Answers on the Regulation of GMOs in the EU (2002), *available at* http://europa.eu.int/comm/dgs/health_consumer/library/press/press298_en.pdf (last visited Oct. 31, 2003) [hereinafter EU Questions].

229. *See* The European Commission, Authorisation, *available at* http://europa.eu.int/comm/food/fs/gmo/gmo_legi_authorise_en.html (last visited Oct. 28, 2002) [hereinafter Authorisation] (copy on file with Indiana International & Comparative Law Review office).

230. *See generally* Europa, *supra* note 225.

231. *See generally id.*

232. *See* Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety, 2002 O.J. (L 31) 1, 4 [hereinafter Regulation 178/2002].

the Member States in the exchange of information and to "minimise the potential for diverging scientific opinions."[233] The European Food Safety Authority "establishes common principles and responsibilities" and provides a "strong science base" to use in making food safety decisions throughout the Member States.[234] The European Food Safety Authority will hopefully help consolidate food regulation in the European Union.[235]

The main regulation addressing genetically engineered products in the EU is Directive 2001/18/EC.[236] Directive 2001/18/EC went into effect on October 17, 2002, creating a case-by-case assessment process.[237] The assessment process occurs, "before any GMO or product consisting of or containing GMOs, such as maize, tomatoes, or microorganisms can be released into the environment or placed on the market."[238] This risk assessment determines the safety risks to health and the environment.[239] Food products derived from genetically modified foods, "such as paste or ketchup from a GMO tomato" are regulated as novel foods under Regulation (EC) 258/97.[240]

B. Food Safety Concerns

Regulation of GM food products falls under the EU's Novel Foods Regulation.[241] Foods that were commercially available in at least one Member

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233. *Id.* ¶ 4.

234. *Id.* ¶ 6.

235. *See generally id.*

236. *See* EU Questions, *supra* note 228. Prior to Directive 2001/18/EC, Council Directive 90/220/EEC was the main law regarding products produced from genetic engineering. *See id.* Council Directive 90/220/EEC was repealed by Directive 2001/18/EC. *See id.* A Council Directive means that the member states must "conform their laws to certain objectives established by the European Union," whereas a decision concerns "specific legislative issues and are binding upon those to whom the decisions are addressed, which may be member states, businesses, or individuals." Stewart & Johanson, *supra* note 226, at 255-56.

237. *See* EU Questions, *supra* note 228.

238. *Id.*

239. *See id.*

240. *Id.*

241. *See* Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 Concerning Novel Foods and Novel Food Ingredients, 1997 O.J. (L 43) 1. The European Union has six different categories of novel foods, they are:

- [F]oods and food ingredients containing or consisting of genetically modified organisms (GMOs) within the meaning of Council Directive 90/220/EEC of 23 April 1990 on the deliberate release into the environment of genetically modified organisms . . . ;
- foods and food ingredients produced from, but not containing GMOs;
- foods and food ingredients with a new or intentionally modified primary molecular structure;
- food and food ingredients consisting of or isolated from microorganisms, fungi or algae;
- foods and food ingredients consisting of or isolated from plants and food ingredients isolated from animals, except for food and food ingredients obtained by traditional propagating or breeding practices and having a history of safe food use;

State prior to May 15, 1997, when the Novel Foods Regulation became active, do not fall under the Novel Foods Regulation.[242] The Novel Food Regulation contains rules for the "authorisation and labelling of novel foods including food products containing, consisting or produced from GMOs."[243] In order for a food product to fall under the Novel Foods Regulation, a food product must not "present a danger for the consumer . . . mislead the consumer . . . [or] differ from foods or food ingredients which they are intended to replace to such an extent that their normal consumption would be nutritionally disadvantageous for the consumer."[244]

An applicant who wants to place a novel food into the marketplace must provide enough information to a Member State to enable that State to adequately decide the safety of the applicant's food product.[245] The Member State then assesses the proposed food product and forwards the assessment to the European Commission, which in turn seeks comments and objections from Member States.[246] Article 12 of the Novel Foods Regulation allows for Member States to restrict an approved novel food from the Member State's jurisdiction if the Member State feels that the food product "endangers human health or the environment."[247] Only "[t]wo genetically modified plants, a variety of soybean and a variety of maize" have been authorized "for use in food" in the European Union.[248] However, the European Union has authorized "[s]everal products derived from GMOs such as flour, starch or oil from a GM maize . . . to be placed on the market following a notification to the Commission."[249]

- foods and food ingredients to which has been applied a production process not currently used, where that process gives rise to significant changes in the composition or structure of the foods or food ingredients which affect their nutritional value, metabolism or level of undesirable substances.

The European Commission, Food Safety: from the Farm to the Fork—Novel Foods Regulation, *available at* http://europa.eu.int/comm/food/fs/novel_food/nf_regulation_en.html (last visited Oct. 31, 2003) [hereinafter EU Novel Foods Regulations].

242. *See* The European Commission, Food Safety: from the Farm to the Fork—Novel Foods, *available at* http://europa.eu.int/comm/food/fs/novel_food/nf_index_en.html (last visited Oct. 31, 2003) [hereinafter EU Novel Foods].

243. Authorisation, *supra* note 229.

244. Regulation (EC) No 258/97 of the European Parliament and the Council of 27 January 1997 Concerning Novel Foods and Novel Food Ingredients, 1997 O.J. (L 043) 1, at 13.

245. *See generally id.*

246. *See generally id.*

247. *Id.*

248. EU Questions, *supra* note 228. There is some confusion as to whether the European Union has approved two or three GM products of food origin as the same source says the Scientific Committee of Food "has issued 3 favourable opinions on food of plant origin (tomato and maize)" and later says, "[t]wo genetically modified plants, a variety of soybean and a variety of maize have been authorised . . . prior to the entry of the Novel Foods Regulation" and that no products containing live GMOs have been authorized under the Novel Foods Regulation. *Id.*

249. Authorisation, *supra* note 229.

On January 28, 2002, the European Union adopted legislation authorizing the creation of a European Food Safety Authority (EFSA).[250] EFSA was formed to "provide independent scientific advice on all matters with a direct or indirect impact on food safety."[251] The European Commission envisioned the EFSA as the "scientific point of reference for the whole Union" in order to maintain a "high level of consumer health protection," and thus "help to restore and maintain consumer confidence."[252] The primary goal of EFSA is direct communication with the public.[253] EFSA will be able to give scientific advice on GMO products, both food and non-food GM products.[254] In fact, EFSA will be able to "cover all stages of production and supply, from primary production, animal feed, right through to the supply of food to consumers."[255]

C. Environmental Concerns

The main law regulating GM products that are to be released into the environment is Directive 2001/18/EC. The Directive requires an environmental risk assessment to determine the "risks to human health and the environment before any GMO or product consisting of or containing GMOs . . . can be released into the environment."[256] Environmental risk assessment is defined as "the evaluation of risks to human health and the environment, whether direct or indirect, immediate or delayed, which the deliberate release or the placing on the market of GMOs may pose."[257] The objective of an environmental risk assessment is to "identify and evaluate potential adverse effects of

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250. *See* About the European Food Safety Authority, *at* http://www.efsa.eu.int/about_en.html (last visited Oct. 31, 2003) [hereinafter EFSA]. The creation of the European Food Safety Authority was called for in the *White Paper on Food Safety*. Commission of the European Communities, White Paper on Food Safety, COM(2000)719 final of Jan. 12, 2000, at 3 [hereinafter White Paper]. The creation of a European Food Safety Authority was a high priority for the European Commission; they felt it was necessary to create such an authority in order to "guarantee a high level of food safety." *Id.* The legislation behind the creation of the EFSA was Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety. *See* Regulation 178/2002, *supra* note 232.

251. EFSA, *supra* note 250. EFSA is mainly responsible to report to the European Commission, although it can also report to the European Parliament and the Member States. *See id.*

252. White Paper, *supra* not 250, at 5.

253. *See id.* at 4.

254. *See id.* It was a goal of the European Commission to set up an independent authority along with other legislation so that all aspects of food products would be covered from "farm to table." *Id.* at 3.

255. *Id.*

256. *Id. See also* EU Questions, *supra* note 228.

257. *See also* Commission Decision of 24 July 2002 Establishing Guidance Notes Supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, 2002 O.J. (L 200) 22.

the GMO . . . on human health and the environment which the deliberate release or placing on the market of GMOs may have."[258] The assessment must carefully analyze "[p]ossible interactions with other organisms, including other GMOs . . . taking into account the complexity of multitrophic interactions."[259] There is a potential that "if biological fitness is enhanced by the genetic modification, the GMO may invade new environments and replace existing species."[260] The environmental risk assessments should be reviewed on a regular basis to consider any new relevant information.[261] As of November 17, 2003, only sixteen assessed GM plants have been approved for release in the European Union.[262]

The European Environment Agency found that genetically modified crops could safely coexist with traditional crops as long as they are kept far enough apart to avoid cross-pollination.[263] Plants needing "extra isolation from GM crops include those grown solely to supply high-quality seeds."[264] "High-yielding 'male-sterile' varieties of oilseed rape" are also at risk of cross-pollination.[265] The European Union has only approved "the commercial release of 18 GMOs" "[s]ince Directive 90/220/EEC entered into force."[266]

D. Transgenic Animals

Like Canada and the United States, the European Union has not approved any transgenic animals to enter into the food supply.[267] Currently,

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258. *Id.*

> The [environmental risk assessment] has to take into account the relevant technical and scientific . . . characteristics of :
> - [T]he recipient or parental organism(s),
> - [T]he genetic modification(s), be it inclusion or deletion of genetic material, and the relevant information on the vector and the donor,
> - [T]he GMO,
> - [T]he intended release or use including its scale,
> - [T]he potential receiving environment, and
> - [T]he interaction between these.

Id.

259. *Id.*

260. *Id.*

261. *See id.*

262. *See* EU Questions, *supra* note 228. The Scientific Committee on Plants "issued opinions on applications for the placing on the market of 17 GM plant varieties under Directive 90/220/EEC." *Id.* The Scientific Committee on Plants issued one unfavorable opinion "due to an insufficient risk assessment in terms of the presence of a number of uncharacterised genes (and particularly) the gene which confers resistance to . . . a clinically important antibiotic." *Id.*

263. *See* Andy Coghlan, *Up to Their Necks in it: Agricultural Biotechnology Firms have Landed in a Legal Mire,* NEW SCIENTIST, Aug. 1, 1998, *available at* http://www.newscientist.com/hottopics/gm (last visited Oct. 31, 2003).

264. *Id.*

265. *Id.*

266. EU Questions, *supra* note 228.

267. *See id.*

the European Union does not have legislation specifically addressing transgenic fish.[268] However, the European Commission has recognized the need for specific legislation focusing on transgenic fish.[269] Concern exists that transgenic fish in laboratories may escape, finding their way into wild fish populations and ultimately harming the wild fish population.[270]

The European Union takes a strong approach in regulating GM products.[271] It has established regulations specifically focusing on GM products.[272] The European Union has approved relatively few GMOs or products containing GMOs for release in either the market place or the environment.[273] The European Union appears to be taking a cautious approach to novel foods and to biotechnology.[274]

VI. A COMPARATIVE ANALYSIS OF CANADA, THE UNITED STATES, AND THE EUROPEAN UNION

Canada, the United States, and the European Union have established different regulatory approaches to products produced through genetic engi-

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268. *See* Communication from the Commission to the Council and the European Parliament: A Strategy for the Sustainable Development of European Aquaculture, COM(2002)511 final of Sept. 19, 2002, at 22. Currently, there is no legislation addressing transgenic animals in general.

269. *See id.*

270. *See id. See also* Lewis, *supra* note 5.

271. *See generally* Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety, 2002 O.J. (L 31) 1. *See also* Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 Concerning Novel Foods and Novel Food Ingredients, O.J. (L 43) 1. *See also* Commission Decision of 24 July 2002 Establishing Guidance Notes Supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, 2002 O.J. (L 200) 22.

272. *See* EU Questions, *supra* note 228. In fact, the European Union also has specific legislation (Council Directive 90/679/EEC) in place to protect workers "from risks related to exposure to biological agents" which also includes GMOs. *Id.* The European Union has strict legislation on labeling requirements for food containing GMOs. *Id.* Food additives and flavorings also have to be labeled if "DNA or protein of GMO origin is present in the final product." *Id.*

273. *See id.*

274. *See generally* Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety, 2002 O.J. (L 31) 1. *See also* Regulation (EC) No 258/97 of the European Parliament and of the Council of 27 January 1997 Concerning Novel Foods and Novel Food Ingredients, 1997 O.J. (L 43) 1. *See also* Commission Decision of 24 July 2002 Establishing Guidance Notes Supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, 2002 O.J. (L 200) 22.

neering.[275] While Canada and the United States take similar, albeit not identical, approaches concerning genetically engineered food, the European Union's stance on such food products is dramatically different.[276] In fact, Canada and the United States have an unprecedented bilateral agreement on agricultural biotechnology.[277]

Canada and the United States forged their agreement in 1998 with the intent to "compare and harmonize" the regulatory process and pre-market assessments of GM plants between the two countries.[278] Another goal was to discuss "future areas of cooperation and information exchange that will facilitate the safe incorporation of transgenic plants into agricultural production and commerce."[279] Prior to this agreement, both countries were already performing case-by-case assessments of proposed GM plants prior to the plant being released.[280] Representatives for the two countries believe that eventually there may be "mutual acceptance of assessment."[281]

Canada and the European Union have adopted the United Nations Cartagena Protocol on Biosafety.[282] The United States, however, has only signed the United Nations Convention on Biological Diversity.[283] The Cartagena Protocol is an international agreement to "establish common rules to be followed in transboundary movements of GMOs in order to ensure, on a global

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275. *See generally* Canadian Food Inspection Agency, U.S. Dept. of Agriculture, Canada and United States 2001 Bilateral on Agricultural Biotechnology (1998), *at* http://www.inspection.gc.ca/english/plaveg/pbo/usda/cdausbilate.shtml (last visited Oct. 31, 2003) [hereinafter Canada and U.S.]. *See generally* EU Questions, *supra* note 228.

276. *See* Canada and U.S., *supra* note 275. The Canadian approach and the approach taken by the United States is similar, but it does vary, mainly in the way the regulatory schemes are split. *See id.* For example, CFIA and Health Canada are the two main agencies responsible for regulating GM plants, whereas in the United States that responsibility is split between FDA, EPA and USDA. *See id.*

277. *See generally id.*

278. Canada and U.S., *supra* note 275.

279. *Id.*

280. *See id.*

281. *Id.*

282. *See* The Cartagena Protocol on Biosafety, The Convention on Biological Diversity, *available at* http://www.biodiv.org/biosafety/protocol.asp# (last visited Oct. 31, 2003) [hereinafter Protocol]. On April 19, 2001, Canada signed the Cartagena Protocol. Office of Biotechnology, Canadian Food Inspection Agency, Cartagena Protocol on Biosafety (2002), *at* http://www.inspection.gc.ca/english/sci/biotech/enviro/cartagenae.shtml (last visited Oct. 31, 2003). The European Union adopted the Cartagena Protocol on January 29, 2000. EU QUESTIONS, *supra* note 228. The United States signed the Convention of Biological Diversity (CBD) but has not ratified the Biosafety Protocol. *See* Protocol, *supra* note 282. As of September 8, 2003, fifty-seven countries ratified the Cartagena Protocol on Biodiversity, including Austria, Barbados, Belarus, Cuba, Denmark, and Samoa. *See id.* There are 186 parties to the Convention on Biological Diversity. *See id.* Included in the parties to the CBD are Argentina, Brazil, Cyprus, Greece, Lesotho, Malta, Saint Kitts and Nevis, Spain, and Togo. *See id.*

283. *See* Protocol, *supra* note 282. The U.N. Convention on Biological Diversity led to the development of the Cartagena Protocol in an effort to "conserve biodiversity." Jonathan H. Adler, *The Cartagena Protocol and Biological Diversity; Biosafe or Bio-Sorry*, 12 GEO. INT'L ENVTL. L. REV. 761, 768 (2000). In June 1993, President Clinton signed the CBD. *See id.*

scale, the protection of biodiversity and of human health."[284] Article 15 of the Cartagena Protocol urges countries to conduct scientific risk assessments concerning the possible effects of a living modified organism.[285] Both Canada and the European Union have regulations that require this type of scientific risk assessment prior to the release of a GM product.[286] The Cartagena Protocol also sets up a "Biosafety Clearing-House"[287] to "[f]acilitate the exchange of scientific, technical, environmental and legal information on . . . living modified organisms."[288] Signatories to the Cartagena Protocol are expected to take the appropriate actions in order to "implement its obligations under this Protocol."[289]

It is difficult to compare regulatory enforcement of GM products between Canada, the United States, and the European Union. Unlike the sovergeign states of Canada and the United States, the European Union bears the power to enact the regulations, but must rely on the Member States to enforce the regulations.[290] However, the European Union, through the European Commission, has a food safety "inspection service, which visits Member

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284. EU Questions, *supra* note 228. Included in the general provisions of the Cartagena Protocol are the following:

- The Parties shall ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into account risks to human health . . . .
- Nothing in this Protocol shall be interpreted as restricting the right of a Party to take action that is more protective of the conservation and sustainable use of biological diversity than that called for in this Protocol, provided that such action is consistent with the objective and the provisions of this Protocol and is in accordance with that Party's other obligations under international law.
- The Parties are encouraged to take into account, as appropriate, available expertise, instruments and work undertaken in international forums with competence in the area of risks to human health.

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, art. 2, 39 I.L.M. 1027 [hereinafter Convention].

285. *See id.* art. 15.

286. *See* Schedule No. 948, *supra* note 100. *See also* CFIA Envtl. Questions, *supra* note 85; Novel Food Regulations (EC) 258/97; Commission Decision of 24 July 2002 Establishing Guidance Notes Supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, 2002 O.J. (L 200) 22. The United States has a similar requirement for a scientific risk assessment to be performed prior to the release of a genetically engineered product. *See* Genetically Engineered Organisms and Products; Simplification of Requirements and Procedures for Genetically Engineered Organisms, 7 C.F.R. § 340 (May 2, 1997). *See also* Pre-market Notice Concerning Bioengineered Foods, 21 C.F.R § 192 (proposed Jan. 18, 2001).

287. Convention, supra note 284, art. 20. The Biosafety Clearing-House will "serve as a means through which information is made available. . . . It shall also provide access, where possible, to other international biosafety information exchange mechanisms." *Id.*

288. *Id.*

289. *Id.* art. 2(1).

290. *See generally* Europa, *supra* note 225.

States on a regular basis."[291] The inspection service has shown that amongst the Member States, "there are wide variations in the manner in which Community legislation is being implemented and enforced."[292] Canada and the United States have agencies in place to regulate all aspects of GM products found in their jurisdictions.[293] The creation of the EFSA will allow the European Union to enjoy the consistency a national regulatory agency can provide.[294]

A notable difference between the European Union, Canada, and the United States, is the amount of GM products each has approved. While Canada and the United States have each approved several GM products, the European Union has approved only a small number of GM products.[295] In fact, the European Union has only approved three food products containing GMOs whereas Canada has approved forty-two GM products and the United States has approved fifty-three.[296] One possible reason for this may be consumer acceptance of GM food products.[297] In both Canada and the United States, consumers accept GM food products with little complaint.[298] However, the opposite is true in the European Union and many of its Member States.[299] Product safety dominates the public GM product debate in the European Union.[300] In fact, one activist against genetically modified food products, Jose Bove, has been charged with destroying GM rice plants in France.[301] Moreover, consumer acceptance can be reflective of the labeling laws of the individual countries.[302] The European Union applies very strict labeling regulations

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291. White Paper, *supra* note 250, at 4.

292. *Id.* The Commission proposed to set up a "Community framework for the development and operation of national control systems." *Id.*

293. *See generally* Response, *supra* note 70; U.S. Regulatory Oversight, *supra* note 153.

294. *See generally* EFSA, *supra* note 250.

295. *See* Schedule No. 948, *supra* note 100. *See also* Completed Consultations, *supra* note 13; Authorisation, *supra* note 229.

296. *See* Authorisation, *supra* note 229. *See also* Schedule No. 948, *supra* note 100. *See also* Completed Consultations, *supra* note 13.

297. *See* Marsha A. Echols, *Food Safety Regulations in the European Union and the United States: Different Cultures, Different Laws*, 4 COLUM. J. EUR. L. 525, 535-37 (1998).

298. *See id.* at 543.

299. *See id.* at 536-37.

300. *See id.* "Greenpeace, Friends of the Earth and other non-governmental organizations in Europe have fought a well-publicized battle against the introduction of genetically modified corn and soybeans there." *Id.* at 536.

301. *See Bove on Trial for Wrecking Genetic Rice*, (Feb. 8, 2001), *available at* http://edition.cnn.com/2001/WORLD/europe/france/02/08/crime.france.bove/ (last visited Oct. 31, 2003).

302. *See generally* FAO Ethics, *supra* note 3, at 23. In the United States, if GM food products "are not different from their traditional counterparts in terms of nutrition, composition or safety, labelling is considered to be unnecessary." *Id.* However, "[i]n the European Union, the question is not *whether* to label products of biotechnology, but *how* to label them." *Id.* Canada requires labeling "for novel foods, including those obtained through biotechnology, where safety concerns (e.g., allergens) that could be mitigated through labelling, or changes in composition or nutrition, are identified." *See* Response, *supra* note 70, ¶ 93.

applying to GM products whereas the United States labeling laws do not specifically address GM products.[303] However, the United States just passed an organic labeling law stating that any food product labeled as organic food must not have "mingled with genetically modified organisms."[304] Canada's labeling laws are similar to those found in the United States in that novel foods need to be labeled when there are safety concerns, such as allergens.[305]

VII. CONCLUSION

> [G]enetically modified organisms (GMOs), like all the new technologies, are instruments that can be used for good and for bad in the same way that they can be either democratically managed to the benefit of the most needy or skewed to the advantage of specific groups that hold the vital political, economic and technological power.[306]

Biotechnology has already become integrated into our world through the production of certain pharmaceutical products and more recently through genetically modified plants and food.[307] In some, if not most, countries around the world, biotechnology has also become somewhat commonplace in the market.[308] However, there is no common international agreement as to the

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303. *See* EU Questions, *supra* note 228. The European Union wants consumers to be able to make an informed choice about the food they are going to consume and therefore require labeling to "indicate the presence of GMOs." *Id.* Meanwhile, the United States just passed (Oct. 21, 2002) new standards for the labeling of organic food. *See* Judith Graham, *Organic Food Seal to Root Out Imitators*, INDIANAPOLIS STAR, Oct. 20, 2002, at A7. This standard will allow for a label that states the given food product does not contain any GMOs, but otherwise the United States does not require food-containing GMOs to be labeled as such. *See id.*

304. Graham, *supra* note 303. The new organic food seal also requires that the food has "never been sprayed with pesticides, shot up with antibiotics, treated with sewage sludge, injected with growth hormones, exposed to irradiation or mingled with" GM organisms. *Id.*

305. *See* Response, *supra* note 70, ¶ 93.

306. FAO Ethics, *supra* note 3.

307. *See* KLUG & CUMMINGS, *supra* note 6, at 432.

308. *See* Office of Scientific Analysis and Support, U.S. Food and Drug Admin., Report on Consumer Focus Groups on Biotechnology (2000), *available at* http://vm.cfsan.fda.gov/~comm/biorpt.html (last visited Oct. 31, 2003). In the United States, genetically engineered products can be found in "cake mix, corn oil, canola oil, [F]lavr [S]avr tomato, vitamin A rice, and growth hormone salmon." *Id.* In September 1999, the following food products were found to be GM food products:

> Frito-Lay Corn Chips, Bravo's Tortilla Chips, Kellogg's Corn Flakes, General Mills Total Corn Flakes Cereal, Post Blueberry Morning Cereal, Heinz 2 Baby Food, Enfamil ProSobee Soy Formula, Similac Isomil Soy Formula, Nestle Carnation Alsoy Infant Formula, Quaker Chewy Granola Bars, Nabisco Snackwell's Granola Bars, Ball Park Franks, Duncan Hines Cake Mix, Quick Loaf Bread Mix, Ultra Slim Fast, Quaker Yellow Corn Meal, Light Life Gimme Lean, Aunt Jemima Pancake Mix, Alpo Dry Pet Food, Gardenburger, Boca

acceptance of GM products.[309] GM products that are accepted in one country might be banned in another.[310] Food products that contain GMOs may be found in abundance in marketplaces throughout Canada and the United States.[311] However, it is unlikely that one could find the same food products in the European Union.[312] Consumer acceptance, and indeed consumer knowledge varies greatly between the European Union, Canada, and the United States.[313] In the EU, consumer knowledge about GMOs is high, possibly because of the labeling laws and activists, and consumer acceptance is low.[314] However, in the United States and Canada, consumers seem to either not know about GM products or are not opposed with as much vehemence as their European counterparts.[315]

The governments of Canada, the United States, and the European Union take an active role in determining the potential risks GMOs pose to human health and the environment.[316] Each of the three governments requires extensive scientific risk assessments to occur prior to releasing a GMO into the environment or into the marketplace.[317] Each government also appears to be

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Burger Chef Max's Favorite, Morning Star Farms Better'n Burgers, Green Giant Harvest Burgers (now called Morningstar Farms), McDonald's McVeggie Burgers, Ovaltine Malt Powdered Beverage Mix, Betty Crocker Bac-O's Bacon Flavor Bits, Old El Paso Taco Shells, Jiffy Corn Muffin Mix.

Id.

309. *See* Convention, *supra* note 284, art. 20, at 1027. Although the Cartagena Protocol would offer some international stability as to genetically modified foods, it has only been ratified by fifty-seven countries. *See* Protocol, *supra* note 282.

310. *See* Authorisation, *supra* note 229. *See also* Schedule No. 948, *supra* note 100; Completed Consultations, *supra* note 13.

311. *See* Schedule No. 948, *supra* note 100. *See also* Completed Consultations, *supra* note 13.

312. *See* Authorisation, *supra* note 229.

313. *See generally* Echols, *supra* note 297.

314. *See id.*

315. *See generally* Transgenic Fish, *supra* note 205. The FDA acknowledges that "[a]pproval by FDA or a food regulatory group in another country does not guarantee public acceptance." *Id.* The fact that so many products containing GMOs are commonly found in the United States suggests that either people do not know that products contain GMOs or that they are not opposed to GMOs being in the food product because consumer acceptance tends to rule the market place. If consumers stop buying an item, eventually the stores will stop selling that item. *See generally* Gale, *supra* note 9.

316. *See generally* Response, *supra* note 70. *See generally* U.S. Regulatory Oversight, *supra* note 153. *See also* Authorisation, *supra* note 229; Schedule No. 948, *supra* note 100; Completed Consultations, *supra* note 13; CFIA Envtl. Questions, *supra* note 85; Novel Food Regulations (EC) 258/97; Commission Decision of 24 July 2002 Establishing Guidance Notes Supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, 2002 O.J. (L 200) 22; Genetically Engineered Organisms and Products; Simplification of Requirements and Procedures for Genetically Engineered Organisms, 7 C.F.R. § 340 (May 2, 1997); Pre-market Notice Concerning Bioengineered Foods, 21 C.F.R § 192 (proposed Jan. 18, 2001).

317. *See* CFIA Envtl. Questions, *supra* note 85. *See also* Commission Decision of 24 July 2002 Establishing Guidance Notes Supplementing Annex II to Directive 2001/18/EC of the

doing all that it can to protect its jurisdiction from the known and unknown risks associated with new technology.[318]

However, some issues concerning biotechnology must be addressed on an international level. Such issues include third world access to biotechnology in an effort to reduce world hunger.[319] International agreements, such as the Cartagena Protocol are efforts to address the ethical and global health considerations of biotechnology.[320] Biotechnology can be a benefit for those that have opportunity to take advantage of the technology.[321] Genetic engineering can create pest resistant vegetables, reducing the need for chemical pesticides.[322] Genetic engineering can also enable fish to grow at a faster rate, thus reducing the amount of time and money spent to raise them.[323] Nonetheless, care should be taken to ensure the safety of these novel products. If neutral experts find such products safe for humans and the environment, these products should be offered so that the public can decide the fate of GM products. Who knows, maybe one day soon you will sit down at your favorite restaurant and order the house special—fried chicken with the health benefits of steamed spinach.[324]

European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, 2002 O.J. (L 200) 22; Genetically Engineered Organisms and Products; Simplification of Requirements and Procedures for Genetically Engineered Organisms, 7 C.F.R. § 340 (May 2, 1997); Pre-market Notice Concerning Bioengineered Foods, 21 C.F.R § 192 (proposed Jan. 18, 2001).

318. *See* CFIA Envtl. Questions, *supra* note 85. *See also* Commission Decision of 24 July 2002 Establishing Guidance Notes Supplementing Annex II to Directive 2001/18/EC of the European Parliament and of the Council on the Deliberate Release into the Environment of Genetically Modified Organisms and Repealing Council Directive 90/220/EEC, 2002 O.J. (L 200) 22; Genetically Engineered Organisms and Products; Simplification of Requirements and Procedures for Genetically Engineered Organisms, 7 C.F.R. § 340 (May 2, 1997); Pre-market Notice Concerning Bioengineered Foods, 21 C.F.R § 192 (proposed Jan. 18, 2001).

319. *See generally* FAO Ethics, *supra* note 3.

320. *See* Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027.

321. *See generally* FAO Ethics, *supra* note 3.

322. *See* KLUG & CUMMINGS, *supra* note 6, at 432.

323. *See* Lewis, *supra* note 5.

324. *See generally* Young, *supra* note 1.