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BUILDING TRUST IN NORTHERN IRELAND: THE ROLE OF CIVILIAN REVIEW OF THE POLICE

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In response to increasing concern about police brutality and abuse, governments all over the world are implementing or strengthening systems of civilian review of police conduct. The police of Northern Ireland, a province rife with conflict between the police and the citizenry, have operated under some form of civilian review of the police for several decades. Despite such review, the police have continued to be the objects of domestic and international criticism for wide-spread corruption and abuse of power.

In 1998, the British government and nationalist and loyalist parties signed the Good Friday Agreement, which stipulated the need for a study of the police system in Northern Ireland and the need for police reform. That same year, the Secretary of State for Northern Ireland appointed an Independent Commission on Policing, lead by Christopher Patten, the former governor to Hong Kong. In 1999, the Commission issued its report, which called for widespread reforms to the police system. Pursuant to this report, the British Parliament passed sweeping legislation to restructure the police force of Northern Ireland and substantially strengthen civilian review of police conduct.[1]

The new legislation enacts many - but not all - of the reforms recommended by the Patten Commission. In light of failed attempts at reform in the past, it remains to be seen whether the new legislation will effect a substantial improvement in the police accountability system or whether it will prove to be yet another toothless attempt at reform.

This Article will explore the context of the current debate over policing in Northern Ireland, describe the civilian oversight protections in the newly-enacted police reform legislation, and evaluate these reforms in light of dominant theories of police review.

I. THE CHANGING FACE OF POLICE OVERSIGHT

Civilian oversight of the police stems from distrust of the police's ability to investigate themselves. This distrust - and distrust of the police in general - is particularly prevalent in minority communities, where the people feel that they are not adequately represented among the police force, and that they are

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1. *See* Police (Northern Ireland) Act 2000.

not sufficiently involved in police decision making processes. In the United States, this distrust of and alienation from the police percolated during the civil unrest of the 1960s and lead to greater support reform of the police.[2] Support for police reform waned in the 1970s but increased again during the 80s and 90s. Police reform movements in other countries have followed suit.

One of the most common products of the police reform movement has been civilian review of police conduct. As of 1992, thirty-four of the fifty largest U.S. cities had implemented some form of civilian review. This trend toward civilian review is also evidenced in other English-speaking countries.[3]

In perhaps the most comprehensive study of police review systems, Douglas Perez identifies and evaluates three types of police review: 1) internal review, 2) civilian monitor, and 3) civilian review.[4] As the name suggests, internal review represents a system where investigations of police misconduct are conducted entirely within the police department itself. In the civilian monitor model, police conduct these investigations under the supervision of an independent body. In the civilian review model, the most comprehensive system of review, an independent civilian body conducts the entire investigation.[5]

In its long history of unsuccessful police reform and attempts to improve police accountability, Northern Ireland has employed each of these three forms of review, buttressed by a general oversight body and local community liaison committees. The most recent reforms of the police system in Northern Ireland have provided for a civilian review model, along with reforms to the internal operations of the police force.

In determining the type of review that is best suited for a particular locality, it is necessary to consider the culture, history, and politics of the current policing situation. The following sections will describe the political and historical situation in Northern Ireland, explain why the current structures for police accountability have been ineffective, and evaluate whether the more recent reforms will improve the system.

II. BACKGROUND

The Royal Ulster Constabulary (RUC), the police force of Northern Ireland, has been a source of conflict among the Catholic community there since its establishment in 1922. Widely criticized for its partiality and its abusive practices, the RUC has been charged with a long list of abuses ranging

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2. *See* Andrew J. Goldsmith, *External Review and Self-Regulation: Police Accountability and the Dialectic of Complaints Procedures*, 33, *in* COMPLAINTS AGAINST THE POLICE (Andrew J. Goldsmith ed., 1991).

3. *See* Goldsmith, *supra* note 2 (noting the emergence of civilian review systems in Australia, Canada, Northern Ireland, England, and Wales).

4. See DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 82-3 (1994).

5. *See id.*

from failure to prevent crimes against nationalist communities to collusion in the murders of prominent defense lawyers.[6]

While the conflict between the Irish and the British dates back several centuries, the conflict peculiar to Northern Ireland originated in 1922, when the Republic of Ireland gained independence from Britain, conditioned on the partitioning of the northern province, which remained British territory. Since this time, Northern Ireland has suffered from sectarian conflict between the majority Protestant loyalist community, who maintains allegiance to Britain, and the minority Catholic nationalist community, whose goal is independence from Britain and reunification with the Republic of Ireland.[7]

As a British province, Northern Ireland was effectively governed by its own parliament at the Stormont Castle until civil unrest broke out in the late 1960s.[8] Unable to effectively subdue public unrest, the Stormont government collapsed, and the British government imposed direct rule and deployed British soldiers to Northern Ireland to help restore order.[9]

A multitude of factors has contributed to the tense relationship between the Catholic community, on one hand, and the RUC and the British army on the other. On a purely political level, nationalists oppose British rule in Northern Ireland *in toto*; they therefore have little or no respect for a force whose job it is to maintain the British rule of law. As a result, the nationalist community has boycotted service in the RUC almost since its inception in 1922, which has contributed to a severe underrepresentation of Catholics in the force.[10] While Catholics make up over forty percent of the population in Northern Ireland, they represent only eight percent of RUC membership.[11]

Although original plans for the RUC included a provision requiring that one-third of the officers represent the Catholic community, this level of representation never materialized.[12] The extent to which this underrepresentation is due to the nationalist boycott of the RUC and fear of ostracism by nationalist communities and the extent to which it is due to other

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6. *See, e.g., The Unfinished Story of Robert Hamill*, IRISH TIMES, May 14, Nov. 1, 4, 5, 1997 (describing incident in which a Catholic man was fatally assaulted by loyalist youths as RUC officers looked on and did nothing); Committee on the Administration of Justice Report 2000 (suggesting RUC collusion in the assassinations of prominent defense lawyers Rosemary Nelson and Patrick Finucane) [hereinafter CAJ Report].

7. Not all Protestants are loyalists, and not all Catholics are nationalists; however, these categorizations are generally accurate.

8. *See* DERMOT P.J. WALSH, BLOODY SUNDAY AND THE RULE OF LAW IN NORTHERN IRELAND 110 (2000).

9. *See* JOHN DARBY, SCORPIONS IN A BOTTLE 33 (1997).

10. *See* JOHN MCGARRY & BRENDAN O'LEARY, POLICING NORTHERN IRELAND: PROPOSALS FOR A NEW START 10 (1999) (citing opinion polls in which Catholics cite fear of intimidation as the most frequent reason for co-Catholics' decisions not to join the RUC). *But see id.* at 14-15 (suggesting bias of polls).

11. *See* A New Beginning: Policing in Northern Ireland, Independent Commission on Policing for Northern Ireland, Section 14.1 (September 1999) [hereinafter Patten Report].

12. *See* MCGARRY & O'LEARY, *supra* note 10, at 30.

factors, such as discriminatory hiring practices and intimidation by a predominantly Protestant police culture, is subject to debate.[13]

The conflict between the Catholic community and the security forces results, in large part, from the same causes of conflict between the nationalists and loyalists in general - a host of historical, political, and socio-economic problems. From its inception in 1922, representation in the Stormont government was gerrymandered to preclude the effective representation of Catholics.[14] In addition to political disenfranchisement, employment discrimination has resulted in large economic inequalities between Catholics and Protestants.[15] Because high unemployment caused large numbers of Catholics to emigrate, employment discrimination was intricately connected with political domination.[16]

Because the unionist majority controlled the political apparatus, it also effectively controlled the courts and the police force.[17] Studies conducted by the British government concluded that the RUC was effectively controlled by the Ulster Unionist Party and failed to impartially enforce the law.[18] In fact, at least one reason for the deployment of British troops in 1969 was the failure of the RUC to impartially handle the political unrest.[19] A report commissioned

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13. While nationalists claim that they are underrepresented in the RUC because of discrimination in recruiting and hiring, unionists claim that this underrepresentation is due not only to political pressure by nationalist parties, but also intimidation by nationalist paramilitary groups. *See generally* MCGARRY & O'LEARY, *supra* note 10, at 7-15. *See also* Chris Ryder, *Boycotting NI Police a Barren Ploy*, IRISH TIMES, Jan. 20, 2000, at 16 ("The evolution of the RUC as the armed wing of unionism in the years after 1922, and the lasting rift between the police and the minority community, only became possible because Catholics then deemed the policing mechanisms unacceptable and boycotted them"); BRENDAN O'LEARY & JOHN MCGARRY, THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND, 126 (1993) (noting that Catholics did not join the police "because they did not regard it as legitimate, and because they faced potential ostracism or worse from their own community" and that the ensuing imbalance was reinforced by the police affiliations with the Orange Order, an exclusively-Protestant loyalist group) [hereinafter ANTAGONISM].

14. *See* ANTAGONISM, *supra* note 13, at 119-25.

15. Although employment discrimination was officially prohibited in 1976, unemployment rates for Catholics continue to be twice as high as that for Protestants. *See* note 9, at 60, 81.

16. *See* Darby, *supra* note 9, at 29 ("The most serious general allegation in this field was that the government operated a policy of deliberate discrimination against part of the province . . . creating conditions which encouraged emigration to counter the higher Catholic birth rate in these areas."). During a depression in the 1930s, a future Prime Minister of Northern Ireland exhorted: "'I recommend those people who are Loyalists not to employ Roman Catholics, 99 per cent [sic] of whom are disloyal; I want you to remember one point in regard to the employment of people who are disloyal . . . . You are disfranchising yourselves in that way." ANTAGONISM, *supra* note 13, at 129. Had there not been such high levels of Catholic emigration, the Catholics would currently represent a much higher proportion of the total Northern Ireland population and thus have greater political power. *See id.* at 131.

17. In 1969, only six out of sixty-eight senior judicial appointments were held by Catholics. *See* ANTAGONISM, *supra* note 13, at 128.

18. *See* MCGARRY & O'LEARY, *supra* note 10, at 32.

19. *See id.*

by the British government found a "'breakdown of [police] discipline,' police involvement in the assault of civilians, and the use of provocative sectarian and political slogans by police officers."[20]

Such inequality and disenfranchisement led to major civil rights protests in the late 1960s and early 1970s. These protests, together with a growing campaign by the Irish Republican Army, invoked a harsh response by the RUC and the British army that resulted in an era of violence commonly referred to as "The Troubles." Between 1969 and 1994, over 3,000 people were killed in Northern Ireland as a result of political violence. Of these deaths, fifty-eight percent were caused by republican paramilitary groups, twenty-eight percent were caused by Protestant paramilitary groups, and sixteen percent were caused by security forces. A majority of those killed by security forces were Catholic and about half were unarmed at the time of their death.[21]

Due to RUC abuses, many Catholics initially welcomed the arrival of British troops.[22] That positive reaction, quickly faded when British troops opened fire on unarmed Catholic civil rights marchers in 1972 a massacre that later became known as "Bloody Sunday." Although the British government conducted an investigation and produced a report vindicating the officers involved, this report has been widely criticized for covering up the fact that British troops opened fire on innocent civilians.[23] The ensuing decade of violence between the police force and the nationalist community has further deepened distrust between the two groups, making it increasingly difficult to reconcile the differences between them.

Given this dynamic, it is not surprising that public opinion surveys reveal a significant disparity in police approval rates among Catholic and Protestant populations.[24] Similarly, substantially fewer Catholics than Protestants believe that the police treat the two communities equally.[25] Only the establishment of an effective police accountability system and comprehensive reform of police operations will lead to better relations between the police and the Catholic community.

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20. *Id.* (quoting the Cameron Report).

21. *See* AI Report United Kingdom Summary of Human Rights Concerns 1995.

22. *See* MCGARRY & O'LEARY, *supra* note 10, at 32.

23. *See, e.g.*, SAM DASH, JUSTICE DENIED: A CHALLENGE TO LORD WIDGERY'S REPORT ON BLOODY SUNDAY. Interestingly, the local RUC commander had opposed the plan of containing the march, which was sure to cause a direct confrontation between the security forces and the marchers. *See* DERMOT P.J. WALSH, supra note 8 at 6. However, his opinion was overruled by the chief constable of the RUC and the British commander of land forces in Northern Ireland, and the plan to contain the march was implemented. *See id.*

24. *See* Patten Report, *supra* note 11, at 13.

25. *See id.* at 14.

III. PAST ATTEMPTS AT CREATING ACCOUNTABILITY

In addition to feeling as though they are the victims of unfair treatment by the police, Catholic communities also feel that they have no effective recourse for such mistreatment. Prior to 1970, the Chief Constable was solely responsible for the operations and accountability of the force.[26] He had sole authority over the investigation of complaints against his own police force, and regulations governing the management and control of the RUC were generally not published as statutory rules.[27] Although there have been several attempts at establishing and reforming a police review system since 1970, none have been particularly effective in creating accountability or increasing public confidence in the police.

More recent reforms grant greater power to oversight structures and have a greater likelihood of effectiveness. These changes in accountability have also been accompanied by major changes in the structure and culture of the police force itself.

A. The Police Authority

Prior to 1970, the RUC was effectively controlled by the loyalist Ulster Unionist Party. In response to findings of two government-sponsored commissions criticizing the politicization and ineffective complaints system of the police,[28] and in an attempt to quell the civil unrest and conflict between the police and the nationalist community, the Stormont Parliament created the Police Authority in 1970. The Police Authority was designed to hold the Chief Constable and senior officers accountable.

The 1970 Act provided that all members of the Police Authority be appointed by the Secretary of State.[29] It also charged the Police Authority with the rather vague duty "to secure the maintenance of an adequate and efficient police force in Northern Ireland."[30] Following this provision, the 1970 Act lists more specific duties, including determining the size and rank of the police force, appointing senior officers and requesting the resignation of any senior

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26. Brice Dickson, *The Police Authority for Northern Ireland*, 39 NORTHERN IRELAND LEGAL QUARTERLY 277 (1988).

27. *See id.* at 278.

28. *See* Ivan Topping, *The Police Complaints System in Northern Ireland*, *in* COMPLAINTS AGAINST THE POLICE: THE TREND TOWARD EXTERNAL REVIEW 233, 244 (Andrew J. Goldsmith, ed., 1991); *see also* MCGARRY & O'LEARY, *supra* note 10, at 100.

29. *See* Patten Report, *supra* note 11, at Section 5.5. Because of several shortcomings of the Police Authority, discussed *infra*, nationalist leaders have refused to nominate members of their communities for appointment to the Authority, making proportional representation difficult to achieve. *See id.*; *see also* Dickson, *supra* note 26, at 279.

30. *See* GERALD HOGAN & CLIVE WALKER, POLITICAL VIOLENCE AND THE LAW IN IRELAND 35 (1989).

officer in the interest of efficiency.[31] The Authority can also require the Chief Constable to submit a report on any matter relating to policing; however, it can conduct no inquiries on its own.[32]

The Police Authority has been criticized for both its lack of power to hold the RUC accountable and its partiality towards the police.[33] The Police Authority's power to hold the police accountable is severely limited.[34] Although the Police Authority is responsible for ensuring the maintenance of an adequate and efficient police force, the "direction and control" of the force remains vested in the Chief Constable.[35] The Police Authority is therefore "not meant to interfere with the way in which the police actually do their job."[36]

The Police Authority ostensibly has the power to compel reports from the Chief Constable. However, the Constable can appeal to the Secretary of State to overrule the Police Authority's request if the report is not in the public interest or is not necessary for the Police Authority to discharge its functions.[37] The Police Authority's power to hold the police accountable is further limited by the fact that it has no power to follow up a report by holding an inquiry on the matter.[38]

These limitations have caused nationalists to criticize the Police Authority as a toothless organization that provides only the appearance of accountability.[39] The Police Authority's lack of power - and the loyalist bias of the RUC - was highlighted by the former RUC Chief Constable, Hugh Annesley when he commented that he would likely pay as much attention to the Police Authority as to a letter in the *Irish News* (a nationalist newspaper).[40]

In addition to the limited nature of its power, the Police Authority has also been considered ineffective due to its pro-police bias.[41] The Police Authority has declined to inquire into the use of plastic bullets on unarmed demonstrators, abusive interrogation practices, shoot-to-kill policies, or allegations of RUC collusion with loyalist paramilitaries, despite widespread allegations of these practices.[42] Although the Police Authority has the power

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31. *See id.*
32. *See id.*
33. BRICE DICKSON, THE LEGAL SYSTEM OF NORTHERN IRELAND 188 (1993).
34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.*
38. Patten Report, *supra* note 11, at 24.
39. *See Shake-up Plan for Police Body*, BELFAST TELEGRAPH, Feb. 9, 1998.
40. *See* MCGARRY & O'LEARY, *supra* note 10, at 102.
41. *See* Patten Report, *supra* note 11, at Section 5.12 ("There is a perception that . . . Police Authority members have strongly pro-police orientations.") (internal citations and quotation marks omitted); *see also* MCGARRY & O'LEARY, *supra* note 10, at 39-40 ("The Police Authority . . . did not seem willing, in the face of the campaign of violence, to say anything remotely critical of the police, or to suggest a change of policy.").
42. *See* Dickson, *supra* note 26, at 282; *see also* MCGARRY & O'LEARY, *supra* note 10, at 101.

to request reports from the Chief Constable, this power has rarely, if ever, been exercised.[43] The Police Authority has also been reluctant to criticize the RUC and defends the RUC's role in investigating its own members.[44] Instead of being an independent regulator, the Police Authority has been considered more akin to an executive collaborator or public relations branch of the RUC.[45] In 1989, the Police Authority praised the RUC as "one of the best police forces in the world."[46] With no apparent research accompanying this claim, it appeared to be based entirely on the subjective views of Police Authority members.[47]

The Police Authority has shown intolerance toward any criticism of the police, a loyalist bias, and a lack of independence. These traits were demonstrated in 1996, when two Police Authority members objected to the flying of the Union Jack over police stations on unionist holidays and to the requirement that police recruits swear allegiance to the Queen.[48] These members were subsequently censured by the Police Authority and dismissed from their positions by the Secretary of State.[49] Following this event, the Police Authority conducted a study of the RUC and public perceptions of the police in 1996; however, it concluded that there should be no change in the name, uniform or badge of the RUC, and merely suggested changing the oath of allegiance to the Queen to an affirmation.[50]

The constraints on the Police Authority's power, together with its reluctance to criticize police actions, has undermined public confidence in its role as an independent check on police conduct. An essential element of civilian oversight of the police is the ability to win public confidence as an independent check on police conduct. Without this confidence, the Police Authority cannot fulfill its role as a legitimate means to hold the police accountable.

B. The Independent Commission for Police Complaints

While the Police Authority was designed to hold accountable the Chief Constable and other senior officers, a separate system was set up to handle citizen complaints about the conduct of individual officers. The Police Complaints Board, established in 1977, was followed by the Independent

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43. *See* Molly R. Murphy, *Northern Ireland Policing Reform and the Intimidation of Defense Lawyers*, 68 FORDHAM L. REV. 1877, 1911 n.267 (Apr. 2000).

44. *See, e.g., Concerns Being Acted on at Last*, IRISH TIMES, Apr. 11, 2001 (noting Police Authority support of RUC involvement in Nelson murder investigation).

45. *See* Patten Report, *supra* note 11, at Section 5.13.

46. MCGARRY & O'LEARY, *supra* note 10, at 100.

47. *See Concerns Being Acted on at Last, supra* note 44.

48. *See* MCGARRY & O'LEARY, *supra* note 10, at 101.

49. See *id.* at 102.

50. *See Id.*

Commission for Police Complaints in 1987.[51] Like the Police Authority, neither of these bodies were successful in effectively reviewing police conduct or winning the confidence of the nationalist community.

The creation of the Police Complaints Board was the first step in implementing an independent element to the review of police conduct in Northern Ireland.[52] The duties of the Police Complaints Board included considering the results of police investigations of complaints of officer misconduct and deciding whether the officer implicated should be charged with a disciplinary offense.[53] Because the Board had no oversight role of the actual investigation, the RUC continued to exercise total control over the investigations of its own members.

To address such shortcomings, the British Parliament replaced the Board with the Independent Commission for Police Complaints (ICPC) in 1987.[54] As an improvement to the Police Complaints Board, the Parliament vested the ICPC with independent supervisory power over RUC investigations of complaints.[55] Additionally, the Secretary of State and the Police Authority were given the power to refer any major public interest matter involving an officer's possible criminal or disciplinary offense to the Commission.[56] This referral could take place even though no formal complaint had been made.[57]

Despite these improvements, the ICPC failed to win public confidence in its ability to hold the RUC accountable. The most widely voiced criticism of the ICPC was its limited involvement in the actual investigative process.[58] The ICPC's authority over RUC investigations was limited to vetoing the appointment of the officer chosen to conduct the investigation and imposing requirements on how the investigation was to be conducted. After the investigation was complete, the investigator was required to submit a report to the ICPC, which determined whether or not the investigation had been completed satisfactorily.[59] If the Chief Constable recommended disciplinary charges, the case would be referred to a tribunal composed of three RUC officers.[60] Thus, the ICPC had no real remedial power to deal with complaints beyond rejecting an RUC investigative report. In effect, the RUC was again left to police itself.

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51. *See generally* Police (Northern Ireland) Order 1987; *see also* Police (Northern Ireland Order) 1977.

52. *See* TOPPING, *supra* note 28, at 244.

53. *See id.*

54. *See id.*, at 246-48.

55. *See id.* at 246.

56. *See* TOPPING, *supra* note 28, at 249.

57. *See id.*

58. *See* HOGAN & WALKER, *supra* note 32, at 35.

59. *See* Mary O'Rawe and Linda Moore, Accountability and Police Complaints in Northern Ireland in Civilian Oversight of Policing (Andrew J. Goldsmith and Colleen Lewis, eds. 2000) at 278.

60. *See* Dermot Walsh, *Report on RUC Goes to Heart of the Problem*, IRISH TIMES, Jan. 14, 1997, at 14.

Even after the establishment of the ICPC, it remained rare for an RUC officer to be subject to discipline. In 1995, less than one percent of complaints against the RUC resulted in any form of disciplinary action.[61] Between 1990 and 1992, the ICPC received 1235 complaints from persons arrested under the emergency powers legislation; none of these complaints were upheld.[62] During this same period, over one million pounds was paid in compensation to complainants filing civil suits for injuries suffered by police abuse of power under the Emergency Powers Act, indicating a disparity between outcomes in the judicial system and the system of police review.[63]

IV. THE FAILURE OF PAST REFORMS: CONTINUING BRUTALITY BY THE POLICE

Despite government efforts at reform, policing by the RUC continues to raise serious questions of abuse and partiality.[64] Several cases illustrate the continuing abuse by RUC officers and the lack of an effective check on their conduct.[65] Widespread allegations of ill-treatment of detainees, collusion with paramilitary forces, and failure to protect Catholic citizens from loyalist abuse continue to taint the reputation of the RUC.[66]

The RUC's impunity for the ill-treatment of detainees was recently evidenced by the case of David Adams.[67] Adams claims that he was subjected to brutal beating and kicking as well as verbal abuse upon his arrest in 1994.[68] He suffered a fractured leg, two fractured ribs, a punctured lung, and cuts and bruises to his face and body.[69] Adams won thirty thousand pounds in compensation in a civil suit against the officers, and the High Court judge concluded that the injuries suffered by Adams "were likely to be the result of direct, deliberate blows" which constituted "illegal behavior."[70] Although the ICPC referred the case to the Director of Public Prosecutions (DPP), the DPP refrained from bringing any criminal charges against the officers implicated.[71] In 1998, the UN Special Rapporteur made a request to the UK government on the findings of the ICPC investigation.[72] He was told that an investigation was being carried out; however, his request was never granted.[73] Despite several

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61. *See* Walsh, *supra* note 7, at 14.
62. *See id.*
63. *See id.*
64. *See infra* text and accompanying notes, 69-103.
65. *See infra* text and accompanying notes, 69-103.
66. *See infra* text and accompanying notes, 69-103.
67. *See* AMNESTY INTERNATIONAL United Kingdom: Northern Ireland, End Impunity for Ill-treatment: The David Adams Case, 2 (1999).
68. *See id.*
69. *See id.*
70. *See id.*
71. *See id.*
72. *See id.*
73. *See id.*

calls for an independent inquiry by Amnesty International, no criminal action has been taken against the officers.[74]

Some of the most disturbing evidence of abuse involves RUC collusion with loyalist paramilitaries to carry out the murders of prominent nationalists. There is substantial evidence that the RUC deliberately leaked documents of IRA suspects to the Ulster Defence Association (UDA), a loyalist paramilitary group, who then carried out the murders of these suspects while the RUC turned a blind eye.[75] Conversely, loyalist paramilitaries augmented the intelligence gathering of the RUC and the British army on Republican suspects.

The evidence of such collusion began to emerge in 1989 when loyalist paramilitary spokesmen justified the killing of a Catholic by claiming that police files indicated that the victim was an IRA member.[76] In response to public concern, the Chief Constable appointed British police officer John Stevens to investigate the leaks.[77] In 1992, two British soldiers were convicted of passing on information that led to a murder by the UDA.[78] One soldier also admitted that he had passed on the names of 14 suspects to loyalist paramilitary groups, had gathered information for these groups while on duty, and had passed them ammunition from the army.[79] Brian Nelson, who served as a military intelligence agent of the army and a senior intelligence officer of the UDA at the same time, was also arrested as a result John Stevens' inquiry.[80] Nelson pleaded guilty to twenty charges; however, some of the most serious charges against him were dropped under suspicious circumstances.[81] According to Nelson, he brought evidence to the RUC on a weekly basis.[82] Evidence later surfaced, however, that Nelson's information to the army about UDA activities saved the lives of only two individuals and resulted in neither arrests nor raids on any UDA operations.[83]

Abuse by the RUC involves not only active misconduct, but also a failure to protect Catholic civilians from loyalist violence. A recent case involved the death of twenty-five year old Robert Hamill.[84] Hamill and four friends were returning from a Catholic dance hall in the city center of Portadown when they were attacked by a mob of loyalist men and women.[85]

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74. *See id.*

75. *See* AMNESTY INTERNATIONAL United Kingdom: Political Killings in Northern Ireland, 14-18 (1994).

76. *See id.* at 14.

77. *See id.*

78. *See id.*

79. *See id.* at 14-15.

80. *See id.* at 15.

81. *See id.* at 16.

82. *See id.* at 18.

83. *See id.* at 14.

84. *See* AMNESTY INTERNATIONAL United Kingdom: Northern Ireland The Sectarian Killing of Robert Hamill, 1 (1999).

85. *See id.*

Two of the men were severely beaten, and Hamill suffered fatal injuries.[86] At the time the assault occurred, two RUC officers were sitting in an official vehicle, which was parked across the street from the place where the incident occurred; however, they failed to make any attempt to prevent the assaults.[87] An ambulance was reportedly called by the RUC at some point, however, the officers did not get out of their jeep until just prior to the arrival of the ambulance.[88]

It appears that the officers had sufficient time to prevent – or at least interrupt - the assaults against Hamill and his friends. Not only were the officers made aware of the situation by shouts for help from two women in the group, but the officers had also been given advance notice of a possible confrontation shortly before it occurred.[89] A Catholic man, who had been frightened by the group on his way home from the dance hall, asked the officers to keep an eye out for other Catholics coming from the hall.[90]

Early RUC reports claimed that there had been a battle between loyalist and republican factions, that it would have been unsafe for the police to intervene, and that the police had come under attack.[91] The RUC officers did not collect any evidence at the scene of the crime, and no one was immediately arrested.[92] Although six people were later arrested for the murder, none were convicted as a result of a lack of evidence[93] (likely due to the RUC's failure to conduct a prompt investigation[94]). After his death, Hamill's family filed a complaint against the police, claiming that the RUC failed to act on continuing loyalist harassment against them and that the family has suffered harassment by RUC officers themselves.[95]

In response to the Hamill family's complaint, the ICPC initiated an investigation into the actions of the RUC officers at the scene of Robert Hamill's murder.[96] The investigation was undertaken by other RUC officers from the Portadown station - the same station where the officers under investigation were based.[97] The ICPC approved the report of the investigation and forwarded it to the DPP.[98] The implicated officers have suffered neither criminal charges nor disciplinary action for their conduct.[99]

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86. *See id.*
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. *See id.*
93. *See id.* at 2.
94. *See id.*
95. *See id.* at 2.
96. *See id.*
97. *See id.*
98. *See id.*
99. *See id; see also* MCGARRY & O'LEARY, *supra* note 10, at 39.

V. WORKING TOWARD A NEW POLICE FORCE: THE GOOD FRIDAY AGREEMENT AND ITS AFTERMATH

Due to pervasive police abuse and weak police accountability structures, the police have been a major source of conflict between nationalists and unionists and have impeded efforts to establish stability in Northern Ireland. Reform of the police force has thus been a critical issue in securing peace in a territory historically plagued by sectarian strife.

There have been several major improvements to the police system in general and police accountability in particular in the past few years. These changes have occurred in two phases. In 1998, the ICPC was replaced with a Police Ombudsman, whose office is now responsible for handling complaints against individual officers. Second, pursuant to the Good Friday Agreement, sweeping police reform legislation was passed in 2000, which more broadly restructured the police force and the police accountability system. The new legislation replaces the Police Authority with a new Police Board, and provides for the establishment of local community policing boards.

It is not surprising that many of these reforms have followed an increasingly conciliatory environment between loyalists and nationalists, and in particular, the signing of the Good Friday Agreement in 1998. The Good Friday Agreement provided:

> The participants [in the negotiations] believe it essential that policing structures and arrangements are such that the police service is professional, effective and efficient, fair and impartial, free from partisan political control; accountable, both under the law for its actions and to the community it serves; representative of the society it policies, and operates within a coherent and cooperative criminal justice system, which conforms with human rights norms.[100]

In accordance with the Good Friday Agreement, the Secretary of State appointed an Independent Commission on Policing for Northern Ireland, which was headed by Christopher Patten, the former British governor of Hong Kong. In September 1999, this Commission published a report (the Patten Report), which proposed recommendations for reform of the Northern Ireland police force.[101] Following the release of the Patten Report, the British Parliament fashioned and passed the Police (Northern Ireland) Act of 2000, which provided for reform of the police system, adopting some - but not all - of the recommendations set forth in the report.[102]

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100. Good Friday Agreement, Art.VI, Paragraph 2.
101. *See* Patten Report, supra note 11.
102. *See* Police (Northern Ireland) Act 2000.

An important corollary to police reform is a power-sharing government and the demilitarization of Northern Ireland by the British Army in exchange for decommissioning by the IRA. The logistics of decommissioning continue to pose a substantial obstacle to full implementation of the Good Friday Agreement; however, there is hope by both sides that a peaceful agreement will be reached on the issue.

A. *Police (Northern Ireland) Act 1998: The Office of Police Ombudsman*

The Office of the Police Ombudsman is perhaps the most important development in external police accountability that has occurred in Northern Ireland. Because the Ombudsman has the power to conduct independent investigations of complaints against the police, it put an end to the RUC's long practice of investigating itself for its own abuses. While the ICPC had the power to supervise RUC investigations of complaints against the police, it had no authority to have its own officers conduct the investigations. The Ombudsman, on the other hand is equipped with a staff of investigators and is authorized to conduct his or her own investigations of complaints against individual members of the police. After an investigation has been conducted, the Ombudsman, not the Chief Constable, decides whether to seek disciplinary charges.[103]

The Ombudsman need not wait for a formal complaint to be filed before investigating an incident of police misconduct. The Ombudsman also has the controversial power to investigate past incidents, and she has recently undertaken an investigation into the death of Robert Hamill, the Catholic man who was beaten to death while RUC officers sat across the street in their vehicle.[104]

The Independent Commission on the Police noted that they "[could not] stress too much the importance" of this position.[105] The first appointment to the position of Ombudsman provides encouragement that the Ombudsman will be truly independent and not merely a puppet of the British government. The first person appointed to the position of Ombudsman is Nuala O'Loan, a Catholic who served on the Police Authority and is married to a nationalist politician. [106] O'Loan enjoys the approval of not only the British government, but also non-partisan human rights organizations.[107]

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103. *See* Police (Northern Ireland) Order 1987 *supra*, note 51.

104. *See Ombudsman Supervises Hamill Case*, BELFAST NEWS LETTER, Nov. 25, 2000 at 5.

105. Patten Report, supra note 11 at 38.

106. *See*, Gerry Moriarty, *Law Lecturer Appointed North's Police Ombudsman*, IRISH TIMES, Oct. 12, 1999 at 8.

107. *See, e.g.*, British-Irish Rights Watch 2000 Annual Report, 9 (2000) (referring to the appointment of O'Loan as a "positive development").

Despite concerns that the Ombudsman lacks all of the powers recommended in the Patten Report, the new office has received positive reviews from human rights organizations.[108] Moreover, an increase in the number of complaints filed since the establishment of the Ombudsman's Office indicates that it enjoys greater public trust than its predecessor, the ICPC.[109]

B. Police (Northern Ireland) Act 2000: The Police Board

The establishment of the Office of the Police Ombudsman was the first important step in strengthening external structures to hold the police accountable. Two years later, pursuant to the Good Friday Agreement, the British government passed the Police (NI) Act 2000, which provided for major restructuring of the Northern Ireland police force.[110] Along with other sweeping changes, the Police (NI) Act 2000 replaced the Police Authority with a new Police Board vested with greater powers.

The Police Board is to be composed of nineteen members - ten from the Northern Ireland Assembly, and nine independent members from various fields.[111] The Police Board has the important power to hold inquiries, which is not held by the present Police Authority.[112] It is also required to hold its meetings in public, with certain exceptions.[113]

Although the Police Board is vested with greater power than the previous Police Authority, it is still significantly limited by the Secretary of State. While the Board can hold inquiries, the Secretary of State can overrule the Board's decision and terminate the inquiry if she determines that the inquiry pertains to an individual and is of a personal and sensitive nature or that it might prejudice court proceedings or the detection of a crime.[114] The Board's power in this area, then, is subject to the Secretary of State that happens to be in office.

VI. POLICE REFORM AND DEMOCRATIC ACCOUNTABILITY IN A BROADER PERSPECTIVE

The recent reforms in Northern Ireland go a long way toward increasing citizen participation in the system of police accountability. However, two

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108. *See, e.g.*, CAJ Report, *supra* note 6 (noting that "the Office of the Police Ombudsperson signals an important new beginning in the protection and vindication of the rights of all"); British-Irish Rights Watch 2000 Annual Report, *supra* note 107, at 9 (noting the improvement of the office of the Ombudsman over the previous ICPC).

109. *See Ahern Urges Independent Nelson Inquiry*, BELFAST TELEGRAPH, Feb. 21, 2001.

110. *See generally* Police (Northern Ireland) Act 2000.

111. *See* Police (Northern Ireland) Act 2000, Schedule 2, Part III, Paragraph 6(1).

112. *See id.*

113. *See id.* at Part IV (19).

114. *See* Police (Northern Ireland) Act 2000 Part VII (60)(5).

questions remain: 1) whether increased civilian participation is an effective means of deterring or preventing police misconduct and increasing public confidence in the police accountability system, and 2) whether the civilian oversight structures in place will have the power to effectively curtail police abuses.

While the role of civilian oversight has been widely hailed as an essential tool in creating police accountability, its actual effectiveness in addressing police misconduct has been subject to debate. At least two commentators have suggested that the effectiveness of civilian review is overrated and that such a system is not necessarily superior to a system in which the police conduct their own internal investigations.[115] These doubts are based on findings that internal review procedures find officers at fault at least as often as do civilian review procedures.[116] Such findings challenge assumptions that the police are incapable of conducting an impartial investigation of other officers, which is the primary rationale for civilian oversight.[117] It has also been suggested that internal review procedures enjoy more respect and deference by police officers, and thus may be more effective in deterring police misconduct.[118]

Although civilian review may not be the panacea its advocates make it out to be, there are two reasons why a strong system of civilian review is essential to police reform in Northern Ireland. First, the findings about the effectiveness of civilian investigations may not apply to the situation in Northern Ireland. Second, despite its shortcomings, civilian review helps to provide legitimacy to a system that has historically suffered from widespread distrust and suspicion.

The suggestion that civilian review is not significantly more effective than internal review does not apply to Northern Ireland with the same force that it applies to policing systems in the United States. The RUC has a long history of allegations of human rights abuses. Particularly disturbing from a self-policing perspective is the evidence of state-sanctioned murders and collusion with loyalist paramilitaries. The severity of human rights abuses by the RUC and state involvement in those abuses casts doubt on RUC investigations beyond the usual suspicions roused by a system in which the police investigate themselves. Because the RUC investigations are more likely to be faulty, the implementation of independent review procedures is likely to have a greater impact.[119]

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115. *See, e.g.*, PEREZ, *supra* note 5, at 243-44; JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 229-30 (1993).

116. *See* PEREZ, *supra* note 5, at 233.

117. *See id.* at 233.

118. *See id.* at 233.

119. *See* SKOLNICK & FYFE, *supra* note 115, at 230 (noting that civilian review is unlikely to significantly change the pattern of dispositions of citizen complaints "unless the former review mechanism has habitually engaged in blatant whitewashes").

In addition to increased effectiveness in investigating police abuses, civilian review also provides a sense of legitimacy that is lacking in the current system.[120] Where "police-community relations suffer from significant tensions," external review procedures are particularly beneficial in gaining the trust of the community.[121] The Catholic community in Northern Ireland has experienced alienation from the police in the extreme, which is reflected in Protestants' occasional reference to the RUC as "our police," reinforcing perceptions among Catholics that the police is not theirs - i.e. that the RUC is a Protestant police force for a Protestant population.[122]

In response to challenges to its effectiveness, advocates of civilian review have argued that it is nevertheless valuable because it provides democratic legitimacy to the police accountability system. In fact, Skolnick and Fyfe have argued that the primary purpose of a system of external review is not effectiveness, but credibility and legitimacy.[123] Ultimately, civilian involvement in governmental processes has its roots in the theory of civic republicanism and participatory democracy. Just as elected representatives should be accountable to the citizenry, so too should those who enforce laws passed by those representatives. Where citizens know that police conduct is reviewed by an independent body, they are more confident that the police are being held accountable.

Beyond its effectiveness, then, civilian involvement carries benefits that cannot be obtained through internal review systems. Because internal and external review structures have their own respective benefits, most of the literature on police review suggests that the most effective type of review combines internal review by the police themselves with some form of external review.[124] This combination of internal and external review often takes the form of the "civilian monitor" model, like the ICPC, where police officers conduct initial investigations, which are supervised and reviewed by a civilian board.

The civilian monitor model has proven effective in a number of localities in the United States.[125] In determining which form of review is best suited for a particular locality, however, one must consider the history, culture, and reputation of a particular police force. Where the record of the RUC's

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120. PEREZ, *supra* note 5, at 236.

121. PEREZ, *supra* note 5, at 236.

122. *See* Patten Report, *supra* note 11, at 16.

123. *See* SKOLNICK & FYFE, *supra* note 115, at 231-40.

124. *See, e.g.*, Errol P. Mendes, *Raising the Social Capital of Policing and Nations: How Can Professional Policing and Civilian Oversight Weaken the Circle of Violence?* 26 DEMOCRATIC POLICING AND ACCOUNTABILITY: GLOBAL PERSPECTIVES (Mendes et al. eds. 1999) [hereinafter DEMOCRATIC POLICING]; Paul G. Chevigny, *Police Accountability in Hemispheric Perspective* in DEMOCRATIC POLICING 69,80; PEREZ, *supra* note 5, at 263.

125. *See, e.g.*, PEREZ, *supra* note 5 at 248 (finding that Kansas City's civilian monitor model was perhaps the most effective system in a study of five prominent civilian review systems).

investigations is so shoddy, and where there is such a poor relationship between the police and the community, any system in which the police are involved in investigating serious complaints will fail to ensure effectiveness or public confidence.

VII. WINNING COMMUNITY SUPPORT IN NORTHERN IRELAND: A COMPREHENSIVE APPROACH TO REFORMING THE POLICE

Although a complaints system that involves internal investigations may offer advantages that a completely external system does not, a strong external review system is necessary in Northern Ireland until the police force wins broad support from the entire community. In evaluating the recent reforms, then, two questions remain: 1) whether the external review structure is equipped with the necessary authority to effectively investigate police abuses and to win the confidence of the Catholic community; and 2) whether the legislation represents substantial long-term reform of internal police investigations and practices. The extent to which the Police (NI) Act 2000 implements the recommendations by the Patten Commission is a good way of evaluating whether the reforms enacted by the legislation are extensive enough to effect real reform of the police or whether they represent mere window dressing to an inherently flawed system.

1. External Accountability

The reforms to the external accountability structures are far-reaching and represent a vast improvement over current accountability structures. Compared with other civilian oversight systems, Northern Ireland's system is very extensive.[126] The Ombudsman's power to conduct a completely independent investigation of complaints from the initial fact-finding stage is not held by the British Police Complaints Authority,[127] and only one-third of the systems in the United States are vested with this power.[128] Further, the Ombudsman's responsibility to decide whether an officer should be

126. The United States Department of Justice conducted a study that categorized civilian oversight systems from one to four, with one being the most expensive and four being the least expensive. *See* PETER FINN, U.S. DEPT OF JUSTICE AND NAT'L INST. OF JUSTICE, CITIZEN REVIEW OF POLICE (2001) *available at* http://www.ncjs.org/pdffiles1/nij/184430.pdf (last vistited Jan. 31, 2002). Northern Ireland's Ombudsman Office would fall into category number one.

127. *See* Mike Maguire, *Complaints Against the Police: The British Experience*, *in* COMPLAINTS AGAINST THE POLICE: THE TREND TOWARD EXTERNAL REVIEW 187 (Andrew J. Goldsmith, ed. 1991) (noting that the PCA has merely the authority to supervise investigations of complaints). *See* Mendes, *supra* note 125, at 26 (civilian oversight bodies in Canada have no power to deal with complaints from their inception).

128. *See* Samuel Walker & Betsy Wright Kreisel, *Varieties of Citizen Review The Implications of Organizational Features of Complaint Review Procedures for Accountability of the Police*, 15 *AMERICAN JOURNAL OF POLICE* 65, 73 (1996).

disciplined adds to his or her power to hold the police accountable, which many other civilian oversight systems lack.[129]

In many respects, the Ombudsman's power compares to the civilian review board of Berkley, California, which has been called one of the most independent systems in America.[130] Like Berkley's Police Review Commission, the Northern Ireland Ombudsman has its own completely independent investigatory staff and procedures. While the Berkley Police Review Commission has the power to recommend disciplinary action,[131] the Ombudsman actually has the power to direct the Chief Constable to carry out his or her recommended discipline.

Unlike Berkeley's review board, however, the Ombudsman has no power to review police policies and practices. Patten strongly recommended that the Ombudsman should have the power to investigate and comment on police policies and practices, to investigate and draw conclusions from clustering in patterns of complaints and to make recommendations for change to police management and the Policing Board.[132] This power is important because it provides a means for civilian input into preventing future police abuses. Practices that senior officers view as an effective means of law enforcement may be seen as an unreasonable and insulting practice by civilians.[133] Consistent with the representation theory of police review, one of the most important benefits of a civilian review structure is its ability to offer citizen perspectives and evaluations of police conduct and practices. The power to comment on policies and practices is important in establishing the policing service as a democratic institution accountable to the people.[134]

The Police (NI) Act 2000 similarly does not fully implement Patten's recommendations for the powers of the Police Board. In several areas, the Police Board's authority is subject to the power of the British Secretary of State. The independence of the Policing Board from the British government is essential to its validity as an impartial body that can effectively investigate such allegations as state-sanctioned murders. The power of the Policing Board is limited in that the Secretary of State can stop an inquiry by a number of vaguely defined justifications.[135] The Board is further constrained by the

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129. *See* Ian Freckelton, *Shooting the Messenger: the Trial and Execution of the Victorian Police Complaints Authority*, *in* COMPLAINTS AGAINST THE POLICE: THE TREND TOWARD EXTERNAL REVIEW 63, 104 (Andrew J. Goldsmith, ed. 1991) (noting that most civilian review boards in Australia lack any disciplinary power).

130. *See* PEREZ, *supra* note 5, at 126.

131. *See id.*

132. Patten Report, *supra* note 11, at 38.

133. *See* SKOLNICK AND FYFE, *supra* note 115, at 233.

134. Many experts have recognized the importance of the power to comment on policies and practices. *See* CITIZEN REVIEW OF POLICE, *supra* note 126, at 69. This power has proven useful to at least one oversight body in the United States and has proven particularly useful in addressing the use of force and crowd control. *See id.* at 70-71.

135. *See* Maggie Beirne, *The Police (Northern Ireland) Act 2000*, JUST NEWS, (Bulletin of the Committe on the Administration of Justice), Nov. 2000, at 1,7.

discretion of the Secretary of State, as approval is required for the appointment of an individual to carry out an inquiry.[136]

The Board's power to hold an inquiry is further impeded by the requirement of a weighted majority vote to hold an inquiry or to appoint an individual to carry out an inquiry.[137] Because of the composition of the Board, this requirement effectively grants unionists a veto power over any inquiry.

2. *Reform of the Internal Police System*

While the police accountability reforms enacted by the Police (NI) Act 2000 ("the Act") could be stronger, they create an accountability system substantially stronger than the system that existed just a few years ago. Greater concern arises from the shortcomings of the reforms made to internal police practices.

One of the most significant reforms included in the Police (NI) Act 2000 involves clear and ambitious plans to recruit more Catholics. In this area, the legislation embodies the full recommendation by Patten that Catholics represent fifty percent of new recruits.[138] Through this recruitment strategy, Catholics will represent thirty percent of all officers in the near future.[139] Unlike previous plans to increase Catholic participation, this time Catholics are responding in record numbers, and there is little doubt that the fifty percent target will be met.[140]

While the recruitment plans represent encouraging steps in reforming the police force from within, the Act failed to incorporate two critical recommendations made by Patten: 1) the disclosure requirement for officer membership in sectarian organizations, and 2) the requirement that all officers take an oath to uphold human rights.[141]

One of the main sources of Catholics' distrust of the RUC is the high rate of overlapping membership in the RUC and loyalist organizations, such as the Orange Order. Although the Police (NI) Act 2000 requires disclosure of officers' memberships in sectarian organizations, the officers are only required to notify the Chief Constable, who will keep the information confidential. This weak requirement may allow for the continuation of current association between the Orange Order and the police force. Furthermore, not

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136. *See* Lawyers Committee for Human Rights, Northern Ireland Update 3 (February 2001) available at www/chr.org/n.ireland/update.pdf (last visited Feb. 20, 2002). [hereinafter Northern Ireland Update].

137. *See id.*

138. *See* Police (NI) Act 2000, Part VI, Section 46(5)(a).

139. In comparison, it took the New York City Police Department twenty-five years to increase the proportion of ethnic minority officers from 12% to 33%. *See* Patten Report, *supra* note 11, at 83.

140. *See* Michael Bradley, *Half of NI Police Force to be Catholics*, The Irish Times, Oct. 13, 2001 at 5.

141. *See* Northern Ireland Update, *supra* note 136, at 5-6.

even the Ombudsman will have access to this information, demonstrating a lack of trust in the Office of the Ombudsman and undermining her ability to conduct thorough and accurate investigations.[142]

Patten's recommendation that all officers be required to take an oath to uphold human rights, which would take precedence over any other oaths taken by officers who belong to sectarian groups, would mitigate the effect of the weak notification requirement. This recommendation, however, was implemented only partially; while new recruits are required to take the new oath, current officers are under no obligation to swear to such an oath.[143]

There is no justification for a failure to require all officers – both currently serving officers and new recruits – to take an oath to uphold human rights. The Implementation Plan states "[e]xisting officers have already been attested as constables and cannot be required to take the new oath."[144] The plan simply offers no reason for excusing currently serving officers from the oath, particularly when some of these very officers have committed human rights abuses in the past and are likely to commit them again.

Promising compromises have been made with regard to issues of culture, ethos, and symbols. The Act implements Patten's recommendation to change the name of the RUC to the Police Service of Northern Ireland (PSNI), and left the design of the flag and the uniform and policies with respect to the flying of the British flag to resolution by the Policing Board, with the consideration of recommendations by the Secretary of State.[145] The compromise reached with respect to these issues provides a flag and emblem that is neutral and be acceptable to all parts of the community.[146] The badge approved by the Policing Board takes the shape of a Garter star, which includes the force's new name, along with a St. Patrick's cross, scales of justice, a crown, a harp, a shamrock, a torch, and an olive branch.[147] The flag features the badge design on a dark green background.[148] The Policing Authority provided that the flag of the PSNI would be the only flag that could be flown from any police building or official police vehicle.[149] The only exceptions to this rule are days on which a station will be visited by the Queen, in which case, the British flag will be flown.[150]

Both the police accountability reforms and other police reforms enacted by the Police (NI) Act 2000 could be stronger. The government did not implement the Patten recommendations in their entirety, which would have

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142. *See* Northern Ireland Update, *supra* note 136.

143. *See* Northern Ireland Update, *supra* note 136, at 6.

144. Secretary of State for Northern Ireland, Updated Implementation Plan for Report of the Independent Commission on Policing for Northern Ireland 1 (Aug. 2000)

145. *See* Police (Northern Ireland) Act 2000 (1)(1); *see also id.* at (54)(2).

146. *See* Patten Report, *supra* note 11, at 99.

147. See *Tories Hit out at Union Flag Ban,* Belfast News Letter, Jan. 22, 2002, at 11.

148. *See id.*

149. *See id.*

150. *See id.*

guaranteed the full support of nationalist leaders and human rights organizations. Furthermore, many issues have been left to be resolved by future amendments to the legislation. The nationalist parties in Northern Ireland are divided over whether the new police plan represents a substantive change or it is merely making minor changes in an unacceptable police force. Both the Catholic Church and the Social Democratic Labour Party (SDLP), the moderate political party of Catholics in Northern Ireland, have endorsed the new policing structures and the SDLP has nominated members of its party to sit on the Policing Board.[151]

Sinn Fein, the nationalist party, has refused to support the new force, claiming that it is simply a disguised RUC.[152]Sinn Fein has a point in that the PSNI includes many officers who have committed human rights abuses in the past and should be required to take the new oath or be expelled from the force. This raises particular concern in view of U.S. studies showing that a small number of officers typically generate a disproportionate percentage of all police complaints.[153]

Despite its shortcomings, however, the new reforms have been endorsed by Christopher Patten and represent a vast improvement over the current system of policing.[154] The Police (NI) Act 2000 deserves the participation and support of the nationalist community. Without such participation, loyalist groups will continue to dominate the policing apparatus, which has proved dangerous to the welfare of Catholic citizens. Only by working within this new framework will the Catholic community be in a position to oversee the work of the police and the success or the failures of the new structures.

CONCLUSION

Recent reforms in the police force and police accountability structures in Northern Ireland represent a significant advancement towards these goals. Where the police force lacks public trust, only a system independent of the police can win the support of the Catholic community. Because of the benefits of internal review, some powers of review may best be devolved back to the responsibility of the police at some point in the future. This devolution should not happen, however, until the police force is significantly reformed and enjoys the support of all sectors of the community. Considering the long

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151. *See* Dan Keenan, *Still Working to Take Politics Out of Policing*, The Irish Times, Dec. 29, 2001 at 14.

152. *See generally Different Name, Same Bigots*, An Phoblacht, Nov. 8, 2001; *Sinn Fein – Response to the Revised Implementation Plan on Policing*, Aug. 29, 2001.

153. See Samuel Walker and Vic W. Bumphus, The effectiveness of Civilian Review, Observations on Recent Trends and New Issues Regarding the Civilian Review of Police 11(4) (1992) at 19.

154. *See* Patten Endorses New Police Plan; A Powerful Appeal from One of the Architects of the New Police Service, Belfast Telegraph, Nov. 28, 2000.

history of abuses by the RUC and the British army, this support may be a long time in coming.

THE INTERNET: EQUALIZER OF FREEDOM OF SPEECH? A DISCUSSION ON FREEDOM OF SPEECH ON THE INTERNET IN THE UNITED STATES AND INDIA

Farzad Damania*

INTRODUCTION

International law states that everyone has the right to freedom of opinion and expression.[1] These rights help underpin democracy and public participation.[2] New technologies, such as the Internet, provide an unprecedented opportunity to promote freedom of speech globally. Regrettably, some democratic governments are busy enacting regulations that inhibit the Internet's power.[3] This paper discusses freedom of speech[4] on the Internet within two of the world's largest democracies, the United States and India.[5]

In the United States and India, similar constitutional provisions have yielded completely different standards for the protection of speech in

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1. *See* International Covenant on Civil and Political Rights, *opened for signature* Oct. 5, 1977, art. 19(2), 999 U.N.T.S. 171,179 (entered into force Mar. 23, 1976), which states, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;" *See also*, Universal Declaration of Human Rights, art. 19, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), which states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

2. *See Article 19: The Global Campaign for Free Expression, available at* http://www.article19.org/homepage.asp (last visited Jan. 28, 2002).

3. *See* Human Rights Watch, *Freedom of Expression on the Internet, available at* http://www.hrw.org/wr2k/issues-04.htm (last visited Feb. 4, 2002).

4. "Speech," as used in this article, includes words, pictures, sculptures, non-verbal symbols, etc. This article focuses on freedom of speech as applied to obscene speech.

5. H.R. 572, 106th Cong., 2d Sess. This Resolution, titled Indian Prime Minister's Visit to the United States, states:

> Whereas the United States and the Republic of India are two of the world's largest democracies that together represent one-fifth of the world's population and more than one-fourth of the world's economy; Whereas the United States and Indian share common ideals and a vision for the 21st century, where freedom and democracy are the strongest foundations for peace and prosperity;

conventional media.[6] Recent legislation by the United States and India reflect the emergence of new standards for the regulation of Internet speech. These new standards aim at preserving distinctions that have evolved in conventional media. Because of the very nature of the Internet, however, these distinctions cannot be sustained with the Internet. The Internet could, nevertheless, act as an equalizer of freedom of speech.

Part I of this article gives a brief background on the development of the Internet[7] and the constitutional issues arising from its use. With the ever-increasing number of Internet users,[8] complex jurisdictional questions for constitutional actions must be addressed.

Despite similarities in their constitutional provisions, the United States and India have their own unique jurisprudence on freedom of speech. Consequently, they differ as to what is and what is not acceptable free speech. This article comparatively analyzes obscenity laws in the United States and India. Part II summarizes the respective obscenity standards in the United States and India while debating whether these tests can be applied to the Internet.

Political[9] and economic[10] considerations forced the regulation of the Internet in diverse areas. While regulators in the United States mainly deal with obscenity,[11] regulators in India initially focused their attention on

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6. Conventional media includes press, radio, television, etc, i.e., means of communication excluding the Internet.

7. The discussion on the Internet's development excludes commentary on who invented it.

8. As of September 2000, estimated users worldwide jumped to 377.65 million, up from 201.05 million the previous year. *See* Nua, *How Many Online?, available at* http://www.nua.ie/surveys/how_many_online/world.html (last visited Jan. 28, 2002). By 2000, the United States alone had 148.03 million users. *See id.* at http://www.nua.ie/surveys/how_many_online/n_america.html (last visited Jan. 28, 2002). The number of Internet users in India increased to 4.5 million in March 2000, up from 800,000 in May 1999. *See id.* at http://www.nua.ie/surveys/how_many_online/asia.html (last visited Jan. 28, 2002).

9. The public outcry over Internet porn is cited by the Congress as one of the main reasons for enacting the Communications Decency Act [hereinafter CDA]. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway, available at* http://www.law.indiana.edu/fclj/pubs/v49/no1/cannon.html (last visited Jan. 28, 2002). Introducing the CDA, Senator Exon declared, "Barbarian pornographers are at the gate and they are using the Internet to gain access to the youth of America." *Id.*

10. A study by a London-based telecom consultancy projected a $ 54 million loss to Videsh Sanchar Nigam Limited [hereinafter VSNL] by the year 2001 due to *Internet Telephony. See The Financial Express Thursday, August 21 1997, available at* http://www.financialexpress.com/fe/daily/19970821/23355653.html (last visited March 19, 2002).

11. The CDA and the Child Online Protection Act [hereinafter COPA] deal primarily with pornography on the Internet. Numerous states have also focused on the issue of Internet obscenity. *See* http://www.aclu.org/issues/cyber/censor/stbills.html (last visited March 19, 2002).

protecting state revenue.[12] Only recently has India made a legislative effort to control obscenity on the Internet. [13] Part III analyzes the different approaches of the United States and India and discusses their legislative efforts at controlling obscenity on the Internet.

This article concludes, revealing that conventional free speech jurisprudence, enunciated by the courts in the United States and India, cannot be sustained with the Internet. The Internet's sheer volume of information[14] necessitates that regulation occur through technological tools,[15] which are bound to have limitations.[16] Applying conventional tests using these imperfect tools could have a dreadful effect on freedom of speech. It is therefore critical that the judiciaries of the leading democracies recognize the potential dangers and protect freedom of speech on the Internet. If liberal standards are adopted for the Internet, there could be a uniform international standard for the freedom of speech.

PART I - THE INTERNET

A. *History*

The Internet is an outgrowth from a 1969 U.S. military program called ARPANET[17]. The next phase of development came in the 1970s when universities and research centers all over the United States were given access.[18] In the mid-1980s, the National Science Foundation took control of ARPANET and expanded its use to civilian networks.[19] In the last decade, the introduction

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12. India has mainly targeted Internet Telephony and other software packages. See discussion Infra Part III C

13. *See* Information Technology Act, 2000 (2000) [hereinafter IT Act].

14. Internet traffic is reported to double every three months. *See. A Framework for Global Electronic Commerce, available at* http://www.ecommerce.gov/framewrk.htm (last visited March 19, 2002)

15. Internet filtering and blocking software, proxy servers, ratings, green spaces, etc. are some of the common technological tools now in use. *See Filtering tools available at* http://www.media-awareness.ca/eng/webaware/tipsheets/filtering.htm (last visited March 19, 2002)

16. The COPA commission in its final report dated October 20, 2000, recognizes that several of the child protective technologies could have an adverse impact on privacy, First Amendment values, and law enforcement. *See Final Report of the COPA Commission Presented to Congress, October 20, 2000, available at* http://www.copacommission.org/report/ (last visited March 19, 2002).)

17. ARPANET is a network system developed by the Advanced Research Project Agency, through the Department of Defense, contributed by elite scientists from the RAND Corporation, MIT, and other scientific laboratories. *See History of ARPANET, available at* http://www.dei.isep.ipp.pt/docs/arpa.html (last visited March 19, 2002)

18. *See A Brief History of the Internet, available at* http://www.isoc.org/internet/history/brief.shtml (last visited March 19, 2002).

19. *See* Reno v. ACLU, 521 U.S. 844, 850 (1997) (quoting findings of fact of ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996)).

of the World Wide Web dramatically changed public access to the Internet.[20] The Internet, as we know it today, has experienced extraordinary growth.[21] Government or state-owned institutions no longer control the Internet; multinational corporations now mainly control it.[22]

India was a late entrant to the Internet revolution. In 1987, the first dial-up e-mail network was set up. In 1995 commercial Internet access was finally introduced.[23] Thereafter, India experienced a technological revolution. Over forty private and government Internet Service Providers [hereinafter ISP] have emerged with over four million users[24] by March 2000.[25]

The rapid growth of the Internet is bound to cause numerous constitutional implications. Freedom of speech, right to privacy, right to information, and property rights are some key issues that are presently being debated. Other issues will undoubtedly arise as the Internet continues to expand. [26] This article focuses, however, on the issue of freedom of speech as it relates in particular to obscenity on the Internet in the United States and India.

B. Jurisdiction over the Internet

The Internet is multi-jurisdictional by nature. Traditional notions of jurisdiction[27] would have to be modified to activities carried out over the

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20. *See CDA*, *supra* note 18.

21. *See* Reno, 521 U.S. at 850.

22. *See* Andrew L. Shapiro, *Street Corners in Cyberspace*, THE NATION, July 3, 1995, *available at* http://www.corpwatch.org/trac/internet/whoowns/streetcorners.html. State control of the Internet in the United States has been transferred to the private sector. *See id.* The federal government gradually transferred control to companies such as IBM and MCI, as part of a larger plan to privatize the Internet. *See id.* Shapiro warns of the danger of having "corporate giants" in charge. *See id.*

23. *See History of GIAS available at*, http://www.vsnl.com/english/userguide/giashist.htm (last visited March 19, 2002)

24. *See* Nua, *How Many Online?*, *available at* http://www.nua.ie/surveys/how_many_online/asia.html (last visited Jan. 28, 2002).

25. *See* MICHAEL CONNORS, THE RACE TO THE INTELLIGENT STATE: CHARTING THE GLOBAL INFORMATION ECONOMY INTO THE 21ST CENTURY (170 to 212, 1996) Connors states, "India is . . . an example of a relatively new phenomenon, the 'info-tiger economy,' one which exists within the broader economy but depends relatively little upon it; it operates according to its own rules and transcends national borders with unprecedented ease." *Id.*

26. *See* Marc L. Caden & Stephanie E. Lucas, *Accidents on the Information Superhighway: On-Line Liability and Regulation*, 2 RICH. J.L. & TECH. 3 (1996), *available at* http://www.richmond.edu/jolt/v2i1/caden_lucas.html; *See also*, Laurence H. Tribe, *The Constitution in Cyberspace*, *available at* http://www.sjgames.com/SS/tribe.html (last visited Jan. 28, 2002).

27. This section does not discuss the complex jurisdictional questions raised by the Internet. Traditional implies the present State-controlled jurisdiction of the Internet using conflict of law theories. A Report of the President's Working Group on Unlawful Conduct on the Internet, March 2000, chaired by the Attorney General, recommended the following:

"[A]ny regulation of unlawful conduct involving the use of the Internet should

Internet,[28] as normal constraints on location are inapplicable. The Internet allows persons from geographically distinct jurisdictions to transact with each other, where little or no sensitivity is given to the potential consequences of their actions in the jurisdiction within which they are operating.[29] Consequently, a stronger jurisprudence on conflict of laws should be developed for the Internet.

Within the United States, each state has separate laws that govern the activities of its citizens. As a result, considerable jurisprudence has emerged regarding conflict of laws in the United States. Where Internet-based disputes involve citizens of two separate jurisdictions, U.S. courts use conflict of law rules to determine what law should govern. That being the case, only a few decisions on Internet-related disputes have actually discussed the law relating to jurisdiction on the Internet. [30] Normally, in the United States, two general

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> be analyzed through a policy framework that ensures that online conduct is treated in a manner consistent with the way offline conduct is treated, in a technology-neutral manner, and in a manner that takes account of other important societal interests, such as privacy and protection of civil liberties;"

The Electronic Frontier: The Challenge of Unlawful Conduct Involving the Use of the Internet available at http://www.usdoj.gov/criminal/cybercrime/unlawful.htm (last visited March 19, 2002) In India, Internet-related disputes fall under the jurisdiction of the newly created Central Tribunal for Adjudication of Cyber Disputes. *See* Ministry of Information Technology New Delhi, G.S.R. 791(E) Cyber Regulations Appellate Tribunal (Procedure) Rules, 2000, *available at* http://www.mit.gov.in/rules/main/htm (Oct. 17, 2000).

28. Speaking on the matter of jurisdiction as it applies to the Internet, one author writes, "[T]here exists in international law a type of territory [called] 'international space.' Currently there are three such international spaces: Antartica, outer space, and the high seas. For jurisdictional analysis, cyberspace should be treated as a fourth international space." Darrel Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. TECH. L. REV. 69 (1998), *available at* http://www.mttlr.org/volfour/menthe_art.html (last visited March 19, 2002). Others argue that the Internet should be regulated through the development of a parallel system of jurisprudence that is uniform for the entire realm of cyberspace. *See* David R. Johnson & David G. Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996), *available at* http://www.cli.org/X0025_LBFIN.html (last visited March 19, 2002) They state that conventional methods of ascertaining jurisdiction have no place in cyberspace, neither from the point of view of enforcement of rules and regulations nor from the traditional understanding of the need for distinct territorially separate jurisdictional demarcations. *See id.* Another states that regulation in cyberspace "is a function of the constraints of law, of norms, of the market, and of . . . 'code.'" Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999). Finally, some others make a convincing argument that we should rely on traditional bodies of law, "[o]r at least start with those bodies of law and make adjustments and modifications to reflect the [Internet]." Andrew L. Shapiro, Symposium, *Constitutional Issues Involving Use of the Internet: The Disappearance of Cyberspace and the Rise of Code*, 8 SETON HALL CONST. L.J. 703 (1998); *See also*, Henry H. Perritt, Jr., Symposium, *Will the Judgment-Proof Own Cyberspace?*, 32 INT'L LAW. 1121 (1998).

29. *See* Rahul Matthan, *Information Technology Law*, *available at* http://www.naavi.com/cyberlaws/cyberlawsfr.htm.

30. *See* Thomas P. Vartanian, *The Confluence of International, Federal, and State Jurisdiction over E-Commerce (Part II)*, *available at* http://www.gcwf.com/articles/journal/jil_dec98_2.html#27 (last visited March 19, 2002).

principles govern a court's assertion of personal jurisdiction over a foreign party: state long-arm statutes and the Due Process Clause of the Constitution.[31]

India's jurisprudence on jurisdictional aspects of the Internet is virtually non-existent. Due to the strong unitary model of government followed in India, interstate disputes never rise to the level of private international law. As a result, there has been little development of conflict of law rules in India. India's courts have had few opportunities to actually assume jurisdiction over foreign subjects. However, when these opportunities occur, India's courts follow universal conflict of law theories.[32] Now with recent passing of the Information Technology Act 2000 [hereinafter IT Act], India finally has a long-arm statute to assert its jurisdiction in court.[33]

Jurisdiction with respect to freedom of speech concerns like who can claim the right and file a complaint differs between the United States and India. In the United States, freedom of speech is guaranteed to citizens, as well as foreigners; however, in India, freedom of speech is only offered to its citizens.[34] This distinction further complicates the already complex jurisdictional issues associated with the Internet.

PART II – OBSCENITY

A. Constitutional Borrowing

The United States and India have similar free speech provisions in their Constitutions. The First Amendment to the U.S. Constitution provides, "Congress shall make no law... abridging the freedom of speech."[35] Similarly, Article 19(1) of India's Constitution provides, "All citizens shall have the right - (a) to freedom of speech and expression."[36] The similarity draws from the framers of India's Constitution borrowing from their U.S. counterparts.[37] Even today, the Supreme Court of India refers to U.S. decisions concerning the First

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31. *See* Matthan, *supra* note 29.

32. *See id.*

33. *See* INFORMATION TECHNOLOGY ACT, 2000 (2000). Section 75 provides the following:

> "(1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality. (2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India."

Id. § 75.

34. *See* Hans Muller v Supdt. (1955) 1 S.C.R. 1285, 1298.

35. U.S. CONST. amend. I.

36. INDIA CONST. art. XIX.

37. *See* 1 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 489 (3d edition 1983).

Amendment.[38] Despite the similarities, however, the United States and India have developed distinct standards for freedom of expression.

B. United States

The right of free speech is not absolute in the United States.[39] The government may restrict speech in one of two ways.[40] First, it may limit speech based on its content. Courts, however, subject all content-based regulations of speech to a strict scrutiny analysis, requiring that the regulation serve a compelling state interest through narrowly tailored means.[41] The second way the government may abridge speech is by enacting statutes that seek to regulate not the content of speech, but rather some effect of it. If a statute regulates speech in the streets, parks, or other public forum, it must serve a significant governmental interest through narrowly tailored means.[42]

Obscenity is excluded from First Amendment protection. This stems from the fact that the framers of the First Amendment did not intend for all speech to be protected.[43] The Supreme Court recognized that certain types of speech, such as obscenity, are harmful to society and are therefore not protected by the First Amendment.[44] Even so, the Court continues to apply a strict scrutiny test to statutes abridging so-called "unprotected" speech.[45]

The Supreme Court first addressed the issue of First Amendment protection for obscenity in *Roth v. United States*.[46] In *Roth*, the Court upheld the convictions of two defendants for violating California and federal obscenity statutes.[47] Roth was convicted under the federal obscenity statute for mailing obscene advertisements and books.[48] The majority opinion concluded

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38. *See* Express Newspapers (Private) Ltd. v. Union of India (1959) 1 S.C.R. 12. In that case, Justice Bhagwati stated, "[that] the fundamental right to the freedom of speech and expression enshrined in...our constitution is based on (the provisions in) Amendment I of the Constitution of the United States... and it would be therefore legitimate and proper to refer to those decisions of the Supreme Court of the United States of America in order to appreciate the true nature, scope and extent of this right in spite of the warning administered by this court against use of American and other cases." *Id.*

39. *See* Breard v. Alexandria, 341 U.S. 622, 642 (1951) (holding the constitutional guarantee of free speech is not absolute).

40. *See* Laurence Tribe, American Constitutional Law, 580. (Foundation Press Inc., 1978)

41. *See* Widmar v. Vincent, 454 U.S. 263, 270 (1981).

42. *See* Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (holding "[t]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.").

43. *See* WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 346 (2d ed. 1999).

44. *See* Miller v. California, 413 U.S. 15, 23 (1975).

45. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

46. *See* Roth v. U.S., 354 U.S. 476 (1957).

47. *See id.* at 493-94.

48. *See id.* at 479-94.

that obscene speech was not afforded protection by the First Amendment.[49] The Court emphasized that the First Amendment protects any speech that has even the smallest redeeming social value, unless it infringes upon other more important freedoms.[50] The Court defined obscene material as that which "deals with sex in a manner appealing to prurient interest."[51] The majority enunciated the following standard for determining whether material is obscene: "whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."[52] The Court concluded that obscenity is widely regarded as lacking any social importance and thus is not entitled to First Amendment protection.[53]

In 1973, the Supreme Court revisited the issue of obscenity. In *Miller v. California*,[54] the Court reviewed the defendant's conviction for using the mail to send unsolicited brochures depicting obscene matter in violation of California's obscenity statute.[55] The majority announced a new three-part test for defining obscenity.[56] The first part asks "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."[57] The second part asks "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[58] Finally, the third part asks "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[59] The Court determined that "contemporary community standards" should be used to determine obscenity and are "not 'national standards,'" which the Roth Court never intended to be used and which would prove unreasonable anyway.[60] It stated, "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City."[61] Nevertheless, the vagueness of this test has compounded the difficulty of defining what is obscene.[62] This has caused a shift in states' policies dealing with obscenity, where instead of

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49. *See id.* at 481-85.
50. *See id.* at 484-85.
51. *Id.* at 487.
52. *Id.* at 488-89.
53. *See id.* at 485.
54. *See* Miller v. California, 413 U.S. 15 (1973).
55. *See id.* at 15-18.
56. *See id.* at 23-25.
57. *Id.* at 24. The *Miller* Court defined prurient interest as "a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." *Id.* at 18.
58. *Id.* at 24.
59. *Id.*
60. *Id.* at 37.
61. *Id.* at 32.
62. *See* BURNHAM, *supra* note 43, at 348.

closing "adult" establishments under anti-obscenity laws, cities are concentrating efforts on regulating them through licensing and zoning.[63]

Currently the problem appears to be how to apply the "contemporary community standards" portion of the *Miller* test to the Internet. The Supreme Court faced similar challenges in the past when previous new media started to transmit indecent or otherwise impermissible material.[64] Ever changing technology forced the Court to consider not only the content of the speech, but also the means used to convey it.[65] In applying obscenity laws to media, courts tend to treat each one uniquely, including television, radio, books, newspapers, etc.[66] Because the various media approach and reach audiences differently, determining the constitutionality of applying obscenity laws has been anything but uniform.

Aside from its vagueness, applying the *Miller* test to the Internet poses many other problems.[67] First, it requires judges and juries to determine what the "community standards" are and to engage in literary criticism. Their non-expertise, as well as the quantum of information that must be scrutinized, could overwhelm most judges and juries. Second, the reference to "contemporary community standards" necessarily means local standards. The Internet's very premise though is universal access, universal content, and a universal audience. This makes applying that part of the *Miller* test to the Internet almost impracticable,[68] as attempting localized regulation of the Internet would only exacerbate the already confusing state of free speech regulation on the Internet.[69]

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63. *See id.*

64. *See, e.g.*, Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

65. *See id.*

66. *See* JEROME A. BARRON & C.THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS §4.9 and §10 (1979).

67. *See* BURNHAM, *supra* note 43, at 347

68. The application of contemporary community standards could never be met, for instance, when a corporation (developing filters and ratings) with office locations throughout the country has to evaluate whether or not certain Internet sites should be blocked. *See* Eileen Candia, Comment, *The Information Super Highway – Caution – Road Blocks Ahead: Is the Use of Filtering Technology to Prevent Access to "Harmful" Sites Constitutional?*, 9 TEMP. POL. & CIV. RTS. L. REV. 85, 96 (1999).

69. First, with respect to how to regulate the Internet, there are different forms that Internet regulation can take. The alternative approaches to content regulation are:

1. Parental Supervision or regulating through parental control; *See* ACLU, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet*, *available at* http://www.aclu.org/issues/cyber/burning.html (last visited Feb. 1, 2002).
2. Publication Restriction or restricting the distribution of certain speech, i.e., child pornography; *See id.* (The CDA and COPA, discussed in Part III of this article, were attempts at content regulation through this type of approach.)
3. Filtering or using technology to block the display of certain content. *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996); *See also*, Thomas B. Nachbar, Article, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215 (2000). Content

C. *India*

Freedom of speech, though guaranteed, is not absolute in India.[70] Unlike the U.S. Constitution, the text of India's Constitution clearly sets out restrictions on free speech.[71] Laws that adhere to sub-clause (2) of Article 19 are expressly permitted by India's Constitution, as they are presumed to be constitutionally valid.[72] The freedom of speech guarantee under Article 19(1)(a) can be subject to reasonable state restriction in the interest of decency or morality.[73] The legislature's judgment, however, is subject to judicial review.[74] India's courts apply the test of obscenity[75] laid down by Chief Justice Cocburn in the *Hicklin's* case.[76] Obscenity in India is defined as "offensive to modesty or decency; lewd, filthy and repulsive."[77] Applying the *Hicklin's* test in *Ranjit*, the Supreme Court of India upheld a conviction under

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filtering can be classified into four categories as follows:

a. Blacklisting or blocking access to those sites that are blacklisted; *See* Nachbar, *supra*.
b. Whitelisting or blocking access to all sites except those that are whitelisted; *See id.*
c. Content Examination Software or software that blocks certain words and phrases; *See id.*
d. Rating Based Filtering or applying ratings to content where the software excludes content if it assigned a particular rating, i.e., through the Internet Content Rating Association. *See id.*

With respect to who should regulate content on the Internet, legislation in both the United States and India places the burden on the content provider to evaluate their own content. See discussion infra Part III B & C Third-party evaluation, i.e., rating agencies (government and non-government) may also take on the responsibility of regulating content on the Internet. The debate between filtering and publication restrictions and the one between private and governmental content regulation is beyond the scope of this article. For a detailed discussion, *see* Laurence Lessig, Symposium, *Law and the Internet: Privacy, Jurisdiction, and the Regulation of Free Expression: What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998); *See also*, Nachbar, *supra*.

70. See INDIA CONST. art. XXXII. This article guarantees a "right to Constitutional Remedies." *Id.* Furthermore, clause (4) provides, "The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution." *Id.* cl. 4.

71. *See id.* art. XIX. Clause (2) provides the following:

> Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

See id. cl. 2.

72. *See* INDIA CONST. art. XIX, cl. 2.

73. *See* id. cl. 2.

74. *See* SEERVAI, *supra* note 37, at 490

75. *See* SEERVAI, *supra* note 37, at 530.

76. (1863) 3 QB 360, 371

77. Ranjit v. State of Maharashtra, 1965 A.I.R. (S.C.) 881, 885.

the Indian Penal Code[78] for being in possession, for the purpose of sale, a copy of D.H. Lawrence's *Lady Chatterley's Lover*. [79] The Court held that an immodest representation may not be reasonably restricted in the interest of "decency and morality" if it leads to the propagation of ideas or information of public interest.[80] It stated that the test of obscenity is whether the publication, read as a whole, has a tendency to deprave and corrupt those whose minds are open to such immoral influences, and therefore each work must be examined by itself.[81] With respect to art and obscenity, the Court held that "the art must be so preponderating as to throw obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked."[82] The Court concluded that the test to adopt in India, emphasizing community mores, is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech.[83]

India now faces the challenge to apply the Supreme Court's interpretation of the "reasonable restriction" test to the Internet. As previously mentioned, the Court emphasized that each work must be individually examined, applying community mores.[84] The Internet, by its sheer volume, however, defies the application of this test.

Like the First Amendment to the U.S. Constitution, India's Constitution creates an absolute prohibition against limiting free speech without any exceptions. Exceptions, however, have evolved by judicial decisions, although their scope is limited.[85] The fact that speech is presumptively constitutional in India, however, underscores the difficulty of reading into the "reasonable restriction" test, the limiting tests enunciated by the U.S. Supreme Court.[86]

Both U.S. and India's courts recognize the differences in the respective freedom of expression provisions.[87] For example, Justice Douglas held that pre-censorship of cinema films is constitutionally void, stating that "if we had a provision in our Constitution for "reasonable" regulation of the press such as India has included in hers there would be room for argument that censorship in the interest of morality would be permissible."[88]

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78. Section 292 of the Indian Penal code was held constitutional, as it did not go beyond "obscenity," which fell directly within the words "public decency or morality" mentioned in Article 19(2). *See id.* at 887

79. *See id.* at 887.

80. The court cited the example of books on Medical science as being informative. *See id.* at 887

81. *See id.* at 888.

82. *See id.*

83. *See id.* at 889.

84. *See id.*

85. *See* SEERVAI, *supra* note 37, at 490.

86. *See id.*

87. *See* Kingsley International Pictures Corp. v. Regents of the University of New York, 360 U.S. 684, 698 (1959).

88. *Id.*

India's courts in the past have turned to U.S. First Amendment cases for guidance.[89] Nevertheless, the United States and India have adopted different tests to judge obscenity. The real difference, however, appears to be a question of degree,[90] which varies according to the moral standard of the community in question. [91] It would be fair to state though that the "reasonable restriction" test, as interpreted by India's Supreme Court, imposes greater restrictions on freedom of speech than the tests followed in the United States.[92]

PART III – OBSCENITY ON THE INTERNET

A. *Free Speech Jurisprudence and the Internet*

The United States has a complex First Amendment jurisprudence that varies the protection offered free speech according to form.[93] Similarly, India developed its own free speech jurisprudence that applies a "reasonable restrictions" test based on eight listed restrictions.[94] These respective restrictions as applied to the Internet raise some important freedom of speech issues in both the United States and India.[95]

B. *United States*

First Amendment jurisprudence varies free speech rights according to the technological medium that is used for expression.[96] Historically, print media (newspapers and magazines) receives the greatest consideration and leniency by U.S. courts while broadcast media (television and radio) the least.[97] The difficulties in applying traditional free speech concepts to such a widely different medium has not discouraged the Congress in its efforts to regulate the Internet. Under the auspices of "[its] compelling interest in protecting children

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89. *See* Ranjit v. State of Maharashtra, 1965 A.I.R. (S.C.) 881, 889-90. The U.S. tests were considered before finally arriving at the "reasonable restriction" test used in India. *See id.*

90. *See id.* at 885. Justice Hidayatullah stated, "Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn." *Id.*

91. *See id.* at 889. Justice Hidayatullah used "judged by our national standards" to convey different standards for different countries. *See id.*

92. *See* Kingsley, 360 U.S. at 684; *See* Ranjit, 1965 A.I.R. (S.C.) at 881; *See also*, DURGA DAS BASU, SHORTER CONSTITUTION OF INDIA (1988).

93. These include the marketplace, self-fulfillment, social outlet, and political theories of free speech. (CLARIFY SENTENCE; NEED SOURCE, CITE)

94. See INDIA CONST art. XIX. Clause (2)

95. For a detailed discussion on U.S. Congressional and State actions to regulate the Internet, *see* Caden & Lucas, *supra* note 26.

96. Southeastern Promotions, Ltd v. Conrad, 420 U.S. 546, 557

97. *See* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 636-40 (1994).

from exposure to sexually explicit material,"[98] Congress enacted legislation to regulate and protect children using the Internet.[99]

In response to public concern over minors' seemingly unhindered access to indecent material on the Internet, Congress passed the Telecommunications Act of 1996 [hereinafter Act].[100] Title V of the Act, commonly referred to as the Communications Decency Act [hereinafter CDA], criminalized indecent speech on the Internet aimed at minors.[101] It prohibited and punished intentional transmission of obscene or indecent communication to recipients under the age of eighteen (the "indecent transmission" provision),[102] as well as intentional sending or displaying of patently offensive messages in any manner to the same (the "patently offensive" display provision).[103] The Act immediately sparked controversy. On the very day President Clinton signed the bill into law, a group of plaintiffs, led by the American Civil Liberties Union [hereinafter ACLU], filed suit against the Attorney General and the Department of Justice challenging the constitutionality of the CDA.[104] Following the district court's grant of a temporary restraining order against its enforcement, several additional plaintiffs filed suits. The cases were consolidated and a three-judge panel convened, which unanimously granted a preliminary injunction against enforcing the CDA's provisions.[105] The

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98. *See* Reno v. ACLU, 521 U.S. 844, 875 (1997). The Supreme Court acknowledged that it "[has] repeatedly recognized the governmental interest in protecting children from harmful material."

99. *See, e.g.*, Child Online Protection Act, H.R. 3783, 105th Cong. (1998); Internet Indecency Act, S. 1482, 105th Cong. (1997); Safe Schools Internet Act, H.R. 3177, 105th Cong. (1998); E-Rate Policy and Child Protection Act, H.R. 3442, 105th Cong. (1998); Internet Freedom and Child Protection Act, H.R. 774, 105th Cong. (1997); Communications Privacy and Consumer Empowerment Act, H.R. 1964, 105th Cong. (1997); Family-Friendly Internet Access Act, H.R. 1180, 105th Cong. (1997).

100. *See* Telecommunications Act of 1996 § 502, 47 U.S.C.A. § 223 (West 2001).

101. *See id.*

102. *See id.* Section (a)(1)(B) provides,

> "Whoever . . . by means of a telecommunications device knowingly . . . initiates the transmission of any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient . . . is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication . . . shall be fined . . . or imprisoned not more than two years, or both." *Id.* § 223(a)(1)(B).

103. *See id.* § 223(d)(1). Section (d)(1) provides,

> "Whoever in interstate or foreign communications knowingly uses an interactive computer service to send to a specific person or persons under 18 years of age , or uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that . . . depicts or describes . . . patently offensive . . . sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication . . . shall be fined . . . or imprisoned not more than two years, or both." *Id.*

104. *See Cyberspace must be free, available at* http://www.aclu.org/issues/cyber/hmcl.html. (last visited March 19, 2002).

105. *See* ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

Government appealed the district court's decision, as the Supreme Court granted expedited jurisdiction to review the constitutionality of the CDA.[106] On June 26, 1997, the U.S. Supreme Court decided its first ever case involving the Internet, *Reno v. ACLU*.[107] The Court ruled that the CDA violates the First Amendment's guarantee of freedom of speech.[108]

The majority opinion recognized that "[t]he Internet is 'a unique and wholly new medium of worldwide human communication.'"[109] It found that "'cyberspace' [is] located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."[110] It held that the CDA had vagueness problems, which undermined its purpose,[111] stating that it "suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[112]

Reno's dissenting opinion agreed with the majority that the CDA placed too much of a burden on adult speech.[113] However, the dissent viewed the CDA as a form of "cyberzoning" akin to a time, place, and manner restriction, and not as a content-discriminatory ban.[114] It concluded that the law was constitutional in part "as applied to a conversation involving only an adult and one or more minors, *e.g.*, when an adult speaker sends an e-mail knowing the addressee is a minor."[115]

After the *Reno* decision, Congress attempted to remedy the constitutional defects of the CDA with the Child Online Protection Act [hereinafter COPA].[116] Before COPA went into effect, plaintiffs similar to the *Reno*

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106. *See* Reno v. ACLU, 521 U.S. 844, 883 (1997). The Court based its expedited jurisdiction on 47 U.S.C.A. § 561 (1997). *See id.*

107. *See id.* at 882-85.

108. *See id.*

109. *See id.* at 850.

110. *Id.* at 851.

111. *See id.* at 870-79. The CDA was aimed at "protecting minors from potentially harmful [or indecent] materials" available on the Internet. *Id.* at 871.

112. *Id.* at 874.

113. *See id.* at 888.

114. *See id.* at 893.

115. *Id.* at 892. For a critical analysis of this case, *see* Mark S. Kende, Article, *The Supreme Court's Approach to the First Amendment in Cyberspace: Free Speech as Technology's Hand-Maiden*, 14 CONST. COMMENTARY 465 (1997).

116. *See* Child Online Protection Act, 47 U.S.C.A § 231 (West 2001). Section (a)(1) provides,

> "Whoever, in interstate or foreign commerce, by means of the World Wide Web, knowingly makes any communication for commercial purposes that includes any material that is harmful to minors, without restricting access to such material by minors pursuant to subsection (c), shall be fined not more than $50,000, imprisoned not more than 6 months, or both." *Id.* § 231(a)(1).

Section (e)(6) defines harmful material to minors as,

> "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that the average person . . . would find . . . is designed to appeal . . . to the prurient interest; depicts, describes, or represents, in a manner . . . offensive with respect to minors, an actual or simulated sexual

plaintiffs challenged the constitutionality of the statute, seeking injunctive relief.[117] The plaintiffs attacked COPA for placing an unconstitutional burden on adults for protected speech, for violating First Amendment rights of minors, and for being unconstitutionally vague in violation of the First and Fifth Amendments.[118] The defendants argued that the statute's requirements did not burden adults' access to constitutionally protected speech, and that the affirmative defenses represented technologically and economically feasible methods to restrict minors' access to targeted websites.[119] After hearing these arguments, the district court granted a preliminary injunction against the government.[120]

The government challenged the preliminary injunction to the United States Court of Appeals for the Third Circuit, which upheld the preliminary injunction.[121] The Third Circuit held that COPA required every web publisher to abide by the most restrictive and conservative state community standards in order to avoid criminal liability, and that this constituted an impermissible burden on constitutionally protected speech.[122] The Court noted, however, "[it] is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if it is not obscene by adult standards."[123] Nevertheless, it affirmed the sentiments of the District Court, stating, "'sometimes we must make decisions which we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.'"[124]

By introducing such new standards as "patently offensive" and "harmful to minors," Congress continues its effort to regulate obscenity on the Internet. The CDA digressed some from the *Miller* test, yet still adopted the language "patently offensive as measured by contemporary community standards."[125] Even so, the U.S. Supreme Court struck it down as unconstitutional.[126] Congress then digressed further, adopting the retooled community standard enunciated in COPA. That standard has since been abandoned, however,

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act . . or contact . . . or a lewd exhibition of the genitals or female breast; and [that]. . . lacks . . . literary, artistic, political, or scientific value for minors." *Id.* § 231(e)(6).

Section (e)(7) defines minor as, "any person under 17 years of age." *Id.* § (e)(7).

117. *See* ACLU v. Reno, 31 F. Supp.2d 473, 477 (E.D. Pa. 1999).

118. *See id.* at 478-79.

119. *See id.* at 479.

120. *See id.* at 492-99. For a detailed discussion on COPA, *see* Abbigale E. Bricker, Note, *You Can't Always Get What You Want: Government's Good Intentions v. The First Amendment's Prescribed Freedoms in Protecting Children From Sexually-Explicit Material on the Internet,* 6 RICH. J.L. & TECH. 17 (1999-2000), available at http://www.richmond.edu/JOLT/v6i3/note5.html (last visited Feb.2, 2002).

121. *See* ACLU v. Reno, 217 F.3d 162, 181 (3d Cir. 2000).

122. *See id.* at 177.

123. *Id.* at 173.

124. *Id.* at 180 (quoting ACLU, 31 F. Supp.2d at 498).

125. *See* Reno v. ACLU, 521 U.S. 844 (1997).

126. *See id.*

leaving U.S. courts to scrutinize Congress' newest standard, that of "harmful to minors."

U.S. courts are also developing a new regulatory standard for Internet speech, one which is technology driven.[127] As "a new medium of mass communication," the Internet compels courts to consider its special qualities in determining the constitutionality of such regulation.[128] Dealing with the CDA and COPA, U.S. courts extensively discussed existing technology and their effectiveness in regulating the Internet.[129] The Supreme Court, for instance, supported its holding on the CDA by adopting the district court's finding that "existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults."[130] This underscores the difficult technological aspect of regulating speech on the Internet and the significance it plays in the approaches continued to be taken by U.S. courts and legislative bodies.

C. *India*

Unlike the U.S. experience, which represents the difficulty in legislating free speech on the Internet, India's experience exhibits the contrary.[131] Until recently, India's government simply regulated the Internet through its state-owned[132] monopoly, Videsh Sanchar Nigam Limited [hereinafter VSNL].[133]

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127. *See* Candia, *supra* note 68, at 100. On March 25, 2002, the trial challenging Congress' third attempt at censoring the Internet (via the Children's Internet Protection Act, known as CIPA) got underway. *See Blocking Programs on Trial, available at* http://www.aclu.org/court/CIPA_Intro.html (last visited March 27, 2002). This legislation requires libraries that participate in certain federal programs to install "technology protection measures" on all of their Internet access terminals. *See id.*

128. *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996). The Internet possesses certain qualities as a medium of communication. First, the Internet presents very low barriers to entry. *See id.* Second, these barriers to entry are identical for both active and passive users. *See id.* Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. *See id.* Fourth and finally, the Internet provides significant access to all who wish to use it, and even creates a relative parity among users.

129. *See, e.g.*, Reno, 521 U.S. at 844; *See also*, ACLU, 217 F.3d at 162.

130. *Reno*, 521 U.S. at 876.

131. (As evidenced by the IT Act's easy passage and lack judicial review thereafter.

132. After the public issue of 1999, private investors held 45.6% of VSNL's equity. *See VSNL: Corporate Profile, available at* http://www.vsnl.net.in/english/corporate.html (last visited Feb. 2, 2002). In February 2002 the Cabinet Committee on Disinvestments (CCD) cleared the sale of 25% stake in VSNL to the Tata group. After the sale the Government's equity in VSNL stood diluted to 28% and the Tata group took over the management of VSNL. *See Tata Group to take over VSNL available at http://www.tata.com/tata_sons/media/20020212.htm* (last visited March 19, 2002)

133. *See VSNL: Corporate Profile, available at* http://www.vsnl.net.in/english/corporate.html (last visited March 19, 2002). VSNL was a government controlled corporation until February 2002, it controled all the international gateways of India. *See id.* All international communications, telephone calls, faxes, etc. had to be routed through the international gateways, which were under the control of VSNL. *See id.* VSNL was the only

Such regulation was not prompted by the desire to protect children, but rather to protect state revenue.[134]

In 1997, a website distributing a software package[135] was blocked by VSNL.[136] The software permitted text customers to browse the net graphically. VSNL charged exorbitant rates for similar graphic service, standing to lose potentially substantial revenue because of this competition.[137] The government justified the illegal blocking of the website on the grounds that the software distributed did not comply with the provisions for text accounts, thus threatening the quality of Internet services to all users.[138] India's courts, however, never tested this illegal blocking of a website.[139]

Through 1997 and 1998, VSNL continued their strong-arm tactics, including blocking websites[140] and threatening action against subscribers.[141] Angered by these occurrences, Dr. Arun Mehta, a free speech activist, petitioned the Delhi High Court.[142] Dr. Mehta argued that "[blocking websites] is wholly without basis in law and amounts to arbitrary and illegal censorship of the petitioner's Fundamental Right to freedom of speech, expression and information as well as an illegal denial of his right to freedom to practice

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ISP in India. *See id.* The ISP business opened to competition in November 1998. *See id.* As of March 31, 2000, seventy private ISPs were operating, while 315 new, private ISPs received licenses. *See id.* Despite the growth of private providers, VSNL still controls around 70% of the ISP market.*See id.* VSNL's exclusive rights in international telephony will continue until April 1, 2002. *See id.*

134. *See* Financial Express, *supra* note 10

135. Xtend Technologies Private Limited developed the software called Shellshock. *See* VSNL Blocks Shellshock SW Usage, *available at* http://www.indiatoday.com/ctoday/111997/buzz3.html#vsnl (last visited March 19, 2002)

136. *See id.* At the time, VSNL constituted the only ISP in India, using its monopoly status to install filters to stop direct access to websites.

137. *See Silencing the Net: The Threat to Freedom of Expression OnLine*, 8 HUMAN RIGHTS WATCH 2, May 10, 1996, at 1-2, *available at* http://www.epic.org/free_speech/intl/hrw_report_5_96.html. (last visited March 19, 2002)

138. *See* Dr. Raj Mehta, *Censorship and Internet in India: Can We Keep Internet in India Free?*, available at http://guide.vsnl.net.in/tcpip/columns/censorship/cc04.html (last visited Feb. 4, 2002)

139. *See id*This illegal blocking was probably never tested by the courts because VSNL lifted the block on the website in just a few months. During the time of its illegal blocking of the website, VSNL worked out a way to break Shellshock. *See id.* It achieved this by further restricting the environment on its text accounts to the extent that Shellshock could not function. *See id.*

140. *See* Mehta v. VSNL, 1998 Indian Dec. W.P. 4732 (Delhi H.C.), *available at* http://members.tripod.com/~india_gii/telepet.html. VSNL's blocking activities continued, as evidenced by an email it sent to its subscribers on Jan. 5, 1998, stating, "As you are aware, the usage of Telephony on the Internet is not permitted as per the terms and conditions of your Internet subscription and the Indian rules and regulations." *Id.*

141. *See id.* VSNL also made threats, as evidenced by the following statement included in a Jan. 5, 1998 email to its subscribers, stating, "You are advised not to use the Internet connection for Telephony or Fax applications. VSNL would be monitoring the use of Internet and those subscribers who are found to be violating the conditions of subscription, would be permanently debarred from using Internet services." *Id.*

142. *See id.*

his chosen profession."[143] VSNL responded, brushing aside the constitutional challenge and arguing that a contractual provision did not permit subscribers to use the telephony service for interactive voice or fax message.[144] The Court admitted Dr. Mehta's petition, which is now pending a final hearing.[145]

Entry of Private ISPs[146] to some extent forced VSNL to change its ways, although it continued[147] to control the international Internet gateways that every Indian ISP had to use.[148] In June 1999, VSNL once again used its control of the gateways to block subscribers' access to the news site of *Dawn*, a leading newspaper in Pakistan.[149] VSNL argued that the blocking was legal, under authority given by the Indian Telegraph Act.[150] The blockade proved ineffective, however, as websites began posting information, instructing how to break it and others like it.[151]

As the number of private ISPs increased, contractual restrictions and executive orders were not an effective way for VSNL to control the Internet. While the arbitrary dictate of VSNL attracted some attention,[152] India's government enacted the IT Act[153] without much opposition.[154]

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143. *Id.*

144. *See id.* VSNL relied on the standard account opening form signed by new subscribers, which stated that the account could not be used for telephony and fax services. *See id.* It argued, "It is denied that the no-provision of certain routes on the Internet amounts to a violation of the fundamental rights guaranteed under the Constitution." *Id.*

145. *See Status of VSNL censorship of IP-telephoney sites, available at:* http://members.tripod.com/~india_gii/statusof.htm (last visted March 19, 2002). The matter was last heard on August 9, 2001 when VSNL pressed for dismissal of the matter on the grounds that the petition was now moot as the sites were no longer blocked. *See id* Justice Mukul Mudgal did not dismiss the petition and gave liberty to Petitioners to approach the court for an immediate hearing if VSNL blocked any more sites. *See id* In reply to this petition VSNL strenuously argued against Internet telephony. *See id* Ironically a year later VSNL announced plans to launch its own Internet telephony service. *See VSNL ready to offer ATM-based Internet telephony, available at* http://www.zdnetindia.com/news/national/stories/24419.html (last visited March 19, 2002)

146. Pursuant to domestic and international pressure, as well as the WIPO agreement, private ISPs were finally allowed by November 1998. *See VSNL: Corporate Profile*, *supra* note 132.

147. VSNL's monopoly on international gateways ended in July 1999 with the issuance of guidelines for private international Gateways, *See India Permits Private Gateways, With Strings Attached, available at* http://asia.internet.com/asia-news/article/0,,161_650621,00.html(last visted March 19, 2002). The first four applications for private international gateways were cleared only in January 2002, *See India to Have 4 Private International Gateways Soon, available at http://asia.internet.com/asia-news/article/0,,161_653161,00.html* (last visited March 19, 2002).

148. *See* Rediff On The Net, *Who Ordered the Blockade in the First Place?*, *available at* http://www.rediff.com/computer/1999/jul/05dawn.htm.(last visited March 19, 2002)

149. *See id.*

150. *See id.*

151. *See* Rediff On The Net, *How to Break the Blockade*, *available at* http://www.rediff.com/computer/1999/jul/05dawn.htm.

152. *See* Human Rights Watch, *supra* note 3.

153. *See* IT ACT, 2000 (2000).

154. *See supra note* 131

The IT Act shares in creating an environment for electronic commerce.[155] It serves as the fundamental mechanism for legalizing electronic transactions,[156] but it also represents, however, an indirect attempt by India's government to impose restrictions on the freedom of speech and privacy on the Internet.[157] As it reflects the prevailing political culture, the IT Act embodies the view that the Internet is something that can and must be regulated before it gets out of control.

Section 67[158] of the IT Act is designed to deter publication and transmission of obscene information in electronic form.[159] Just like the U.S. COPA equivalent, this section departs from the test enunciated by the U.S. Supreme Court.[160] Under Section 67, "any material which is lascivious or appeals to the prurient interest or . . . tend[s] to deprave and corrupt persons who are likely . . . to read, see or hear the matter . . . " is considered obscene.[161] The section imposes dual punishment on offenders, including a fine and imprisonment up to a maximum term of ten years.[162]

Through the IT Act's passage, India's legislature ignored the "lewd, filthy and repulsive" and "preponderating social purpose" tests associated with earlier attempts at regulation.[163] Section 67 retains only the "tendency to deprave and corrupt" test.[164] It introduces two new standards, "lascivious" and "appealing to prurient interest,"[165] similar to COPA's introduction of new standards in the United States. These new standards even bear resemblance to COPA's provisions.[166] In addition, Section 67 appears to be as vague as COPA yet remains unchallenged,[167] reflecting the emergence of a new

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155. *See* IT ACT, 2000 (2000).

156. *See id.*

157. *See id.* §§ 29,67.

158. *See id.* § 67. This section, entitled "Publishing of information which is obscene in electronic form," provides, "Whoever publishes or transmits . . . in . . . electronic form, any material which is lascivious or appeals to . . . prurient interest or if [it] . . . tend[s] to deprave and corrupt persons . . . shall be punished . . . with imprisonment . . . and with fine . . ." *Id.*

159. *See id.*

160. *See* Ranjit v. State of Maharashtra, 1965 A.I.R. (S.C.) 881. (CONFIRM THIS CITE)

161. IT ACT, 2000 § 67 (2000).

162. *See id.*

163. *See id*

164. *See id*

165. *See id*

166. The IT ACT, 2000 uses language similar to COPA with respect to the "prurient interest" provision.

167. An online search for petitions challenging IT ACT, 2000 § 67 did not reveal any filings as of March 19, 2002. One interesting petition is the one pending in Bombay High Court, Writ Petition 2611 of 2001. *See Protecting Minors from Unsuitable Internet Material, available at* http://www.bombaybar.com/cyberreport/cover.html (last visited March 24, 2002). A letter from Jayesh Thakkar and Sunil Thacker to the Chief Justice of the Bombay High Court complaining about the proliferation of pornographic sites on the Internet was treated as a suo motu Writ Petition. The Division Bench of the High Court, presided over by the Chief Justice, passed an order appointing a Committee to suggest and recommend ways, measures, and means to protect/shield minors from access to pornographic and obscene material on the Internet. *See id.* The Committee comprehensively rejected the proposal for site blocking as being

regulatory standard for Internet speech in India.

Sections 29[168] and 69[169] of the IT Act give officers[170] unrestricted access to computer systems, apparatus, and data, disregarding the established standard of privacy.[171] Section 72,[172] however, imposes a penalty on an officer for breach of confidentiality or privacy.[173] Even so, this is inadequate to police the potential abuse of the sweeping powers given to officers under the Act.[174]

As already discussed, India's courts have thus far been left out of the debate on the freedom of speech on the Internet. Consequently, India's regulators have had a seemingly free ride in their attempts to regulate the Internet. The apparent reasons for this could be summarized as follows: (1) The arbitrary blocking of websites (such as that of Shellshock and Dawn) lasted only temporarily and, therefore, eluded necessary testing by India's courts; (2) The blocking of Internet telephony sites did not constitute actionable harm for either the owners or their attempted users, as the majority non-Indian owners could not seek redress in India's courts, and standard VSNL user contracts explicitly prevented account users telephony and fax applications; (3) The IT Act's infancy necessarily means India's courts have not had an opportunity to scrutinize it; and (4) India's Civil liberties organizations are not well equipped to handle constitutional issues related to freedom of speech on the Internet.

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technically and legally unsound. *See id.* The Committee's recommendations included requiring that minors be restricted to using machines in the common open space of Cyber Cafes and requiring that these machines be fitted with software filters providing for the maintenance of Internet Protocol address. *See id.* During the subsequent hearings, the Internet Users Association of India (IUAI) was permitted to intervene in the matter. *See id.* On February 13, 2002, the High Court passed an order stating that the report by the Special Committee be made available to the public online for download to enable comments and suggestions. *See id.* The matter stood over for further orders until April 13, 2002. *See id.*

168. *See* IT ACT, 2000 § 29 (2000). This section, entitled "Access to computers and data," provides, "the Controller or any person authorized by him shall, if he has reasonable cause to suspect that any contravention of the provisions of this Act . . . has been committed, have access to any computer system . . . for the purpose of searching . . . any information or data contained in . . . such computer system." *Id.* § 29(1).

169. *See id.* § 69. This section, entitled "Directions of Controller to a subscriber to extend facilities to decrypt information," provides, "If the Controller is satisfied that it is necessary . . . to do in the interest of . . . public order or for preventing incitement to the commission of any cognizable offence . . . direct any agency of the Government to intercept any information transmitted through any computer resource." *Id.* § 69(1).

170. The IT Act does not refer to "officer." *See id.* §§ 29, 69. It is being used here as a general term for the Controller and those authorized by him under the Act.

171. *See id.*

172. *See id.* § 72. This section, entitled "Penalty for breach of confidentiality and privacy," provides, "Save as otherwise provided . . . any person who . . . has secured access to any electronic record . . . or other material without the consent of the person concerned . . . discloses such electronic record . . . or other material to any other person shall be punished with imprisonment . . . or with fine . . . or with both." *Id.*

173. *See id.*

174. Despite numerous powers, the IT Act provides only two grounds for sanctioning erring officers. *See id*

The most significant reason though for the apparent unchallenged acceptance of government restrictions on the Internet seems to be India's citizens' nonchalant attitude towards the operation of these restrictions. With conventional media, the means and degree of regulation are relevant, sensitive considerations. In the case of the Internet, however, regulations have passed almost unnoticed because of the historically high degree of freedom enjoyed with its use. The mentioned restrictions seem a bit hollow when compared to the widespread availability of the Internet. The reality is that the Internet allows its users to easily access information that in the past may have been unobtainable, or at the very least difficult to procure, without much thought about the transmission.

CONCLUSION

Differences in the right to free speech in the United States and India lie largely in the means used to protect this right and the degree of freedom enjoyed. In the United States, adopting a standard that adequately identifies obscene material has been anything but easy. Conventional media, as well as the Internet, have made this a difficult task, as each created problems for the three-part test for obscenity originally offered in *Miller*. India has struggled too, as the standard, "preponderating social purpose," laid down in *Ranjit,* has proven impractical when applied. The vagueness and uncertainty surrounding these attempted regulatory standards, coupled with the Internet's inherent defiant attitude toward regulation, caused them to infringe upon adults' rights, while trying to protect children's interests.[175] Both legislatures, therefore, enacted new standards[176] for regulating obscenity on the Internet. These new standards aim to maintain the distinctions that have evolved with conventional media, while attempting to regulate the Internet more precisely. Even if they could overcome their vagueness problems, it seems improbable that such provisions could be implemented.[177] The Internet cannot relate to the current methods adopted by the United States and India that restrict freedom of speech. It can, however, temper the differences in these means, and in doing so, could act to equalize the means adopted to regulate freedom of speech.

As mentioned, the real difference in freedom of speech enjoyed in the United States and India is a question of degree.[178] This difference in degree is attributable to the reasonable restrictions provision[179] and the moral standard of the communities.[180] India has progressed from an authoritarian system[181] of control and is now attempting a legislative model of control, quite similar to

175. *See* Reno v. ACLU, 521 U.S. 844, 882-84 (1997).
176. These new standards include COPA and the IT Act.
177. *See* Candia, *supra* note 68, at 104
178. *See* Ranjit v. State of Maharashtra, 1965 A.I.R. (S.C.) 881, 885.
179. *See* INDIA CONST. art. XIX.
180. *See* Ranjit, 1965 A.I.R. (S.C.) at 889.
181. In so far as the state-owned monopoly, VSNL, was arbitrarily regulating the Internet.

that of the United States. In India, the degree of freedom enjoyed on the Internet has far exceeded any similar freedom enjoyed with conventional media. The Internet provides access to all who wish to use the medium, and has created a relative parity among all users.[182] Moreover, the sheer volume of information made available by the Internet has substantially diluted the difference in the degree of freedom enjoyed in the United States and India.

The expanse and indefinable growth of the Internet[183] suggests that technology will play a key role in any future attempt at its regulation.[184] The difficulty lies in finding mechanisms that will selectively police content without infringing on the protected speech rights of its users. A group of high-tech companies[185] is currently joining forces to develop such a system to cope with indecent materials in Cyberspace.[186] Its proposed effect on freedom of speech on the Internet can only be speculated at this time.[187] Government lawmakers and judiciaries are also proceeding with newly adopted standards.[188] It is imperative, however, that any and all attempts at regulating Internet speech be uniform globally to allow the Internet to retain its universal character. As the most participated form of mass speech out there, the Internet deserves the highest protection.[189] We have the opportunity with this duty to do something more, develop a uniform international standard for the freedom of speech.

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182. *See* ACLU v. Reno, 929 F. Supp. 824, 877

183. *See* Framework *supra* note 14.

184. *See* Mainstream Loudoun v. Board of Trustees of the Loudoun County Library, 2 F. Supp.2d 783, 792 (E.D. Va. 1998).

185. This group consists of approximately two-dozen corporations, including Microsoft Corp., Apple Computer Co., AT&T Corp., Time Warner, Inc., and Spyglass, Inc. *See* Caden & Lucas, *supra* note 26. Led by the World Wide Web Consortium at the Massachusetts Institute of Technology, it intends to develop a selection or rating system entitled "Platform for Internet Content Selection" or "P.I.C.S.". *See id.*

186. *See id.*

187. *See* Shapiro, *supra* note 22.

188. *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824, 881

189. *See generally Id.*

TREADING WATER IN THE DATA PRIVACY AGE: AN ANALYSIS OF SAFE HARBOR'S FIRST YEAR

I. INTRODUCTION

In 1995 the European Union (EU) enacted the Data Privacy Directive[1] (Directive), a comprehensive law requiring each EU Member State[2] to adopt strict controls over the use of personal information gathered in Internet transactions and the creation of national privacy regulators.[3] The Directive, which became effective on October 25, 1998, requires EU member states to prohibit the transfer of personally identifiable data[4] to non-EU countries that do not provide "adequate" privacy protections, thereby forcing such countries to enact legislative provisions that would meet this "adequacy" standard.[5]

From its inception the Directive has proven problematic for United States companies as the U.S. has stood firm on its policy to not create broad privacy laws.[6] The U.S. has long sought to foster its capatalistic market economy by encouraging industry self-regulation, rather than enacting broad

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1. *See* Council Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data 1995 (O.J. 95/L281). (hereinafter *Directive 95/46/EC*) *See also* THE EUROPEAN COMMISSION INTERNAL MARKET DIRECTIVE *available at* http://europa.eu.int/comm/internal_market/en/ (last visited on Oct. 26, 2001).

2. The fifteen Member States of the EU include Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *See* SAFE HARBOR WORKBOOK, *at* http://www.export.gov/safeharbor/sh_workbook.html (last visited Oct. 26, 2001).

3. *See* FRED H. CATE, PRIVACY IN THE INFORMATION AGE 1-4 (1997). The rise of data transfer technology over the last few decades has made the protection for individual's personal information all the more difficult. *See id.* In meeting the struggle to maintain an appropriate level of protection, countries throughout the world have developed legislative enactments. *See id.* As this area of law continues to expand, it can be expected to draw increasing attention from the U.S. Legislature. *See id.* In the 104th Congress, nearly 1,000 of 7,945 bills introduced addressed some privacy issue. *See id. See also* James M. Assay, Jr., Demetrious A. Eleftheriou, *The EU-U.S. Privacy Safe Harbor: Smooth Sailing or Troubled Waters?*, 9 COMMLAW CONSPECTUS 145 (2001).

For a discussion on information acquisition techniques including covert acquisition, overt acquisition and use of information obtained from consumers see Anna E. Shimanek, *Do You Want Milk with Those Cookies?: Complying with the Safe Harbor Privacy Principles*, 26 J. CORP. L. 455 (2001).

4. The Directive defines "personal data" as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity." *Directive 95/46/EC*, *supra* note 1, at art. 2(a). For more on the definition of "personal data" see *infra* note 65.

5. *Directive 95/46/EC*, *supra* note 1, at art. 25(1).

6. *See* CATE, *supra* note 3, at 48. "It is difficult to imagine a regulatory regime offering any greater protection to information privacy, or any greater contrast to U.S. law." *Id.*

legislation, in providing protection for its citizens' personal information.[7] With the inception of the EU's Data Privacy Directive, however, many feared that the United States' failure to meet the Directive's standards may cause U.S. companies to lose a great deal in revenue and efficiency as data transfers "are the life blood of many organizations and the underpinnings for all of electronic commerce."[8] To overcome this obstacle, the United States began negotiating "Safe Harbor" privacy principles with the EU.[9] Under these provisions, U.S. companies would voluntarily create a set of self-regulatory guidelines that would be deemed "adequate" by the Data Privacy Directive standards.[10] In order to acquire personal data from companies in EU Member States, U.S. companies who agree to the regulation must provide a higher level of privacy to these consumers by promising them basic control over how their information is used.[11]

Following a period of intense negotiations, and to the dismay of broad privacy law advocates and many in the European Union Parliament, in July 1999, the U.S. convinced the European Commission, by a vote of 279 to 259, to accept the Safe Harbor principles.[12] On November 1, 2000, the compromise took effect, leaving many uncertain as to whether U.S. companies would jump on board and be willing to operate under the self-regulated Safe Harbor

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7. *See* SAFE HARBOR WORKBOOK, *supra* note 2.

8. *Id.* In 1999, the U.S. had approximately $350 billion in trade with EU Member States. *See id.* In terms of cost efficiency, where many multinational corporations share offices in both the U.S. and in one or more EU Member States, the prohibition of transferring information such as personal telephone directories, personal records, and other human resource information within a single organization could lead to a significant increase in costs and decreased efficiency. *See id.* In terms of revenue, one source estimated the loss to be as much as $120 billion. *See* Lawrence Jenab, *Will the Cookie Crumble?: An Analysis of Internet Privacy Regulatory Schemes Proposed in the 106th Congress*, 49 U. KAN. L. REV. 641, 650 (2001). *See also* Neil King, Jr., *Clinton and EU Make Progress, but Not a Lot*, WALL ST. J., June 1, 2000, at A24.

The Directive's standard states that the EU could prohibit the transfer of data to the U.S. if the U.S. is unwilling to provide an "adequate" level of protection. *See Directive 95/46/EC*, *supra* note 1, art. 25(4). "Where the Commission finds, under the procedure provided for in Article 31(2), that a third country does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question." *Id.*

9. ISSUANCE OF SAFE HARBOR PRIVACY PRINCIPLES AND TRANSMISSION TO EUROPEAN COMMISSION, 65 Fed. Reg. 45,666 (2000) [hereinafter *Safe Harbor*]. For more on the EU and U.S. positions in the negotiations see *infra* note 80

10. *See Safe Harbor*, *supra* note 9, at 45,666. *See also Directive 95/46/EC*, *supra* note 1, at art. 25(1).

11. *See* Juliana Gruenwald, *Stormy Seas Ahead Over 'Safe Harbor'*, INTERACTIVE WEEK (Oct. 30, 2000), *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2646060,00.html. From the onset, this has been one of the chief concerns with the U.S. compromising with the EU in enacting the Safe Harbor program. *See id.* Under the program, U.S. companies would be agreeing to provide a higher level of information protection to EU Member State citizens than to citizens of the U.S. *See id.*

12. *See Safe Harbor*, *supra* note 9, at 45,666.

provisions.[13] Further, many wondered whether U.S. consumers would stand for companies providing higher levels of protection for European consumers than for U.S. consumers.[14]

Following the close of the Safe Harbor program's first year, many are continuing to call the U.S. Legislature to abandon the Safe Harbor self-regulatory program and enact broad privacy laws.[15] This note, however, will show that in light of the first year of Safe Harbor, the United States policy of self-regulation in the private sector based upon its capitalistic market economy is actually strengthened and that the program is proving beneficial to both U.S. organizations and U.S. citizens. The analysis will begin in Section II with a comparison of privacy policies under European and United States perspectives. Section III will present the development and guidelines of the Directive and the provisions of the Safe Harbor compromise negotiated by the EU and the United States. Finally, Section IV will show how U.S. companies have responded to the Safe Harbor program in its first year, how U.S. companies have weighed the benefits and costs associated with Safe Harbor, and how Safe Harbor has impacted U.S. companies, U.S. citizens, and U.S. policy as a whole.

II. A COMPARISON OF THE EU AND U.S. APPROACHES TO DATA PRIVACY LAW

A. *European Approach*

To understand the conflict the United States has had in collaborating with the terms of the EU's Directive, the two governmental approaches on privacy issues must first be discussed. While the United States has long sought to avoid broad policy laws and allow industries to self-regulate protection of data privacy matters,[16] European nations have recognized individual data privacy as a fundamental right,[17] leading many European

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13. *See id. See also* Gruenwald, *supra* note 11. Many experts feel that the plan will fall apart as U.S. companies fail to join the safe harbor program. *See id.*

14. *See* Gruenwald, *supra* note 11.

15. *See The EU Data Protection Directive: Implications for the U.S. Privacy Debate: Hearings Before the Subcomm. On Commerce, Trade and Consumer Protection*, 107th Cong. at 40-41 (Mar. 8, 2001)(statement by Rep. Markey)[hereinafter *Hearings*]. In his address to the Subcommittee on Commerce, Trade, and Consumer Protection, Representative Markey expressed his concern that rather than Congress listening to the "85% of Americans" who would prefer broad privacy enforcement, Republicans and Democrats in the House of Representatives have turned this into a political battle. *See id.*

16. *See* Assay, *supra* note 3, at 149-50.

17. *See* SAFE HARBOR WORKBOOK, *supra* note 2. In addressing the history of the European fundamental right view, the Chairman of the Committee on Energy and Commerce, Hon. W.J. "Billy" Tauzin, stated:

> The U.S. and EU Member States approach the issue of privacy from different perspectives. Europeans are instilled with the belief that privacy is a

governments to enact "rights-based data protection."[18]

The history of European data privacy protection law goes back to 1970 when the German state of Hesse enacted the first data protection statute.[19] Sweden soon followed in enacting the first national data protection statute.[20] By 1997, most European nations[21] had broad policy or data protection statutes.[22]

The 1980's opened with the Committee of Ministers of the Organization for Economic Cooperation and Development (OECD) issuing their *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (Guidelines).[23] The Guidelines presented basic data privacy principles and allowed for data to freely pass between nations who adopted the principles.[24] The OECD intended that these "principles . . . be built into existing national legislation, or serve as a basis for legislation in those countries which do not yet have it."[25] One year following the issuance of the Guidelines, the Council of Europe promulgated a convention, *For the Protection of Individuals with Regard to Automatic Processing of Personal Data*, which took effect in 1985.[26] The convention focused more heavily on protection of personal

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> fundamental human right. There are a number of reasons for this belief, including the vast and traumatic experiences of the Nazi regime during the 1940's. Another reason for this perspective is the simple fact that many EU countries are relatively new democracies.

Hearings, supra note 15, at 5. (statement by Hon. W.J. "Billy" Tauzin, Chairman, CEC). This recognition of privacy rights as fundamental was codified in Chapter I, Article 1, of the Directive where it states,

> In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.

Directive 95/46/EC, supra note 1, at art. 1.

18. Assay, *supra* note 3, at 148.

19. *See* CATE, *supra* note 3, at 32.

20. *See id.*

21. These nations include Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom. *See id.*

22. *See id.*

23. *See* GUIDELINES ON THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA, O.E.C.D. Doc (C 58 final)(Oct. 1, 1980) [hereinafter GUIDELINES]. *See also* CATE, *supra* note 3, at 34.

24. *See* GUIDELINES, *supra* note 23.

25. Julia M. Fromholz, *The European Union Data Privacy Directive*, 15 BERKELEY TECH. L.J. 461, 466 (2000), *citing* GUIDELINES, *supra note 23*. The principles set forth in the Guidelines were intended as a response to the "danger that disparities in national legislations could hamper the free flow of personal data across frontiers." *Id.* These principles are largely mirrored in the Directive. *See id.*

26. *See* CATE, *supra* note 3, at 34. Both the Guidelines and the convention are criticized due to the lack of enforcement power held by the OECD and the Council. *See id.* However, where the Guidelines failed to set a vision for how countries should work together to bridge their different protection standards, the Convention focused on "stregthen[ing] democracy, human rights, and the rule of law throughout its member states" and attempted to inform national legislation on the uniform protection of personal data. Fromholz, *supra* note 25, at 466,

privacy than the Guidelines and required member countries to enact conforming national laws.[27] Following the Council of Europe's urging EU Member States to ratify and implement the convention, by 1997 all but one of the EU Member States had national legislation consistent with the convention.[28]

The enactment of the Directive in 1998 acted as a harmonization of the domestic privacy laws of many of the member states.[29] The Directive's roots, however, can be traced to the *Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*,[30] a 1990 draft publication of the commission of the European Community[31] that sought to move European data protection policies away from merely an economic perspective and into the political realm, thus, creating a broad-based political union.[32] The draft directive was soon thereafter amended and approved in 1992, as the European Parliament sought

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467 *quoting* OECD WORKING PARTY ON INFORMATION SECURITY AND PRIVACY, MINISTERIAL DECLARATION ON THE PROTECTION OF PRIVACY ON GLOBAL NETWORKS, 5 (Oct. 1998).

27. *See* CATE, *supra* note 3, at 34.

28. *See id.* at 35. Although the principles of the convention were adopted by fourteen of the fifteen EU member states and Switzerland, there was disunity between the legislative enactments of the states. *See id.* One author concluded that this was due to three reasons: first, some national legislation existed before the convention; second, the convention was not self-executing, meaning that each country could enact their own national laws in different ways; and third, the convention failed to define what an "adequate" level of data protection was, leaving countries to enact their own standard. *See id.*

29. *See* Assay, *supra* note 3, at 149. For more on the Directive acting as a response to a number of domestic privacy laws that arose in Europe throughout the 1970's and 1980's see Kevin Bloss, *Raising or Razing the E-Curtain?: The EU Directive on the Protection of Personal Data*, 9 MINN. J. GLOBAL TRADE 645 (2000).

30. DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL OF EUROPE ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENT OF SUCH DATA, art. 4, *reprinted in* THE PRIVACY LAW SOURCEBOOK 1999: UNTITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS 219 (Marc Rotenberg ed., 1999).

31. *See id. See also* CATE, *supra* note 3, at 35.

32. *See* CATE, *supra* note 3, at 35. Many feel that the European approach is an attempt to prevent an authoritarian regime as was seen in Nazi Germany. *See id.* One author noted: European data protection laws include the hidden agenda discouraging a recurrence of the Nazi and Gestapo efforts to control the population, and so seek to prevent the reappearance of an oppressive bureaucracy that might use existing data for nefarious purposes. This concern is such a vital foundation of current legislation that it is rarely expressed in formal discussions. This helps to explain the general European preference for strict licensing systems of data protection . . . . Thus European legislators have reflected a real fear of Big Brother based on common experience with the potential destructiveness of surveillance through record-keeping. None wish to repeat the experiences endured under the Nazis during the second World War. *Id.* at 43-44 *quoting* DAVID H. FLAHERTY, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES: THE FEDERAL REPUBLIC OF GERMANY, SWEDEN, FRANCE, CANADA, AND THE UNITED STATES, 306 (University of North Carolina Press, 1989). In his analysis, Fred H. Cate stated, "It is ironic that the directive seeks to ensure the prevention of an authoritarian regime by creating government authorities with sweeping powers to oversee data-related activities." CATE, *supra* note 3, at 44.

to do away with any distinction between information gathered from private and public sectors.[33] In 1995, the Council of Ministers formally approved the Directive which would take effect three years later.[34]

B. United States Approach

While Europe has moved from individual states enacting rights-based data protection in the 1970's and 1980's to a uniform broad-based political information protection in the 1990's, the United States has consistently held to its market-based, industry-regulated approach.[35] The U.S. Constitution does not address privacy and personal autonomy directly, and therefore, privacy rights in general were not recognized as fundamental for many years.[36] The Supreme Court expanded the term "liberty" over the last century to include certain privacy protections for U.S. citizens.[37] In this expansion, the Supreme Court has interpreted a number of the Bill of Rights amendments as providing a right to privacy against intrusive governmental activities.[38] These individual fundamental rights of privacy, however, are limited to protection from the public, governmental sector, unless otherwise provided by state action.[39]

U.S. privacy law in the private sector can be a bit troubling as Congressional privacy protections in general provide little help.[40] Adding to the confusion in the private sector, the definition of "privacy" itself seems to change from one area of the law to another.[41] One author described this inconsistency: "Privacy is a notoriously slippery term. Because, for good or ill, United States citizens enjoy limited privacy rights under a patchwork of sectoral privacy laws, different situations call for different definitions of privacy."[42]

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33. *See* CATE, *supra* note 3, at 36.

34. *See Directive 95/46/EC, supra* note 1. *See also* CATE, *supra* note 3, at 36.

35. *See* SAFE HARBOR WORKBOOK, *supra* note 2.

36. *See* CATE, *supra* note 3, at 52.

37. *See* WILLIAM COHEN, AND JOHNATHON D. VARAT, CONSTITUTIONAL LAW: CASES AND MATERIALS, 570-71 (Tenth Edition, The Foundation Press, Inc., Westbury, New York, 1997).

38. *See* CATE, *supra* note 3, at 52. The Amendments in the Bill of Rights interpreted by the Supreme Court to provide such protection include the First Amendment's provisions for freedom of expression and association, the Third Amendment's protection against quartering solders in one's home, the Fourth Amendment's protection against unreasonable searches and seizures, the Fifth Amendment's due process clause and freedom from self-incrimination, the Ninth and Tenth Amendments' freedom for people to retain power over state, and the Fourteenth Amendment's due process clause and equal protection clause. *See id.*

39. *See id.*

40. *See id.*

41. *See* Jenab, *supra* note 8, at 647.

42. *Id.*

The purpose of the U.S. approach is based upon the premise that information privacy is not an unlimited or absolute right.[43] U.S. policy, therefore, seeks to draw a balance between the individual's desire to maintain a level of privacy over his personal information and society's benefit in its use of such information.[44] In its continued attempt to steer clear of broad-privacy policies while providing a means for appropriate personal information protection, the U.S. continues to approach data-privacy in the private sector through issuance of regulations and statutes protecting specific types of data.[45] Specifically, the U.S. has regulated privacy in five areas: federal statutes and regulations, state statutes and regulations, state common law, self-regulation, and through the EU Directive.[46]

With regard to the first area, federal statutes, Congress has passed a number of enactments intended to protect individual privacy data that is specific to the area of the enactment.[47] Examples include the Fair Credit Reporting Act,[48] which governs credit reporting agencies and employment-

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43. *See* Jonathan P. Cody, *Protecting Privacy Over the Internet: Has the Time Come to Abandon Self-Regulation?*, 48 CATH. U. L. REV. 1183, 1197 (1999).

44. *See id.*

45. *See* Eric Jorstad, *The Privacy Paradox*, 27 WM. MITCHELL L. REV. 1503, 1513-14 (2001).

46. *See id.* For more on the provisions of the EU's Data Privacy Directive see *infra* Part III. State statutes and regulations and state common law are beyond the scope of this note and, therefore, will be excluded from the discussion. However, for more information concerning these areas of privacy law see *id.* at 1516-17.

47. *See id.* at 1514. Recently, in *Reno v. Condon*, 528 U.S. 141 (2000), the Supreme Court reinforced this power of Congress to enact narrowly drawn statutes governing protection of personal information in specific fields. *See id.* at 151. In this case, the State of South Carolina and its Attorney General brought an action against the United States challenging the constitutionality of the Driver's Privacy Protection Act, 18 U.S.C. §2721-2725 (DPPA). *See Reno v. Condon*, 528 U.S. 141 at 143. The DPPA restricts the ability of the states to disclose a driver's personal information without the driver's consent. *See* Driver's Privacy Protection Act, 18 U.S.C. §2721-2725. Upon granting certiorari, the Supreme Court reversed the district courts issuance of summary judgment for the plaintiff and held that the DPPA is a proper exercise of Congress' authority to regulate interstate commerce under the Commerce Clause. *See Reno v. Condon*, 528 U.S. 141 at 151.

Although the decision in *Reno v. Condon* may have expanded the scope of Congressional authority over personal information "sold or released into the interstate stream of business," *Id.* at 148, Congress still falls short from being able to enact generalized privacy regulations over the private sector as much of the information transferred and used does not meet the standard of "sold or released." *Id. See also* Shimanek, *supra* note 3, at 470.

48. Fair Credit Reporting Act, 15 U.S.C. § 1681, (1994 & Supp. 1998). The statute requires consumer reporting agencies to "adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter." *Id.* at §1681(b). The statute creates civil liability for consumer reporting agencies and users of consumer reports that fail to comply with its requirements. *See Wiggins v. Philip Morris, Inc.*, 853 F.Supp 458, at 468 (D.D.C. 1994).

related data,[49] the Gramm-Leach-Bliley Act,[50] which governs data practices of financial institutions,[51] and the Health Insurance Portability and Accountability Act,[52] which governs data gathered by health care institutions.[53] Other federal statutes regulate data collection based upon the age of the data subject, type of data recipient, or means of data collection.[54] These examples illustrate that U.S. privacy statutes are narrowly drawn to govern either the collection and use of personal identifiable information within specific industrial or economic sectors or are limited to government collection and use of personally identifiable information.[55]

A second manner in which the U.S. protects data is through industry self-regulation.[56] The idea is to allow private-sector industries to develop themselves without the burden of government interference.[57] These self-regulatory programs are designed to allow industry representatives to work along side consumer groups, and often the Secretary of Commerce and the Director of the Office of Management and Budget, to develop mechanisms to protect privacy using traditional fair information privacy practices.[58] This

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49. *See* Jorstad, *supra* note 45, at 1514.

50. Financial Services Modernization (Gramm-Leach-Bliley) Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999). The Gramm-Leach-Bliley Act was signed into law by President Clinton on November 12, 1999. *See id.* Under the act, financial institutions must provide clear and conspicuous notice to consumers upon their initiating the customer relationship, obtain consent from consumers prior to disclosing a consumer's nonpublic information to a nonaffiliated third party, and provide a reasonable method for consumer's to "opt out" of such disclosures. *See id.* The statute became mandatory on July 1, 2001. *See* Privacy of Consumer Financial Information, 65 Fed. Reg. 33, 677 (May 24, 2000). *See also* Bradley A. Slutsky, Allison S. Brantley, *21st Annual Institute on Computer Law, I. Privacy on the Internet: A Summary of Government and Legal Responses and a Practical Guide to Protecting Your Client*, 637 PLI/PAT 85, 90 (Feb.-Mar. 2001).

51. *See* Slutsky, *supra* note 50, at 90.

52. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996). This statute was created by the 104th Congress to "improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes." *Id.*

53. *See* Jorstad, *supra* note 45, at 1514.

54. *See id.* Examples of such regulatory statutes include The Children's Online Privacy Act, which provides protection for web site collection and use of data of children age thirteen and under, 15 U.S.C. § 1601-1606 (Supp. 1998), The Electronic Communications Privacy Act, which governs the turning over of information to law enforcement agencies, 18 U.S.C. §2510-2513, 2515-2522 (1994 & Supp. 1998), and Federal anti-eavesdropping and wiretapping laws that prohibit third party interception of communications. *See* Anti-Wire Tapping Act, 18 U.S.C.A. § 2511 (West 2000). *See also* Communications Act of 1934, 47 U.S.C.A. § 605a (West 1991).

55. *See* Cody, *supra* note 43, at 1197.

56. *See* Jorstad, *supra* note 45, at 1514.

57. *See* Cody, *supra* note 43, at 1203.

58. *See id.* Many advocates for the U.S. self-regulatory approach feel that industries change too rapidly for government legislative solutions. *See* CATE, *supra* note 3, at 198. Also, most U.S. corporations are looking at a global market, which is impossible for a single country

level of industry autonomy, free from governmental intrusion, has long been a foundation for the U.S. market economy.[59]

III. ELEMENTS OF THE DIRECTIVE AND THE U.S.-EU COMPROMISE

With the two approaches towards protecting private information so drastically opposing, it is no wonder that the U.S. struggled with the EU's development of the Directive in 1995. In particular, the U.S. conflict with the Directive arises under the Directive's "adequacy" requirement,[60] where EU Member States are prohibited from transferring personal data[61] to any non-EU country that fails to provide "adequate" privacy protection.[62] As a result of this requirement being aimed at receiving countries rather than receiving organizations, the Directive forces these countries to enact broad privacy laws if they desire to continue receiving this information from EU countries.[63] Without such broad legislation, the EU argues that the basic purpose of the Directive, to protect personal information from citizens within the EU community, would be undermined.[64] The EU determines this level of

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to regulate. *See id.* It is interesting to note that certain industries have successfully regulated personal sensitive information without government encouragement or mandates. *See id.* This has been primarily through recognized privileged relationships such as attorney-client, doctor-patient, and news reporter-source. *See id.* at 199. For more discussion on industry self-regulatory development see *id.* at 198, 199. *See also* Fred H. Cate, *Principles of Internet Privacy*, 32 CONN. L. REV. 877 (2000).

59. *See* Cody, *supra* note 43, at 1203.

60. *Directive 95/46/EC*, *supra* note 1, at art. 25.

61. Under the Directive, "Personal Data" is defined broadly as "any information relating to an identified or identifiable natural person." *Id.* at art. 2(a). Thus, Personal Data includes more than mere textual information but also photographs, audiovisual images, and sound recordings of an identified or identifiable person. *See* CATE, *supra* note 3, at 36. Additionally, under this definition personal data is protected for any "natural person" rather than just a "living person," meaning that the requirements to protect an individual's private information continues on beyond life. *See id.*

62. *See* Assay, *supra* note 3, at 146. "Member States shall provide that the transfer to a third country of personal data . . . may take place only if . . . the third country in question ensures an adequate level of protection." *Directive 95/46/EC*, *supra* note 1, at art. 25(1). In his address to the House of Representatives' Subcommittee on Commerce, Trade, and Consumer Protection, David Smith, the Assistant Information Commissioner from the United Kingdom, stated, "What is actually meant by 'adequacy'? It doesn't necessarily require data protection law. It does depend on the nature of the data that are transferred, codes of practice, enforceable codes, and the like, that exist in the country involved." *Hearing*, *supra* note 15, at 15 (testimony of David Smith, Assistant Commissioner, Office of the UK Information Commissioner).

63. *See Directive 95/46/EC*, *supra* note 1, at art. 25(1). "The Member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection." *Id.*

64. *See* CATE, *supra* note 3, at 41.

adequacy "in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations."[65]

The Directive does, however, provide certain exceptions to the requirement for recipient countries to enact broad privacy laws.[66] Article 26(2) states:

> A Member State may authorize transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25(2), where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights.[67]

In response to this provision, a few countries,[68] the U.S. being the first, have accepted "Safe Harbor" provisions as negotiated between the U.S. Department of Commerce and the EU.[69] The Safe Harbor provisions allow companies based within these countries to individually adopt regulatory principles that govern their use of data received from organizations based within the EU countries.[70] As an additional method, the EU has recently approved a standard contractual clause for data transfer to non-EU countries.[71] Approved on June 18, 2001, these contract clauses ensure adequate safeguards for personal data transferred from the EU to countries outside the EU.[72]

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65. *Directive 95/46/EC, supra* note 1, at art. 25(2).

66. *See id.* at art. 26.

67. *Id.* at art. 26(2). "Controller" is defined in Article 2(d) as "the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data." *Id.* at art. 2(d).

68. Hungary and Switzerland have adopted the Safe Harbor provisions negotiated by the U.S. Department of Commerce. *See Data Protection: Commission Approves Standard Contractual Clauses for Data Transfers to non-EU Countries,* at http://europa.eu.int/comm/internal_market/en/dataprot/news/clauses2.htm (last modified June 18, 2001).

69. *See Safe Harbor, supra* note 9, at 45,666.

70. *See id.*

71. The option for the contract clause method is provided in *Directive 95/46/EC, supra* note 1, at art. 26(4), which states, "Where the Commission decides, in accordance with the procedure referred to in Article 31(2), that certain standard contractual clauses offer sufficient safeguards as required by paragraph 2, Member States shall take the necessary measures to comply with the Commission's decision." *Id.* For more information concerning the contract clauses approved by the European Commission see *Standard Contractual Clauses for the Transfer of Personal Data to Third Countries - Frequently Asked Questions,* at http://europa.eu.int/comm/internal_market/en/dataprot/news/clauses2faq.htm (last modified June 18, 2001).

72. Many feel that the contract clause approach has great merit. *See Data Protection: Commission Approves Standard Contractual Clauses for Data Transfers to non-EU Countries, supra* note 68. The clause approach could be especially useful in allowing companies within the U.S. who do not receive great amounts of information from EU countries to insert the clause in a one-time agreement with an organization based in an EU country. *See id.* The clause

In order to maintain the transfer of data from European nations to U.S. companies, the Department of Commerce initiated negotiations with the EU in 1998.[73] Throughout the negotiations, both the U.S. and the EU were in agreement that levels of U.S. privacy protection needed improvement.[74] Both parties, however, continued to disagree on the nature of the improvement, each holding to their privacy policy approaches.[75] While the EU continued to call on the U.S. to enact federal legislation governing commercial entities' use of personal information transferred from EU Member States, the Department of Commerce continued to hold to its industry self-regulation approach.[76]

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simply calls for the "Data Exporter" and the "Data Importer" to undertake the transfer process in accordance with the basic protection rules provided for in the Directive. *See id.* Frits Bokestein, the EU Internal Market Commissioner, stated, "This new practical measure will make it easier for companies and organizations to comply with their obligation to ensure 'adequate protection' for personal data transferred from the Community to the rest of the world while safeguarding individuals' right to privacy." *Id.*

This view, however, is not shared by all. In his address to the Subcommittee on Commerce, Trade, and Consumer Protection, Chairman Tauzin expressed his fear that the contracts are merely providing additional protection on top of Safe Harbor for the EU community. *See Hearings, supra* note 15, at 6 (statement by Hon. W.J. "Billy" Tauzin, Chairman, CEC). In his address he stated, "Many experts have suggested that the model contracts will be imposed on U.S. firms as a way to 'top off' or strengthen the Safe Harbor. This seems to directly contradict the purpose of the Safe Harbor and the negotiations that took place. Was the Department of Commerce duped into supporting the Safe Harbor? Are the Europeans really trying to find ways to strengthen the Privacy Directive?" *Id.*

73. *See Safe Harbor, supra* note 9, at 45,666. After the EU found that U.S. information privacy laws failed to meet this adequacy requirement, the EU began negotiations with the U.S. Department of Commerce pursuant to Article 25(5) which states, "At the appropriate time, the Commission shall enter into negotiations with a view of remedying the situation resulting from the finding made pursuant to paragraph 4." *Directive* 95/46/EC, *supra* note 1, at art. 25(5). *See also* Sean D. Murphy, *U.S.-EU "Safe Harbor" Data Privacy Arrangement*, 95 AM. J. INT'L L. 156, 157 (2001).

Interestingly, the U.S. Department of Commerce stays away from the term "negotiation" in its SAFE HARBOR WORKBOOK, *supra* note 2. Instead, the Department states that ". . . [T]he United States initiated *a high-level formal dialogue*, led by the U.S. Department of Commerce' International Trade Administration and the European Commission Directorate for Internal Markets, with the goals of ensuring the free flow of data and effective protection of personal data." *Id.* (emphasis added).

74. *See Safe Harbor, supra* note 9, at 45,667. *See also* Assay, *supra* note 3, at 472. In a statement concerning privacy practices, Representative Mike Doyle noted, "[I]f we in America do not act to establish some general requirements to ensure the integrity of personal privacy for our citizens and global consumers, both Americans and Europeans may very well risk losing out on vast economic opportunities." *Hearings, supra* note 15, at 7 (statement by Hon. Mike Doyle).

75. For a discussion on the EU and U.S. policies on privacy law see *supra* Section II. *See also* SAFE HARBOR WORKBOOK, *supra* note 2.

76. *See* Assay, *supra* note 3, at 147, 48. Throughout the negotiations, the U.S. held to three bottom line issues. *See Hearings, supra* note 15, at 44 (statement of David L. Aaron, Senior International Advisor, Dorsey & Whitney LLP). First, The U.S. was not going to negotiate a treaty or an executive agreement that would apply the Directive in the United States. *See id.* The U.S. was willing, however, to issue guidance to companies within the U.S. on the elements of the Directive. *See id.* In the past the Department of Commerce has issued guidance to help U.S. companies doing business with countries such as China and the Soviet Union. *See*

After submitting five proposals, each rejected by the EU, the EU and the U.S. Department of Commerce finally reached an agreement on March 14, 2000, "The Safe Harbor Agreement."[77] The agreement presented a set of protection provisions to the EU that would allow U.S. companies who comply with Safe Harbor to receive and use personal data from EU Member States by granting a presumption of "adequacy" for purposes of the Directive.[78] The Safe Harbor framework is comprised of seven privacy principles that, when followed, qualify organizations for this protection.[79]

The first principle, "Notice," requires an organization to inform individuals about the purpose for which it collects and uses their personal information.[80] Further, the notice requirement mandates that the organization provide contact information to the individual so that the individual may inquire into the organization's use of the information.[81] This includes allowing the individual to lodge a complaint, inquire as to the types of third parties to which the information may be disclosed, and have opportunities available to limit such disclosure.[82] The notice must be in "clear and conspicuous" language.[83]

Under the second requirement, "Choice," the organization must provide the individual an opportunity to "opt out" of disclosing their information to third parties or to use the information for a purpose other than what was originally authorized by the individual.[84] Again, the option for this choice

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id. Second, the U.S. would not accept European jurisdiction. *See id.* The EU and the U.S. did finally agree to be silent on this issue, but the voluntary self-regulatory scheme of Safe Harbor is under the framework of existing U.S. law. *See id.* Third, in order to adapt the provisions of the Directive to the advanced information economy of the U.S., the U.S. felt that the Safe Harbor principles must be more flexible and address real-world information practices. *See id.*

The EU also had a bottom line position. *See id.* at 44-45. The EU insisted on a high level of privacy protection for European personal data as defined in the Directive. *See id. See also Directive 95/46/EC, supra* note 1, at art. 2(a).

77. *Safe Harbor, supra* note 9, at 45,667. *See also* Assay, *supra* note 3, at 147.

78. *See Safe Harbor, supra* note 9, at 45,666.

79. *See id. See also* SAFE HARBOR WORKBOOK, *supra* note 2. *See also* Murphy, *supra* note 71, at 159.

80. *See Safe Harbor, supra* note 9, at 45,667.

81. *See id.*

82. *See id.*

83. *See id.* Footnote 1 provides an exception where the recipient of the personal information is acting in an agency capacity to the discloser. *See id.* at 45,667, n.1. "It is not necessary to provide notice or choice when disclosure is made to a third party that is acting as an agent to perform task(s) on behalf of and under the instructions of the organization. The Onward Transfer Principle, on the other hand, does apply to such disclosures." *Id.*

84. *See id.* at 45,667, 45,668. *See also* Assay, *supra* note 3, at 151, 152. *See also* Murphy, *supra* note 71, at 158. This principle ensures that consumers have choices regarding the collection of their personal data. *See* SAFE HARBOR WORKBOOK, *supra* note 2. Under the "Choice" principle, consumers can choose to not have their information shared, have complimentary goods and services market to them, or have their information sold to third parties. *See id.*

must be made to the individual with "clear and conspicuous" language by the organization.[85]

Third, where the organization is transferring personal information to an agency of the organization, it may do so only where the agent has either adopted the privacy principles set out in the Directive or contracted with the organization to adopt adequate privacy policies concerning the information.[86] This "Onward Transfer" requirement provides protection for the organization if, after complying with this provision, the third party agent misuses the information.[87]

The fourth and fifth principles are designed to protect the treatment of the transferred information.[88] The fourth provision, "Security," directs the organization to take reasonable precautions to protect the personal information it uses or disseminates from "loss, misuse and unauthorized access, disclosure, alteration and destruction."[89] Under the fifth principle, "Data Integrity," the organization is required to limit the use of such information only to where it is relevant for its purpose.[90] This provision attempts to minimize the risk that personal information will be misused or abused.[91]

The sixth provision, "Access," requires the organization to allow individuals the opportunity to access their personal information and to grant these individuals the ability to "correct, amend, or delete information where it is inaccurate."[92] The exception to this provision is where the expense of providing access greatly outweighs the risks associated with the individual's privacy or where the rights of a third person would be violated.[93]

Finally, the seventh provision, "Enforcement," states that the privacy protection must have effective enforcement mechanisms in place to ensure compliance with the safe harbor principles.[94] The Safe Harbor Privacy Principles lay out the basic framework for this enforcement requirement:

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85. *See Safe Harbor, supra* note 9, at 45,668. For certain "sensitive" information, the "opt out" requirement becomes an "opt in" requirement. *See id.* That is, for transfer and use of information such as medical or health conditions, racial or ethnic origin, political opinions, religious beliefs, or information regarding the sexual preferences of the individual, the organization must receive the explicit approval from the individual that the information can be transferred or used. *See id.* As with the requirement of Notice, the agency exception of footnote 1 applies to choice as well. *See id.* at 45,667, n.1.

86. *See id.* at 45,668.

87. *See id.*

88. *See id.*

89. *Id.*

90. *See id.*

91. *See* SAFE HARBOR WORKBOOK, *supra* note 2.

92. *Safe Harbor, supra* note 9, at 45,668. However, according to the SAFE HARBOR WORKBOOK, *supra* note 2, "Expense and burden are important factors and should be taken into account but they are not controlling in determining whether providing access is reasonable." *Id.* Additionally, "[t]he sensitivity of the data is also important in considering whether access should be provided." *Id.*

93. *See Safe Harbor, supra* note 9, at 45,668.

94. *See id.*

> At minimum, such mechanisms must include (a) readily available and affordable independent recourse mechanisms by which each individual's complaints and disputes are investigated and resolved by reference to the Principles and damages awarded where the applicable law or private sector initiatives so provide; (b) follow up procedures for verifying that the attestations and assertions businesses make about their privacy practices are true and that privacy practices have been implemented as presented; and (c) obligations to remedy problems arising out of failure to comply with the Principles by organizations announcing their adherence to them and consequences for such organizations.[95]

Under the provisions of the Safe Harbor program, participation in Safe Harbor is completely voluntary, but it is not self-executing.[96] That is, an organization must take the affirmative step and self-certify annually to the Department of Commerce that it adheres to the Safe Harbor requirements.[97] Additionally, an organization must publicly announce their intention to do so.[98] Also, the Department of Commerce recommends that the organization state in its published privacy policy that it adheres to the Safe Harbor requirements.[99] These requirements to qualify for Safe Harbor can be met in one of two ways: an organization may join a self-regulatory privacy program that adheres to the Safe Harbor requirements or it may develop its own self regulatory privacy policy that conforms to Safe Harbor.[100]

IV. ANALYSIS

On November 1, 2000, the Safe Harbor principles went into effect as the U.S. Department of Commerce began accepting Safe Harbor applications and launched a website dedicated to helping U.S. organizations join the program.[101]

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95. *Id.* This final provision is divided into three components for safe harbor private sector enforcement: verification, dispute resolution, and remedy. *See* SAFE HARBOR WORKBOOK, *supra* note 2. Organizations are required to have procedures for verifying compliance, to have a dispute resolution system that will investigate and resolve individual disputes, and to remedy problems arising out of a failure to comply with the principles. *See id.*

96. *See* M. Flynn Justice, *Emerging Internet Laws*, 1230 PLI/CORP 123 (2001).

97. *See* SAFE HARBOR WORKBOOK, *supra* note 2.

98. *See id.* The organization's annual self-certification must be in writing and include elements such as notice, choice, access, and enforcement. *See id.*

99. *See id.*

100. *See id.*

101. *See* SAFE HARBOR WORKBOOK, *supra* note 2. The U.S. Department of Commerce developed a website to provide basic information concerning the provisions of the Directive and Safe Harbor, information on how to apply for certification under Safe Harbor, and a list of companies that to date have filed for certification. *See Safe Harbor Overview, at*

Since the date of the compromise, politicians, commerce experts, and corporate directors have been split on their predictions of whether the program would be successful.[102] While many have criticized the Safe Harbor program as providing little incentive for companies to join, others have been quick to stand behind the program and argue that it is a long-overdue unifying bridge between the U.S. and European approaches to data privacy.[103] Some have expressed that the Safe Harbor provisions would collapse as U.S. companies would avoid complying with the unenforceable provisions,[104] while others have expressed great satisfaction in the potential for increased efficiency and higher measure of certainty that the program would grant companies.[105] On October 30, 2000, two days before the opening of the program, one critic of the program, Simon Davies, Director of Privacy International in London, expressed, "It'll fall to pieces within a year because of lack of take-up."[106]

In reaction to these views, the following analysis will show how Safe Harbor has impacted U.S. parties in its first year. Part A of this analysis will address how U.S. companies have reacted to certification. Part B will analyze the benefits and costs recognized by U.S. parties, and Part C will weigh the costs and benefits to determine the impact of Safe Harbor on U.S. companies, U.S. citizens, and U.S. policy in general.

A. Review of the First Year: U.S. Companies React to Safe Harbor

On the opening date of the program, many felt that U.S. companies would be slow to join.[107] To a large degree, this has been true. On February 1, 2001, three months into the program, only twenty companies were on board receiving certification.[108] By May 1, 2001, six months into the program, the number of companies had increased to a mere thirty-nine.[109] The consistent slow growth continued throughout the first year as by August 1, 2001, the number of companies certified under safe harbor had increased only to

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http://www.export.gov/safeharbor/sh_overview.html (last visited Oct. 26, 2001). *See also* Assay, *supra* note 3, at 147.

102. *See* Sara Fitzgerald, E-Commerce Privacy War, CORPORATE LEGAL TIMES 9(94), pBWB19 (Sept. 1999).

103. *See id.*

104. *See* Assay, *supra* note 3, at 158.

105. *See id.* at 156.

106. Gruenwald, *supra* note 11.

107. *See id.* However, some U.S official expressed hope that 100 companies would sign up in the first month and 1,000 within the first year. *See Microsoft Plans to Sign EU Document*, ASSOCIATED PRESS ONLINE, May 15, 2001.

108. The U.S. Department of Commerce provides a list of companies certified under safe harbor and their dates of certification, *at* http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list (last visited Nov. 1, 2001) [hereinafter *Safe Harbor List*].

109. *See id.*

eighty,[110] and by October 31, 2001, at the completion of one full year of the program, the certified total was 124.[111]

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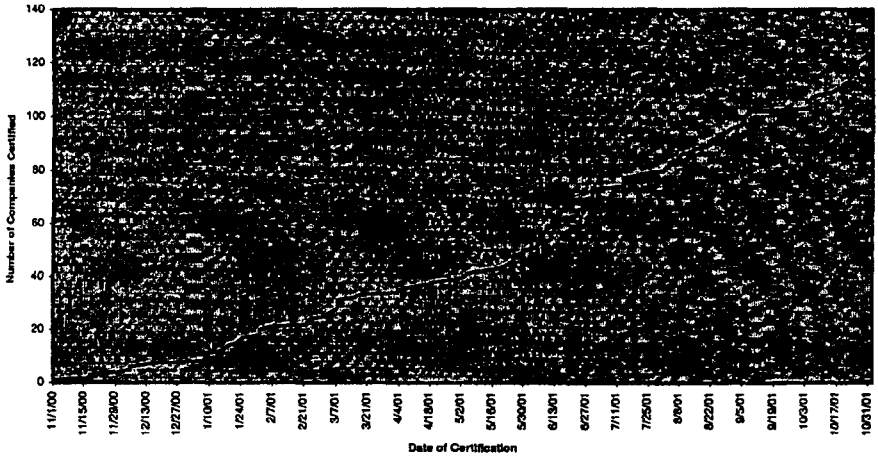
110. *See id.*

111. *See id.* The following chart, Figure 1, shows the consistent growth trend in companies joining the safe harbor program:

Figure 1: Companies Certified by Safe Harbor



The information used to develop Figure 1 was drawn from the Department of Commerce's Safe Harbor List. *See id.* Figure 1 presents the 124 U.S. companies that have applied for certification under Safe Harbor as of October 31, 2001 with the y-axis representing the total number of companies certified and the x-axis representing their dates of certification. The chart shows a linear trend (consistent growth) over the first year represented by the equation $y = 0.3527x - 15.796$, where time (x) is measured in days, solving for the total number of companies certified (y). Under linear interpretation, it could be estimated that the end of year two (720 days), 239 companies will be certified under the program. A further computation of this equation shows that the Department of Commerce's goal of 1,000 companies certified by the end of year one would not actually occur for seven years and eleven months. *See Microsoft Plans to Sign EU Document, supra* note 107.

This equation, however, does not consider other factors that may drive the trend out of linear growth. First, the idea that more companies will be willing to join as they see more companies become certified, *see* Assay, *supra* note 3, at 158, implies exponential growth, under which, the curve begins a low horizontal line near the x axis (y increases minimally while x increases greatly) until it hits a range where the curve begins to climb. It climbs to where the curve is nearly, but never actually becomes, a vertical line (x increases minimally for a very large increase in y).

If U.S. organizations begin to become more comfortable with Safe Harbor and the growth become exponential, the curve will at some future point return to a consistent linear growth as EU enforcement and industry regulation becomes routine practice. However, for this analysis, there is no way to assess at what point companies will begin applying for certification at a higher rate.

Second, the linear interpretation fails to take into effect other cause-and-effect factors such as EU enforcement (or lack of enforcement), industry international trade situations, and other economic trends. *See* Featherely, *supra* note 160. Any of these factors could effect, likely negatively, U.S. companies' applying for certification. *See id.*

By February 16, three and a half months into the program, only twenty-one companies had applied for certification.[112] One information technology journalist noticed that with the exception of Hewlett Packard Company and The Dun & Bradstreet Corporation, all of the certified companies were small to medium size businesses.[113] It appeared that the larger Fortune 500-type companies were either "investigating their options or taking a wait-and-see approach."[114] As the large U.S. companies were showing their reluctancy to join, many were calling the program an early failure.[115] One member of Congress argued that Republicans and the corporate sector were trying to block privacy measures that have been introduced at both the federal and state levels.[116]

The reluctancy of large companies to join, however, did not last long. By October 31, 2001, the end of the first year of the Safe Harbor program, a number of large corporate entities had been approved for certification.[117] Many of these larger corporations did not join until seven months or more after the start of the program.[118] Just recently, in October 2001, Eastman Kodak, Gateway and Pennzoil-Quaker State sought certification.[119] Thus, it appears that although many larger corporations did not join the program within the first couple of months after its inception, many started joining by the end of the first year.[120]

June 30, 2001 represented the EU's deadline on continued transfer of personal information from EU Member States to U.S. companies that have not been certified for Safe Harbor.[121] Since that date, U.S. companies that are not committed to the Safe Harbor Privacy Principles for "adequate" data protection and are doing business in or receiving personal data from EU Member States risk disruptions in the transfer of such information or prosecution under European privacy laws.[122] In light of these potential harms, Microsoft registered for Safe Harbor in May 2001,[123] followed shortly by other

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112. *See Safe Harbor List, supra* note 108.

113. *See* Patrick Thibodeau, *HP Embraces U.S.-Europe 'Safe Harbor' Privacy Deal*, COMPUTERWORLD, (Feb. 16, 2001), *at* http://www.computerworld.com/cwi/story/0,1199,NA47_STO57787,00.html.

114. *Id. quoting* Jeff Rohlmeier, a trade official at the Commerce Department.

115. *See Hearings, supra* note 15, at 41 (statement by Rep. Markey). *See also* Shimanek, *supra* note 3, at 476-77.

116. *See id.*

117. *See Safe Harbor List, supra* note 108. The list of larger companies includes Baxter Healthcare, Genetic Technologies, Hewlett Packard, Intel, Microsoft, Pharmaceutical Product Development, Proctor & Gamble, The BMW Group, and The Dun & Bradstreet. *See id.*

118. *See id.* In May 2001, seven months into the program, Intel, Microsoft, Proctor & Gamble, and Baxter Healthcare all applied and were approved for certification. *See id.*

119. *See id.*

120. *See id.*

121. *See Safe Harbor, supra* note 9, at 45,667.

122. *See Microsoft Plans to Sign EU Document, supra* note 107.

123. *See id. See also Safe Harbor List, supra* note 108.

Fortune 500 companies such as Intel and Proctor & Gamble.[124] The addition of these giant, industry-leading firms has not only proven that such companies will adhere to the Safe Harbor principles,[125] but many feel that it was the stepping stone needed for other companies to join.[126]

B. Cost/Benefit Analysis of Safe Harbor

(1) Benefits

The Safe Harbor program provides benefits for both the U.S. as a whole and for individual U.S. organizations.[127] First, participating with Safe Harbor offers organizations a higher level of certainty and predictability.[128] This is noticed primarily in the presumption of "adequacy" provided to companies certified under Safe Harbor.[129] That is, once certified, an organization will be deemed "adequate" under the EU Directive, thereby binding all fifteen EU Member States, and will continue to receive transfer of data from EU Member States.[130] Under Safe Harbor, these transfers are automatically approved, thereby allowing transfers to process quickly.[131] This also alleviates the administrative burden upon the organization of providing protection on a case-by-case basis.[132] Further, the organization's administration will not need to seek approval from each EU Member State individually.[133] Under Safe Harbor, all fifteen Member States are bound to give a presumption of "adequacy."[134]

Second, organizations certified under the program are provided a "flexible privacy regime more congenial to the U.S. approach to privacy."[135] Companies are provided with the independence of self-regulation coupled with the benefit of a single set of provisions for which to comply.[136] Hewlett Packard Company (HP) recognized this benefit as it was one of the first large

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124. *See Safe Harbor List*, *supra* note 108.

125. *See* Thibodeau, *supra* note 113.

126. *See id.*

127. *See* Assay, *supra* note 3, at 156.

128. *See* SAFE HARBOR WORKBOOK, *supra* note 2.

129. *See* Assay, *supra* note 3, at 156.

130. *See id. See also* SAFE HARBOR WORKBOOK, *supra* note 2.

131. *See Safe Harbor*, *supra* note 9, at 45,666.

132. *See id.* at 46,667. This decreased burden also works itself into decreased costs. *See* Thibodeau, *supra* note 113. The Dun & Bradstreet Corporation, for example, recognized that it saved a significant amount in legal expenses by gaining a waiver for transfers. *See id. See also* Assay, *supra* note 3, at 156.

133. *See* Rolf Rykken, *Europe's Privacy Directives*, EXPORT TODAY'S GLOBAL BUSINESS, 17(2) at 22 (Feb. 2001).

134. *See id.*

135. *See* SAFE HARBOR WORKBOOK, *supra* note 2.

136. *See* Patrick Thibodeau, *Key U.S. Lawmaker Calls for Review of Europe's Privacy Laws*, COMPUTERWORLD (March 8, 2001) *at* http://www.computerworld.com/cwi/story/0,1199,NAV47_STO58406,00.html.

companies to join the Safe Harbor program, applying for certification on January 23, 2001.[137] Barbara Lawler, the HP Manager of Customer Privacy, stated, "HP believes that self-regulation and credible third-party enforcement . . . is the single most important step that businesses can take to ensure that consumers' privacy will be respected and protected."[138] With regard to Safe Harbor, Ms. Lawler stated, "[I]t's the ultimate 'self-regulatory' approach."[139] In a later interview, speaking on joining Safe Harbor, Ms. Lawler asserted, "If corporations are serious about following the self-regulation approach, rather than having to deal with privacy regulations, then this is what they should be looking at."[140]

This benefit extends beyond individual organizations and reaches the U.S. policy as a whole.[141] Not only has the U.S. Department of Commerce negotiated a regime that will allow U.S. companies to continue receiving private personal data from EU Member States, thus dodging the potentially enormous economic hit valued by many economists as being in the billions of

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137. *See Hearings, supra* note 15, at 78 (statement of Barbara Lawler, Manager, Customer Privacy, Hewlett-Packard Company). *See also* Thibodeau, *supra* note 113. *See also Safe Harbor List, supra* note 108.

138. *Hearings, supra* note 15, at 78 (statement of Barbara Lawler, Manager, Customer Privacy, Hewlett-Packard Company).

139. *Id.* at 80.

140. Thibodeau, *supra* note 113, *quoting* Barbara Lawler, Hewlett Packard consumer privacy manager.

Some have stated that this freedom to self-regulate balanced with the standard set of policy principles is very similar to the U.S. Better Business Bureau privacy program which is already followed by a number of U.S. businesses, including HP. *See* Rykken, *supra* note 133, at 22. Gerrit de Graaf, the Trade Counselor in the Washington office of the EC, expressed that the Better Business Bureau standards "are in line with the Safe Harbor standards. If your company follows the BBB, you can sign up on Safe Harbor." *Id.* Initiated in 1997, the U.S. Better Business Bureau privacy standards allow companies to join and adopt privacy standards for their consumers' Internet transactions. *See id.* The programs also allow consumers to identify online businesses that are following the standards. *See id.* "BBB*OnLine*'s mission is to promote trust and confidence on the Internet through the BBB*OnLine* Reliability and BBB*OnLine* Privacy programs." BBBOnline, *at* http://www.bbbonline.org (last visited Oct 20, 2001).

The Bureau has two privacy "trustmark" programs with over 11,000 combined participating websites. *See id.* One of these programs, the "Privacy Seal," fully incorporates the requirements of Safe Harbor, providing "Privacy Seal" members with the option of joining Safe Harbor. *See* BBBOnline's Privacy Seal website, *at* http://www.bbbonline.com/privacy/index.asp (last visited Oct. 20, 2001). Posted on the website, "[T]he BBB*OnLine* Privacy Seal fully incorporates the requirements of the US/EU Safe Harbor Agreement, providing BBB*OnLine* Privacy Seal Participants with the ability to enter the EU Safe Harbor. Any company collecting and transferring personally identifiable information from European consumers, or its own European employees, to the US via their website, is required to meet E.U. Data Directive requirements." *Id.* The "privacy seal" program includes "verification, monitoring and review, consumer dispute resolution, a compliance seal, enforcement mechanisms and an educational component" for members. *Id.* For more information on the Better Business Bureau's "Privacy Seal" program see *id.*

141. *See Hearings, supra* note 15, at 44 (statement by David L. Aaron, Senior International Advisor, Dorsey & Whitney LLP). *See also id.* at 70 (statement by Joel R. Reidenberg, Professor of Law, Fordham University School of Law).

dollars,[142] but in the program's providing the benefits listed above to individual companies, the U.S. policy on self-regulation is actually strengthened.[143] In the conflict between the European and U.S. approaches towards information privacy policies, many felt that the EU's Directive threatened national sovereignty as the EU insisted that its Directive be treated as the de facto global standard.[144] As it is understandable that the EU desires to protect the objectives of the Directive, which are feared to be lost if third countries were not bound by the "adequacy" standards,[145] many feel that the Directive's extraterritorial force upon non-EU countries to either adopt the EU legislation

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142. *See* Jenab, *supra* note 8, at 650.

143. *See Hearings, supra* note 15, at 44 (statement of David L. Aaron, Senior International Advisor, Dorsey & Whitney LLP). In his address to the Subcommittee on Commerce, Trade, and Consumer Protection, Mr. Aaron stated his belief that Safe Harbor strengthens the U.S. self-regulatory approach by providing a uniform system for all fifty states. *See id.* One of the original goals for the Directive was to develop one market amongst the fifteen EU Member States. *See id.* In the same manner, the Safe Harbor program could provide one market amongst the fifty United States. *See id.*

U.S. policy will continue to be strengthened by Safe Harbor if Safe Harbor proves effective. *See* Assay, *supra* note 3, at 158. Many feel that this will show itself true as more large companies come aboard. *See* Thibodeau, *supra* note 113. *See also* Karen Dearne, *Privacy Threatens EU Trade*, THE AUSTRAILIAN, May 22, 2001, at 25.

144. *See Hearings, supra* note 15, at 5 (statement of Hon. W.J. "Billy" Tauzin, Chairman, CEC). In his address to the Subcommittee, Chairman Tauzin stated:

> I believe that the EU Privacy Directive may act as a de-facto privacy standard on the world . . . [I]t certainly is an effort to impose the EU's will on the U.S. While I recognize that similar charges have been laid against certain U.S. policies, the EU Privacy Directive could be the imposition of the one of the largest free trade barriers ever seen and is a direct reversal of the efforts we have made in various free trade agreements. It certainly provides for extraterritorial enforcement of EU principles on Americans and American companies.

Id. at 5-6. The Chairman further stated, "I have serious reservations about the real impact of the EU Privacy Directive on commerce and trade. I am very concerned that U.S. companies, which have been the creators and the leaders of E-commerce, will be forced to deal with such a restrictive concept." *Id.* at 6.

In 1996, Congress enacted the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. § 6021, commonly referred to as The Helms-Burton Act, in an attempt to protect the property rights of American citizens whose property was confiscated without compensation by the Castro regime. *See id.* The Act imposed sanctions on those who profited off the stolen property. *See id.* In its response to the act the EU issued the following statement: The European Union is opposed to the use of extraterritorial legislation, both on legal and policy grounds. In the last few years there has been a surge of U.S. extraterritorial sanctions legislation [both at federal and sub-federal level]. Such laws represent an unwarranted interference by the U.S. with the sovereign rights of the EU to legislate over its own citizens and companies, and are, in the opinion of the EU, contrary to international law.

Hearings, supra note 15, at 47 (statement by Jonathan M. Winer, Counsel, Alston and Byrd LLP). For more on the topic of the EU overreaching its power see Thibodeau, *supra* note 136.

145. *See Hearings, supra* note 15, at 66 (testimony of Joel R. Reidenberg, Professor of Law, Fordham University School of Law). "I would disagree with the assessments that this is an extraterritorial application of European law, because I think that it is the European Union saying, 'If it is European origin data, we want to be sure that our local privacy rules are not circumvented oversees.'" *Id.*

or face the consequences is over reaching their rights.[146] Therefore, the fact that the U.S. came out of the negotiations maintaining its self-regulatory approach, refraining from enacting broad legislation, and implementing a program that has proven beneficial in giving more guidance and uniformity to individual industry self-regulatory standards has led the U.S. to a stronger overall policy.[147]

Third, claims that are brought by citizens of EU Member States against organizations certified under Safe Harbor against the organization's use or transfer of personal information will be heard in the U.S., subject to limited exceptions.[148] Enforcement of these claims will be carried out in accordance with U.S. law, primarily by the private sector.[149] This private sector self-regulation and enforcement is backed by federal and state unfair and deceptive statutes.[150]

Finally, organizations certified under Safe Harbor may recognize increased consumer confidence and approval as the concern of personal privacy issues continues to grow.[151] In her statement to the Subcommittee on Commerce, Trade and Consumer Protection, Ms. Lawler asserted, "We believe that consumer confidence will be enhanced by ensuring customer privacy rights on- and off-line in a global commerce environment. E-commerce will grow faster if consumer confidence is reinforced by company efforts to ensure consumers have an effective recourse for privacy complaints through agreements like the Safe Harbor."[152]

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146. *See id.* at 6 (testimony of Hon. W.J. "Billy" Tauzin, Chairman, CEC). Chairman Tauzin stated, "I must admit that I take a dim view about the way the EU went about enacting this new privacy regime. The EU designed the rules and told the U.S. companies to abide by them or risk losing the transfer of any data from European nations. In essence, do it or suffer the consequences." *Id.*

147. *See Hearings, supra* note 15, at 44 (statement by David L. Aaron, Senior International Advisor, Dorsey & Whitney LLP). *See also id.* at 70 (statement by Joel R. Reidenberg, Professor of Law, Fordham University School of Law).

148. *See* Thibodeau, *supra* note 136.

149. *See Safe Harbor Overview, supra* note 101.

150. *See id.*

151. *See* Assay, *supra* note 3, at 156. A recent company to apply for certification under Safe Harbor, Agilent Technologies, Inc., capitalized on this benefit. *See Agilent Technologies Signs U.S./Europe Safe Harbor Agreement to Promote Data Privacy: Framework Enhances Protection of Personal Data Transmitting from European Union Countries* (Oct. 4, 2001), *at* http://www.agilent.com/about/newsroom/presrel/2001/04oct2001a.html. In an October 4, 2001 interview, Agilent's director of customer privacy, Jim Allen, was quick to point out "Agilent places the highest priority on customer privacy." *Id.* Mr. Allen further stated, "Our company's global privacy policies are consistent with the European Union's principles for data protection, so our signing the safe harbor agreement is a logical next step in our commitment to customer privacy. In signing this critical agreement, we want to reassure our European customers that we treat their data in the most ethical manner." *Id.*

152. *Hearings, supra* note 15, at 79 (statement of Barbara Lawler, Manager, Customer Privacy, Hewlett-Packard Company).

(2) Costs

That is not to say, however, that there are no costs associated with an organization's certification under the Safe Harbor principles. First, certification may require that the organization make significant changes to its information practices.[153] Second, upon certification, the organization runs into an immediate decision of whether to provide the privacy protection to only EU citizens, as required, or whether it should extend the protection to U.S. consumers as well.[154] Either way, the organization is likely to meet additional costs and work itself into a couple of additional problems.[155] First, as a matter of good business practice, it may not be in the best interest of the organization to deny equal protection to U.S. consumers.[156] To do otherwise would be to treat the citizens of one's own country as second-class to EU citizens.[157] However, in granting the protection, the company risks lost transactions.[158] Additionally, in embracing more than one standard, the organization enters the difficult task of managing more than one level of protection and enforcement associated with different standards.[159]

Third, there are costs associated with implementing enforcement mechanisms to investigate and verify consumer complaints.[160] Finally, the organization has potential liabilities that it may incur if it fails to fulfill its obligations under the Safe Harbor provisions.[161] These liabilities could take the form of negative publicity campaigns, requirements to delete information or provide compensation for losses incurred, potential "delisting" where the organization continues to fail to comply, and potential liability for

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153. *See* Assay, *supra* note 3, at 156. These changes may require employee education and/or technical improvements. *See id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id. See also Safe Harbor, supra* note 9, at 45,666. This has been a trouble point of the Directive since its inception. *See* Assay, *supra* note 3, at 156. If a U.S. organization complies with the elements of the Directive through the Safe Harbor Principles, it is in effect required to provide a higher level of privacy protection to citizens of foreign countries than it is required to provide to citizens of the U.S. *See id.*

One expert noted, "American law and practice allows those same companies to provide far less protection, if any, to data about American citizens. This is a particularly troubling aspect of US [sic] opposition to the European Directive's standards." *Hearings, supra* note 15, at 71 (statement by Joel R. Reidenberg, Professor of Law, Fordham University School of Law). He further asserted, "In effect, the proliferation of European style data protection measures around the world means increasingly that American citizens will be left with second class privacy in the United States and afforded greater privacy protection against American companies outside the US [sic] borders." *Id.*

158. *See* Assay, *supra* note 3, at 156.

159. *See id.*

160. *See id.*

161. *See id.*

misrepresentations made to the public and/or the government in its certification letters.[162]

C. *Safe Harbor's Impact on U.S. Companies, U.S. Citizens, and U.S. Policy*

In the nature of a compromise, both the EU and the U.S. gained some benefit at some cost in their agreement to accept the Safe Harbor program.[163] U.S. companies, for example, would have preferred Safe Harbor principles that would be words without effect, leaving them free to maximize their autonomy to profit from the use of personal data.[164] The EU, on the other hand, would have preferred that the U.S. abandon its self-regulatory system and enact broad-privacy laws in accordance with the Directive's standards.[165] As a result of the compromise, however, the Safe Harbor provisions bind U.S. companies certified under the program to the standards set out in the Directive, securing the EU's chief objective,[166] but they also protect U.S. companies' autonomy to self-regulate and the U.S. government from being required to enact broad-privacy legislation, thus, securing the U.S.'s key objective.[167] With respect to the benefits and costs listed in the proceeding section, the following analysis will measure the impact of the Safe Harbor program on U.S. companies, U.S. citizens, and U.S. policy in general.

As its primary loss, U.S. companies lost ground on their ability to maximize profits from the use of personal information gathered from EU Member States.[168] However, to date, it is not clear that U.S. companies are reaping this effect.[169] In a recent study conducted by Anderson Consulting, American companies doing business oversees electronically failed to implement many of the minimum data privacy protections laid out in the Safe Harbor Principles.[170] Of seventy-five Fortune 500 and medium-sized companies polled,[171] none of the companies had privacy policies that met even six of the seven Safe Harbor Principles and only two of the companies had

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162. *See id.*

163. For more discussion on the benefits and costs associated with Safe Harbor see Assay, *supra* note 3, at 156.

164. *See* Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 YALE J. INT'L L. 1, 75 (Winter 2000).

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *See* Kevin Featherly, *U.S. Companies Don't Make 'Safe Harbor' Privacy Grade – Study*, NEWS BYTES NEWS NETWORK, Aug. 16, 2001.

170. *See id.*

171. The seventy-five companies have a combined total of 1.7 trillion in annual revenues. *See id.*

policies that met five of the principles.[172] Enforcement was found to be the least complied with principle with only five percent of companies maintaining procedures to assure compliance while describing recourse for individuals whose privacy is breached.[173] However, the study also showed that the EU has been very slow to enforce the provisions of its Directive, let alone the principles of the Safe Harbor program.[174]

Therefore, from a U.S. company's prospective, not much has changed, as for the most part companies are not substantially changing their privacy policies.[175] This could change quickly if the EU decides to increase its enforcement against U.S. companies.[176] However, even if the EU does increase enforcement, it is still unclear as to the degree they will enforce the principles and whether the degree of force shown will lead U.S. companies to apply for certification.[177]

With respect to U.S. citizens, it has been argued that in initiating the Safe Harbor program, U.S. consumers may be treated as "second class citizens within their own country"[178] as U.S. companies will be required to provide a higher level of privacy protection to citizens of EU Member States than to U.S.

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172. *See id. See also* Safe Harbor, *supra* note 9, at 45,666.

173. *See* Featherly, *supra* note 169. Of the other principles, the Anderson study showed that twenty-five percent of the companies passed the Notice standard, eighty percent passed the Choice standard, forty-six passed Security, seventy-four passed Data Integrity, and thirty-four passed Access. *See id.* Of the industries polled, the financial services firms were highest in the choice standard (opt-in and opt-out), but lagged on data integrity and security; the retail industry was the worst at providing notice and access, but faired well in data integrity, choice security; the telecom/media/entertainment industry proved worst among all sectors, but scored highest in data integrity. *See id.*

174. *See id.* Although they have not acted upon their authority, the EU can begin enforcement and potentially block data transfer to U.S. companies that do not meet the Directive's requirements at any moment it desires. *See Directive 46/95/EC*, *supra* note 1, at art. 25(3). Many broad privacy law advocates are calling the EU and the United States to begin enforcing the Safe Harbor provisions in an attempt to force U.S. companies to comply with Safe Harbor. *See Hearings, supra* note 15 at 3 (statement of Rep. Towns, CEC). In a call for the United States to begin such enforcement, Representative Towns stated, "[A]ny privacy policy is meaningless unless it is enforceable. Therefore, government has an important part to play in making privacy enforceable." *Id.*

In addressing this enforcement concern, the Chairman of the Committee on Energy and Commerce stated, "Compliance and enforcement of the Privacy Directive has, at best, been spotty in European Nations . . . Given this, we need to know whether enforcement of the Privacy Directive on U.S. companies represent a double standard when compared to enforcement of European firms. We also need to know the consequences for competition if this occurs." *Id.* at 6 (statement by Hon. Tauzin, Chairman, CEC).

175. *See* Featherely, *supra* note 169.

176. *See id.*

177. *See id.*

178. Assay, *supra* note 3, at 156. *See also Hearings, supra* note 15, at 71 (testimony by Joel R. Reidenberg, Professor of Law, Fordham University School of Law). Professor Reidenberg expresses his concern that the Directive makes American citizens "second-class citizens in the privacy world." *Id.* For additional information on U.S. citizens being granted a lower level of privacy protection than EU citizens see *supra* note 157.

citizens.[179] Thus far, however, this has not shown to be the case. First, as U.S. companies are becoming certified under Safe Harbor and applying its seven principles, they are finding it more difficult to keep multiple databases to distinguish EU citizens from U.S. citizens than to merely apply equal privacy policies across the board to all consumers.[180] Second, most U.S. companies complying with the Safe Harbor principles are finding the "good business" factor of providing higher levels of privacy beneficial to their public image.[181] Therefore, due to individual companies analyzing the costs and benefits associated with applying the Safe Harbor principles to U.S. citizens and finding that it is more beneficial for them to grant U.S. citizens an equal level of protection, U.S. citizens are gaining protection and assurance under Safe Harbor.[182]

With respect to U.S. policy, many feel that the U.S. lost a piece of its ultimate sovereignty by compromising with the Safe Harbor principles in that, under Safe Harbor, the Department of Commerce and the Federal Trade Commission have the responsibility of providing overall enforcement on the principles as originally laid out in the Directive.[183] While the U.S. may have conformed to certain provisions of the Directive, the U.S. refrains from enacting broad legislation under the compromised framework.[184] If the U.S. would have adopted broad legislation, it would have fallen at the feet of what many consider an economic threat from the EU.[185] However, the compromise allowed the U.S. to maintain its self-regulatory approach, leaving for the most

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179. *See* Assay, *supra* note 3, at 156.

180. *See id.*

181. *See Microsoft Plans to Sign EU Document*, *supra* note 107. In reaction to this concern, Microsoft has called Safe Harbor its "floor" for data protection company-wide and that the principles will be provided equally to citizens of all countries. *See id.*

182. *See id.*

Not discussed in the analysis, EU citizens will also be impacted by the issuance of Safe Harbor. *See Hearings*, *supra* note 15, at 44 (statement of David L. Aaron, Senior International Advisor, Dorsey & Whitney LLP). It is interesting that it is these individuals who were originally intended protection under the Directive, and yet, from their perspective it is unclear whether the Directive, let alone Safe Harbor, is succeeding at all. *See id.* A primary reason for this is the EU's lack of enforcement of the Directive in EU Member States. *See id.* If the EU were to step up enforcement, EU citizens may consider the protection as a benefit but may find the scale-back of U.S. companies offering services and products within their own country as too great a cost. *See id.* As the EU begins enforcing the Safe Harbor principles and finding certain U.S. companies as failing to provide "adequate" levels of privacy protection, European communities risk both long term economic loss as some companies will pull out of the European market altogether instead of revising their privacy policies and short term loss as companies will have to temporarily pull out of the market to update and revise their standards. *See id.* One expert noted, "[T]his could hurt Europe as much as it would the United States." *Id.*

183. *See* Shaffer, *supra* note 164, at 75.

184. *See Hearings*, *supra* note 15, at 6 (testimony of Hon. W.J. "Billy" Tauzin, Chairman, CEC).

185. *See id.*

part, the government out of industry privacy control.[186] Instead of initiating broad-privacy laws to which organizations must comply, the U.S. maintained its stance that individual organizations can choose whether to comply in light of the costs and benefits it will incur.[187] Although the Safe Harbor Principles are an alteration from the U.S. position before the compromise, the program upholds the foundational bedrock of U.S. commerce in promoting industry self-regulation.[188]

V. CONCLUSION

In light of the two opposing approaches on data privacy protection, it is not surprising that the enactment of the Directive instigated great concern in the U.S. Where the European "fundamental rights" approach is geared towards broad legislative privacy law,[189] the U.S. has historically maintained a government "hands off" approach toward the private sector.[190] Instead, The U.S. encourages industry self-regulation on data privacy matters.[191] The Directive's calling for countries outside of the EU to enact broad information privacy laws that comply with its "adequate" privacy standard was quite over-reaching, threatening the U.S. to abandon its long standing position on privacy policy.[192]

The negotiated compromise of the Safe Harbor Privacy Principles[193] has not only allowed the U.S. to maintain its historical approach towards data privacy, but it has actually strengthened the approach.[194] Safe Harbor provides industries with guides and standards on privacy protection, allowing them to maintain efficiency in data transfer from EU Member States,[195] grants U.S. citizens a higher level of protection, assurance, and knowledge,[196] and maintains the foundational principles of U.S. policy.[197] Companies who come

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186. *See id.* at 44 (statement of David L. Aaron, Senior International Advisor, Dorsey & Whitney LLP).

187. *See* Assay, *supra* note 3, at 156.

188. *See id.*

189. *See Directive 95/46/EC*, *supra* note 1, at art. 1. For more on the European "fundamental right" privacy approach see *supra* note 17.

190. *See* CATE, *supra* note 3, at 36.

191. *See id.*

192. *See Hearings*, *supra* note 15, at 6 (testimony of Hon. W.J. "Billy" Tauzin, Chairman, CEC).

193. *Safe Harbor*, *supra* note 9, at 45,666.

194. *See Hearings*, *supra* note 15, at 44 (statement of David L. Aaron, Senior International Advisor, Dorsey & Whitney LLP).

195. *See* SAFE HARBOR WORKBOOK, *supra* note 2. *See also* Assay, *supra* note 3, at 156.

196. *See Hearings*, *supra* note 15, at 78 (statement of Barbara Lawler, Manager, Customer Privacy, Hewlett-Packard Company). *See also* SAFE HARBOR WORKBOOK, *supra* note 2.

197. *See Hearings*, *supra* note 15, at 78 (statement of Barbara Lawler, Manager, Customer Privacy, Hewlett-Packard Company).

under Safe Harbor become more efficient in their application and development of individual regulatory systems.[198]

An ultimate deciding factor on whether Safe Harbor succeeds will be how the EU chooses to enforce the program.[199] To date, the EU has been slow to enforce Safe Harbor, let alone the Directive in general.[200] It appears, however, that the EU is ready to begin enforcement of the provisions and may do so soon.[201] U.S. companies, on the other hand, have shown interest in the program and will likely continue to come aboard. [202] In light of its first year, Safe Harbor is proving successful in providing a higher level of protection over the use and transfer of individual's personal information while maintaining the capitalistic nature of the U.S. economy.

*David A. Castor**

198. *See id.*

199. *See Hearings, supra* note 15, at 44 (statement of David L. Aaron, Senior International Advisor, Dorsey & Whitney LLP).

200. *See id. See also* Featherely, *supra* note 160.

201. *See Hearings, supra* note 15, at 6 (testimony of Hon. W.J. "Billy" Tauzin, Chairman, CEC).

202. *See* Safe Harbor List, *supra* note 108.

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CHINA'S UNLAWFUL CONTROL OVER TIBET: THE TIBETAN PEOPLE'S ENTITLEMENT TO SELF-DETERMINATION

I. INTRODUCTION

Few people who travel to the Himalayas realize that hundreds of Tibetans have traveled over the area to flee Chinese-occupied Tibet.[1] As one twenty-one year old male from Chamdo remembered:

> It was very difficult crossing over the mountains. The snow was up to our waists, but I was so anxious to reach Nepal I kept walking, I didn't give up. We heard that refugees often die in the mountains because of the cold. We joined a guide with five children; one small boy almost died, we took turns carrying him. For three days I was snow blind and couldn't see anything.
>
> We know our Tibetan mountains, we know how to hide in them, but Nepal is unfamiliar to us; it is easy for the Nepalese to catch and arrest us. I didn't want to leave my country, but living in Tibet has become difficult. In India we will be protected by His Holiness the Dalai Lama. Only then, will we be able to work for our country's independence.[2]

This Note will demonstrate that the Tibetan people are entitled to exercise their right to self-determination because the Chinese are attempting to destroy the Tibetan way of life by illegally controlling Tibet.[3] This Note will also demonstrate that the Chinese do not have a valid claim to rule Tibet because the Seventeen Point Agreement, which the Chinese rely on, is void under international law.[4]

The Chinese assert that Tibet has been a part of China since the Thirteenth century.[5] This is contrary to Tibet's claim that the Tibetan people were independent prior to China's invasion.[6] Part II of this Note will discuss

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1. *See The Situation of Tibet and its People: Hearing on S. Hrg. 105-124 Before the Senate Committee on Foreign Relations*, 105th Cong. 76 (1997) (An Issue of Protection: Tibetan Refugees by Maura Moynihan) [hereinafter Senate Hearing].

2. *Id.* at 82. For accounts by other Tibetans leaving Tibet to resettle in India, see generally *id.*

3. *See* INTERNATIONAL COMMISSION OF JURISTS, THE QUESTION OF TIBET AND THE RULE OF LAW 21 (1959) [hereinafter ICJ].

4. *See infra* notes 90-99 and accompanying text.

5. *See* Frederick J. Petersen, *The Façade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations*, 15 ARIZ. J. INT'L & COMP. L. 871, 899 (1998).

6. *See id.*

the history of Tibet and how the government of Tibet has evolved over the centuries.[7]

The Seventeen Point Agreement, which allegedly gives China the power to rule Tibet, was signed under coercion.[8] Part III of this Note will discuss the legality of the Seventeen Point Agreement,[9] and China's violations of the Agreement.[10] Part IV will discuss the human rights instruments of which China is a member.[11] "As a result of the Chinese occupation, Tibetans in Tibet are deprived of their basic human rights."[12] Part V will discuss human rights violations that China imposes upon the Tibetans.[13]

Part VI of this Note will discuss the right to self-determination with a major portion discussing the benefits of pursuing Tibet's right to self-determination.[14] "The right to self-determination expressly incorporates cultural integrity by guaranteeing the right of peoples to pursue economic, social, and cultural development."[15] The basis of democracy, the notion that the government should earn its authority from the people, is also the basis for self-determination.[16]

II. HISTORY OF TIBET[17] AND ITS GOVERNMENT

A. *History of Tibet Pre- and Post-Chinese Occupation*

The Chinese Emperor and the Tibetan Emperor signed the Tibet-China Treaty in 821 A.D.[18] This Treaty, designed as a peace treaty,[19] was documented in Tibetan and Chinese on three pillars located at Tibet's capital,

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7. *See infra* notes 18-89 and accompanying text.

8. *See* MICHAEL C. VAN WALT VAN PRAAG, THE STATUS OF TIBET: HISTORY, RIGHTS, AND PROSPECTS IN INTERNATIONAL LAW 154 (1987).

9. *See infra* notes 91-99 and accompanying text.

10. *See infra* notes 100-113 and accompanying text.

11. *See infra* notes 114-179 and accompanying text.

12. Guidelines for Future Tibet's Polity and the Basic Features of its Constitution *at* http://www.tibet.com/future.html (last visited Oct. 2, 2001). *See also infra* notes 180-288 and accompanying text.

13. *See infra* notes 180-288 and accompanying text.

14. *See infra* notes 289-338 and accompanying text.

15. Michele L. Radin, *The Right to Development as a Mechanism for Group Autonomy: Protection of Tibetan Cultural Rights*, 68 WASH. L. REV. 695, 705 (1993).

16. *See* VAN WALT VAN PRAAG, *supra* note 8, at 190.

17. For a summary of the history of Tibet see generally HUGH E. RICHARDSON, TIBET AND ITS HISTORY (2nd ed. 1984).

18. *See* VAN WALT VAN PRAAG, *supra* note 8 at 1. With this treaty, the Chinese and Tibetans confirmed boundaries and promised to respect each other's sovereignty. *See also* Tibet: Two Distinct Views *at* http://www.rangzen.com/history/views.htm (last visited Sept. 6, 2001) [hereinafter Rangzen].

19. *See* VAN WALT VAN PRAAG, *supra* note 8, at 1. This treaty was "meant to end almost two centuries of fighting." *Id.*

China's capital, and a city located at the border.[20] This Treaty allowed China to control the whole region to the East while giving Tibet control of the region to the West.[21]

Between 907 and 1276 A.D., the Tibetan government had little if any contact with the Chinese government.[22] It was not until the Mongols captured China and Tibet that contacts between the two countries were restored.[23] Therefore, the Chinese claim a right to Tibet based on the past influence the Mongols[24] and Manchus[25] exerted over Tibet.[26]

The Mongols ruled over Tibet from 1259[27] until 1350 and over China from 1279 until 1368 and established the Yuan Dynasty in later years.[28] During the 13th century when the Mongols expanded to China in the East, the Tibetan leaders concluded an agreement with the Mongols to avoid the inevitable capture of Tibet.[29] This agreement "promised political allegiance and religious blessings and teachings in exchange for patronage and protection."[30] A Tibetan Lama, Sakya Pandita, was summoned to Prince Goden's[31] Court, in which the Lama introduced Buddhism and Tibet's culture to the Mongols.[32] Because of Sakya Pandita's loyalty, he was given temporal authority over all of Tibet.[33] There is no evidence that the Mongols integrated Tibet and China,[34] and throughout the Mongolian domination, "Tibet remained a unique part of the Empire and was never fully integrated into [the Mongolian Empire]."[35]

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20. *See id.* This treaty is "most significant because it reveals, in clear and unambiguous language, the nature of Sino-Tibetan relations at the time." *Id.*

21. *See id.*

22. *See id.* at 4.

23. *See id.* at 4-5.

24. *See id.* at 5-7. The Mongols, under Chingis Khan's rule, came from Central Asia and began a series of conquests, including Tibet and China, which led to the establishment of the Yuan Dynasty, one of the greatest empires in the world. *See id.*

25. *See id.* at 11. The Manchus, who invaded and conquered China, established the Qing Dynasty. *See id.*

26. *See* Tibet File No. 11: The Legal Status of Tibet *at* http://www.freetibet.org/info/file18.htm (last visited Sept. 23, 2001) [hereinafter File No. 11].

27. *See* VAN WALT VAN PRAAG, *supra* note 8, at 6. This was the year in which Kubilai Khagan established a definite degree of authority over Tibet. *See id.* However, there are some records that state the Tibetans gave in to Chingis Khan as early as 1207. *See id.* at 5.

28. *See id.* at 5-6.

29. *See* File No. 11, *supra* note 26.

30. *Id.*

31. *See* VAN WALT VAN PRAAG, *supra* note 8, at 5. Prince Goden was the grandson of Chingis Kahn and ruler of Kokonor. *See id.*

32. *See id.*

33. *See id.*

34. *See* File No. 11, *supra* note 26.

35. VAN WALT VAN PRAAG, *supra* note 8, at 6. "[L]icensed border markets continued to exist for trade between China and Tibet, as they existed nowhere in Yuan China." *Id.*

The Tibetans broke away from the Yuan Dynasty prior to China,[36] under the lay myriarch Changchub Gyaltsen[37] and became once again a sovereign nation.[38] Once China broke away from the Yuan Dynasty, the Chinese established the Ming Dynasty and did not show any interest in taking over Tibet.[39] The rise of the fifth incarnation,[40] known as the Great Fifth, gave the Dalai Lama the power to rule over Tibet.[41]

In 1644, the Manchus invaded and conquered China and established the Qing Dynasty.[42] The Manchus developed close ties with the Tibetans and the Dalai Lama, who then agreed to be the spiritual guide of the Manchu emperor.[43] Some Manchu rulers exerted some degree of influence over Tibet, such as sending troops into Tibet to protect the Tibetans from foreign invasion or internal turmoil.[44] However, this influence over Tibet was not a type of weakness that entailed the legal extinction of a State.[45] The Manchu rule was ineffective by 1904 and ceased to exist by 1911.[46]

Following the Manchus invasion in 1644, the British government wanted to reestablish Indian trade with Tibet in 1873, but was not sure whether to negotiate with the Chinese Government or the Tibetan Government in Lhasa, because at that time, the "legal position of Tibet was ambiguous."[47]
Tibet had re-emerged as a fully sovereign state in 1912.[48] On December 12, 1912, the Mongolian and Tibetan Governments concluded the Treaty of Friendship and Alliance,[49] in which Tibet and Mongolia declared themselves

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36. *See id.* at 6-7. China regained its independence in 1368, while the Tibetans regained their independence in 1350. *See id.*

37. *See id.* at 6. Changchub Gyaltsen established himself as the ruler of the newly unified and centralized Tibet. *See id.*

38. *See id.* at 7. *See also*, File No. 11, *supra* note 26.

39. *See* VAN WALT VAN PRAAG, *supra* note 8, at 7.

40. *See id.* at 8. This idea of incarnation is "based on the belief that human beings who have attained a very high degree of enlightenment can reincarnate voluntarily and out of compassion, in order to help all living beings on their path to final liberation." *Id.*

41. *See id.* at 10.

42. *See id.* at 11.

43. *See* File No. 11, *supra* note 26. This relationship was the only "formal" tie and it had no effect on Tibet's status as a sovereign state. *See id.*

44. *See id.*

45. *See id.*

46. *See id. See also* VAN WALT VAN PRAAG, *supra* note 8, at 11. The Chinese overthrew the Qing Dynasty in 1911 to set up China's own native rule. *See id.*

47. ICJ, *supra* note 3, at 75.

48. *See id.* at 85. It has been viewed that the overthrow of the Manchu dynasty severed the link between China and Tibet, and the Tibetans believed they were independent from China in fact and in law. *See id.*

49. The preamble states: Mongolia and Thibet [sic], having freed themselves from the dynasty of the Manchus and separated from China, have formed their own independent States, and, having in view that both States from time immemorial have professed one and the same religion, with a view to strengthening their historic and mutual friendship . . . have made the following agreement.

Treaty of Friendship and Alliance, ICLT – Legal Materials on Tibet – Treaties and Conventions Relating to Tibet *at* http://www.tibeticlt.org/materials/treaties/treaties14.html (last

as independent states free from Manchu rule.[50] The Tibetans' position was one of de facto independence.[51]

China invaded Tibet in 1949, at which time Tibet possessed internationally recognized attributes of independence, such as a government, a defined territory, and the ability to carry out international relations.[52] At the time of the invasion, China believed that it was liberating Tibet from foreign imperialists.[53] China then "incorporated Tibet as the Tibetan Autonomous Region."[54]

B. Chinese Government in Tibet

China invaded the de facto independent province in 1950 and forced an agreement on the Tibetans in 1951 that established Chinese rule.[55] With most of the eastern region of Tibet occupied and the Tibetan army in disarray, the Tibetans' only alternative was to negotiate with China.[56] As negotiations continued, the Tibetans' positions[57] were rejected, and the delegation was threatened and virtually held hostage by the Chinese.[58] The Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, known as the Seventeen Point Agreement,[59] was concluded and signed on May 23, 1951.[60] The Agreement does not contain the official seal of Tibet because the delegation, not having

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visited Oct. 2, 2001). *See also* VAN WALT VAN PRAAG, *supra* note 8, at 320.

50. *See* VAN WALT VAN PRAAG, *supra* note 8, at 50.

51. *See* ICJ, *supra* note 3, at 85. "[T]here are . . . also strong legal grounds for thinking that any form of legal subservience to China has vanished." *Id.*

52. *See* Rangzen, *supra* note 18.

53. *See* Radin, *supra* note 15, at 698. China insists that "Tibet never existed as an independent state, and even if it had, Tibetans exercised their self-determination and chose integration with China." *Id.* at 698-699.

54. *Id.* at 699.

55. *See* Michael J. Kelly, *Political Downsizing: The Re-Emergence of Self-Determination, and the Movement Toward Smaller, Ethnically Homogenous States*, 47 DRAKE L. REV. 209, 270 (1999).

56. *See* The Seventeen Point Agreement *at* http://www.tibet.ca/pub/17Point Agreement.htm (last visited Sept. 21, 2001) [hereinafter Tibet.ca].

57. One particular demand was that Chinese armies not be stationed in Tibet. *See id. See also* VAN WALT VAN PRAAG, supra note 8, at 82. Another demand was the return of territories under Chinese control. *See id.* Finally, the Tibetans demanded that the Chinese respect the boundaries of Tibet. *See id.*

58. *See* Tibet.ca, *supra* note 56. The delegation was not allowed to contact the Cabinet or the Dalai Lama but instead had to comply with China's position. *See id.*

59. Article 1 provides: "The Tibetan people shall be united and drive out imperialist aggressive forces from Tibet; the Tibetan people shall return to the big family of the motherland the People's Republic of China." The Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet, *available at* http://www.tibetjustice.org/materials/China/china3.html (last visited March 10, 2002) [hereinafter Seventeen Point Agreement]. *See also* ICJ, *supra* note 3, at 140. *See also* Part III *infra* and notes 90 to 113 and accompanying text.

60. *See* Tibet.ca, *supra* note 56.

final authority to sign, did not have possession of the Tibetan seal.[61] The preamble[62] to the Agreement allows for the exercise of regional autonomy where a profuse amount of national minorities are located.[63]

China issued a document known as the China White Paper, which provides the Chinese government's position on Tibet.[64]

China's invasion and occupation of Tibet is termed a liberation from traditional Tibetan society.[65] However, this justification for liberation is unacceptable.[66] First, international law does not allow one country to "invade, occupy, annex and colonize another country just because its social structure does not please it."[67] Second, China brought about more suffering in the name of liberation.[68] Finally, Tibetans are capable of reforming the standard of human rights within their society.[69]

The celebration of the fiftieth anniversary of the signing of the Seventeen Point Agreement in May 2001 indicates the continued reliance by the Chinese on this document as a means of giving legitimacy to their claim over the Tibetan region.[70]

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61. *See id.* The seal appearing on the agreement was allegedly forged by the Chinese authorities. *See id.*

62. A portion of the preamble states:

> [T]he Central People's Government declared that all nationalities within the boundaries of the People's Republic of China are equal, and that they shall establish unity and mutual aid and oppose imperialism and their own public enemies, so that the People's Republic of China may become one big family of fraternity and cooperation... [and] national regional autonomy is to be exercised in areas where national minorities are concentrated, and all national minorities are to have freedom to develop their spoken and written languages and to preserve or reform their customs, habits, and religious beliefs, and the Central People's Government will assist all national minorities to develop their political, economic, cultural, and educational construction work. . . . [I]n order that the Tibetan nationality and people may be freed and return to the big family of the People's Republic of China to enjoy the same rights of national equality as all other nationalities in the country and develop their political, economic, cultural, and educational work. . . . The result of the talks is that both parties have agreed to establish this agreement and ensure that it be carried into effect.

Seventeen Point Agreement, *supra* note 59. *See also* VAN WALT VAN PRAAG, *supra* note 8, at 337-38.

63. *See* Tibet.ca, *supra* note 56.

64. *See* Tibet File No. 16: China White Paper *at* http://www.freetibet.org/info/file16.htm (last visited Sept. 23, 2001).

65. *See* CENTRAL TIBETAN ADMINISTRATION, TIBET: PROVING TRUTH FROM FACTS 40 (1996) [hereinafter PROVING].

66. *See id.*

67. *Id.*

68. *See id.*

69. *See id.*

70. *See* Tibet Information Network – Anniversary of 17-Point Agreement in Tibet, May 3, 2001, *at* http://www.tibetinfo.net/news-updates/nu030501.htm (last visited Sept. 23, 2001) [hereinafter Tibetinfo.net]. People were "notified that participation in the celebrations is 'an important political responsibility.'" *Id.*

C. *Tibetan Government-in-Exile*[71]

The Tibetan Government-in-Exile,[72] also known as the Central Tibetan Administration (CTA),[73] is located in Dharamsala, India, which is currently home to the Dalai Lama.[74] If an exiled government is recognized as an authority, then it is accorded treatment due to its status as a government.[75] The term government-in-exile indicates the location of the government.[76] The recognition of governments-in-exile combines the subjective concept of recognition[77] and the objective concept of government.[78]

The Tibetans created this government to represent the Tibetan people after the Chinese occupation.[79] The CTA organizes the struggle for the self-determination of the Tibetan people.[80] The three organs of the CTA, as created by the Tibetan Constitution, are: the judiciary; the legislature, known as the Assembly of Tibetan People's Deputies; and the executive, known as the Kashag.[81] The judiciary is responsible for adjudicating all civil disputes within the exiled community, unless it would be contrary to the host country's laws.[82] The Legislature is responsible for passing new laws and for amending or repealing old laws.[83] The Kashag is elected by and answers to the legislature.[84]

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71. For a general discussion on governments-in-exile see generally STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW (Clarendon Press, 1998).

72. *See* TALMON, *supra* note 71, at 7. There are situations in which it may be necessary for States to announce their decision to recognize an authority as the government of a particular State. *See id.* The Tibetan situation is one in which "an authority in exile claims to be the government of a State which is under the effective control of a colonial power, a belligerent occupant or its local puppet, or an authority which came to power by *coup d'etat* or revolution." *Id.* at 8.

73. *See* TibetNet – Tibetan Government-in-Exile, *at* http://www.tibet.net/eng/tgie (last visited Oct. 2, 2001) [hereinafter TibetNet]. The Dalai Lama created the Central Tibetan Administration, which is the official name of the government-in-exile. *See id.*

74. *See* Senate Hearing, *supra* note 1, at 79.

75. *See* TALMON, *supra* note 71, at 14-15.

76. *See id.* at 16. The term does not accord the government any special legal status. *See id.* at 15.

77. Recognition can be implied if States continue dealing with the newly elected government. *See id.* at 22. Recognition can also signify an indication of willingness by a State to establish or maintain official relations with the government in question. *See id.* at 23. Recognition or non-recognition can mean manifestation of a recognizing State's opinion that the government in question does exist legally. *See id.* at 29.

78. *See id.* at 14. Once other States recognize a government in a State, "they accord it the treatment attached to the same legal status, i.e. that of a government." *Id.*

79. *See* Radin, *supra* note 15, at 699.

80. *See* TibetNet , *supra* note 73.

81. *See id.*

82. *See id.* The members of the judiciary are appointed by the Dalai Lama. *See id.*

83. *See id.* There are forty-six members of the legislature of which three are nominated by the Dalai Lama, and the legislature has local assemblies in thirty-eight Tibetan communities. *See id.*

84. *See id.* The Kashag consists of eight members and it is the highest executive body of the exiled community. *See id.*

The Legislature adopted the Charter of the Tibetans in Exile as the exiled Tibetan community's Constitution.[85] The preamble to the Charter provides:

> Whereas His Holiness the Dalai Lama has offered a democratic system to Tibetans, in order that the Tibetan People in-Exile be able to preserve their ancient traditions of spiritual and temporal life, unique to the Tibetans, based on the principles of peace and non-violence, aimed at providing political, social and economic rights as well as the attainment of justice and equality for all Tibetan people. Whereas efforts shall be made to transform a future Tibet into a Federal Democratic Self-Governing Republic and a zone of peace throughout her three regions. Whereas in particular, efforts shall be made in promoting the achievement of Tibet's common goal as well as to strengthen the solidarity of Tibetans, both within and out of Tibet, and to firmly establish a democratic system, suitable to the temporary ideals of the Tibetan people; the Eleventh Assembly of Tibetan People's Deputies do hereby take over Legislative powers, promulgate and legalize this Charter of the Tibetans in-Exile as their fundamental guide.[86]

The Constitution is binding on all Tibetans,[87] and it allows for local laws to conform to international law.[88] Chapter Two of the Charter sets out the fundamental rights and duties of Tibetans.[89]

III. SEVENTEEN POINT AGREEMENT[90]

A. *Legality of the Agreement*

This Agreement should not be binding for a number of reasons. First,

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85. *See id.* This Charter was adopted on June 14, 1991, and draws heavily on the Universal Declaration of Human Rights. *See id.*

86. ICL - Tibet - Constitution *available at* http://www.uni-wuerzburg.de/law/t100000_.html (last visited Oct. 2, 2001) [hereinafter Tibetan Constitution].

87. *See id.* Article 2 provides: "This Charter shall be binding and enforceable to all Tibetans under the jurisdiction of the Tibetan Administration in-Exile." *Id.*

88. *See id.* Article 6 provides in part that all laws of the Tibetan Administration in-exile shall conform to the principles of international law and the local laws of the host countries. *See Id.*

89. *See id.* Article 9 sets out equality before the law. *See id.* Article 10 allows for religious freedom. *See id.* Article 11 allows for the right to vote and nomination of candidates for the assembly. *See id.* Article 12 sets out other fundamental rights and freedoms. *See id.* Article 13 sets out obligations of the citizens. *See id.*

90. For the history of the Seventeen Point Agreement, see *supra* notes 55-70 and accompanying text.

it was signed while the armies of the People's Republic of China occupied Tibet.[91] Second, the Tibetan representatives did not have authority to sign an agreement on behalf of the Tibetan people.[92] Third, the Agreement was signed under the threat of possible military action.[93] If a treaty is imposed by force or a country is threatened by the use of force into signing an agreement, then the agreement is void and is not binding upon the parties to the agreement.[94] Tibet was already occupied by Chinese troops when it agreed to negotiate,[95] which is in violation of international law.[96] The Cabinet Minister, who was sent to negotiate with the Chinese as the chief negotiating representative, was unable to consult with the Cabinet or the Dalai Lama before concluding an agreement.[97] Due to the lack of authority and the threat of military advancement by the Chinese, this Agreement[98] lacks legal authority under international law.[99]

B. Violations of the Agreement

The Tibetans, through the Dalai Lama, repudiated this Agreement in 1959 following accusations that the Chinese breached the Agreement.[100]

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91. *See* REPORT OF THE WORKSHOP ON SELF-DETERMINATION OF THE TIBETAN PEOPLE, TIBETAN PEOPLE'S RIGHT OF SELF-DETERMINATION 16 (1996) [hereinafter REPORT].

92. *See id.*

93. *See id.*

94. *See* The Government of Tibet in Exile, Invasion and Illegal Annexation of Tibet: 1949-1951 *at* http://www.tibet.com/WhitePaper/white2.html (last visited Sept. 23, 2001) [hereinafter Illegal Annexation]. This view is indicated in the Vienna Convention on the Law of Treaties. *See id. See also* PROVING, *supra* note 65, at 27. *See* Vienna Convention on the Law of Treaties *at* http://www.un.org/law/ilc/texts/treaties.htm (last visited Oct. 29, 2001). Article 49 states, "If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty." *Id.* Article 50 states, "If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty." *Id.* Article 51 states, "The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect." *Id.* Article 52 states, "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." *Id.*

95. *See* Tibet.ca, *supra* note 56. Forty thousand Chinese troops occupied most of Tibet by 1951. *See id.*

96. *See id.*

97. *See id.*

98. *See* REPORT, *supra* note 91, at 108. The Tibetan delegation signed the agreement under force while also being under the impression that the Agreement could not limit the Dalai Lama's powers. *See id.*

99. *See* Tibet.ca, *supra* note 56.

100. *See* Tibet File No. 2: The Seventeen Point Agreement – May 1951 *at* http://www.freetibet.org/info/file2.htm (last visited Sept, 21, 2001) [hereinafter File No. 2]. *See also* Tibet.ca, *supra* note 56. The Dalai Lama could not repudiate the Agreement until he was safely in India. *See id.*

Although the Tibetans do not recognize the Agreement, China promotes it as binding but fails to observe its provisions.[101] Violations of the Agreement should be seen as releasing the Tibetan Government from its obligations under the Agreement, with the result being Tibet regaining previously surrendered sovereignty.[102] The Chinese violated the Agreement when it instituted communist-style reforms and repressed the Tibetan peoples' religious freedoms.[103]

The Dalai Lama is the personal authority for the Tibetan people because he embodies all for which his land stands.[104] The Chinese government's undermining of the Dalai Lama's authority is a step towards destroying the Tibetan way of life.[105] The Chinese pledged to respect the Tibetans' separate way of life;[106] however, the regional office located in Lhasa, Tibet, is a Chinese-controlled institution.[107] In violation of Article Seven of the Agreement,[108] the Chinese do not allow Tibetans to engage freely in their choice of religion.[109] In violation of Articles Four[110] and Eleven,[111] the Chinese government decided to implement socialism[112] in Tibet against the wishes of the Dalai

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101. *See* Tibet.ca, *supra* note 56. *See also* Tibetinfo.net, *supra* note 70. Examples of China's failure to observe certain provisions of the Agreement include the violation of China's commitment not to alter Tibet's existing political system, not interfere with the status, function, and powers of the Dalai Lama or the Panchen Lama, allow regional autonomy to the Tibetans, and respect their religious beliefs and customs. *See id.*

102. *See* ICJ, *supra* note 3, at 17. China's violations are more than just a matter of domestic concern because it involves the existence of Tibet as a member of nations. *See id.*

103. *See* Kelly, *supra* note 55, at 270.

104. *See* ICJ, *supra* note 3, at 21.

105. *See id.*

106. *See id.* at 140. Article 3 of the Agreement states, "In accordance with the policy towards nationalities laid down in the Common Programme [sic] of the CPPCC, the Tibetan people have the right of exercising national regional autonomy under the unified leadership of the CPG." *Id.*

107. *See id.* at 21. "Regional autonomy should mean more than co-operation; it should mean powers of initiative and decision." *Id.*

108. *See id.* at 140. Article 7 states:

> The policy of freedom of religious belief laid down in the Common Programme [sic] of the CPPCC shall be carried out. The religious beliefs, customs and habits of the Tibetan people shall be respected and lama monasteries shall be protected. The central authorities will not effect a change in the income of the monasteries.

Id.

109. *See infra* notes 264-270 and accompanying text.

110. *See* ICJ, *supra* note 3, at 140. Article 4 states, " The central authorities will not alter the existing political system in Tibet. The central authorities also will not alter the established status, functions and powers of the Dalai Lama. Officials of various ranks shall hold office as usual." *Id.*

111. *See id.* at 141. Article 11 states, "In matters related to various reforms in Tibet, there will be no compulsion on the part of the central authorities. The local government of Tibet should carry out reforms of its own accord, and, when the people raise demands for reform, they shall be settled by means of consultation with the leading personnel of Tibet." *Id.*

112. Socialism is

> 1: any of various economic and political theories advocating collective or governmental ownership and administration of the means of production and distribution of goods

Lama.[113]

IV. HUMAN RIGHTS INSTRUMENTS

A. *In General and the Charter of the United Nations*

China became a member of the United Nations on October 24, 1945,[114] and ratified the Charter of the United Nations[115] on September 28, 1945.[116] The purpose of the United Nations, as set out in the Charter, is to maintain international peace, develop friendly relations, achieve cooperation in solving problems, and to be the center of harmonization.[117] The Charter requires

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2: a: a system of society or group living in which there is no private property
b: a system or condition of society in which the means of production are owned and controlled by the state
3: a stage of society in Marxist theory transitional between capitalism and communism and distinguished by unequal distribution of goods and pay according to work done.

WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1118 (9th ed. 1990).

113. *See* ICJ, *supra* note 3 at 48.

114. *See* List of Member States *at* http://www.un.org/Overview/unmember.html (last visited Sept. 6, 2001).

115. The preamble states:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, AND FOR THESE ENDS to practise [sic] tolerance and live together in peace with one another as good neighbours, [sic] and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples. . . .

U.N. CHARTER *at* http://www.unhchr.ch/html/menu3/b/ch-chp1.htm (last visited Oct. 29, 2001).

116. *See* Multilateral Treaties to Which China is a Party or Which China Has Signed *at* http://www.china-un.org/eng/premade/13561/Multilateral%20Treaties.htm (last visited Sept. 5, 2001).

117. Chapter I, Article 1 states: The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

Members to fulfill obligations, settle disputes peacefully, refrain from the threat or use of force, and assist the United Nations in any action it takes.[118]

B. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is not a binding instrument and is used to promote respect for human rights.[119] The UDHR

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3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

U.N. CHARTER, *supra* note 115.

118. Chapter I, Article 2 states: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it take in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Id.

119. The Preamble states:

Whereas 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, Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, Whereas it is essential to promote the development of friendly relations between nations,

promotes equality among people,[120] without distinction of any kind.[121] The UDHR allows for the right to life,[122] equal protection of the law,[123] freedom to choose to marry,[124] the right to move within the country and leave the country,[125] and protection against unemployment.[126] The UDHR opposes the

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> Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom, Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge, Now Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Universal Declaration of Human Rights *at* http://www.un.org/Overview/rights.html (last visited Sept. 6, 2001) [hereinafter UDHR].

120. Article 1 provides, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." *Id.*

121. Article 2 provides in part, "Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, [sic] sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.* Article 7 provides in part, "All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." *Id.*

122. Article 3 provides, "Everyone has the right to life, liberty and security of person." *Id.*

123. Article 7 provides in part, "All are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.*

124. Article 16 provides:

> (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
> (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Id.

125. Article 13 provides, "(1) Everyone has the right to freedom of movement and residence within the borders of each state. (2) Everyone has the right to leave any country, including his own, and to return to his country." *Id.*

126. Article 23 provides:

> (1) Everyone has the right to work, to free choice of employment, to just and favourable [sic] conditions of work and to protection against unemployment.
> (2) Everyone, without any discrimination, has the right to equal pay for equal work.

use of torture[127] and arbitrary arrest.[128] The Chinese are in violation of many of the human rights expressed in this Declaration.[129]

C. *Convention on the Elimination of All Forms of Racial Discrimination*

China became a member to the Convention on the Elimination of All Forms of Racial Discrimination (CERD) on December 29, 1981.[130] The main objective of this Convention is to promote racial equality by providing special protections for certain racial and ethnic groups.[131] The CERD covers indirect discrimination, which is also referred to as unjustified disparate impact.[132] "[T]he term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour [sic], descent, or national or ethnic origin which has the purpose . . . of nullifying or impairing the . . . enjoyment . . . of human rights. . . ."[133]

The CERD condemns racial discrimination and undertakes to pursue a policy that eliminates racial discrimination.[134] It condemns propaganda and or-

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(3) Everyone who works has the right to just and favourable [sic] remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Id.

127. Article 5 provides, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*

128. Article 9 provides, "No one shall be subjected to arbitrary arrest, detention or exile." *Id.*

129. *See infra* notes 180-288 and accompanying text.

130. *See* Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties *at* http://www.unhchr.ch/pdf/report.pdf (last modified Oct. 22, 2001) [hereinafter Status of Ratifications].

131. *See* International Convention on the Elimination of All Forms of Racial Discrimination, New York, 7 March 1966 *at* http://untreaty.un.org/English/Treaty Event2001/6.htm (last visited Oct. 5, 2001). "[This Convention] was the first human rights instrument to establish an international monitoring system and was also revolutionary in its provision of national measures towards the advancement of specific racial or ethnic groups." *Id.*

132. *See id.*

133. International Convention on the Elimination of All Forms of Racial Discrimination *at* http://www.unhchr.ch/html/menu3/b/d_icerd.htm (last visited Oct. 29, 2001) [hereinafter CERD].

134. Part I, Article 2 provides in part, "1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races. . . ." *Id.*

ganizations that promote discrimination,[135] guarantees the right of equality,[136] assures effective protection and remedies,[137] and undertakes to adopt measures that combat racial discrimination.[138]

D. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

China became a member to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on October 4, 1988.[139] Torture and other cruel treatments are strictly condemned by the international world because of the seriousness of the violations.[140] The prohibition against torture[141] is absolute and no circumstances can justify the

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135. Part I, Article 4 provides in part, "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour [sic] or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. . . ." *Id.*

136. Part I, Article 5 provides in part: States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour [sic], or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;
(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) Other civil rights;
(e) Economic, social and cultural rights;
(f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Id.

137. Part I, Article 6 provides in part, "States Parties shall assure to everyone within their jurisdiction effective protection and remedies. . .against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention. . . ." *Id.*

138. Part I, Article 7 provides in part, "States Parties undertake to adopt immediate and effective measures, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethical groups. . . ." *Id.*

139. *See* Status of Ratifications, *supra* note 130.

140. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984 *at* http://untreaty.un.org/English/Treaty Event2001/7.htm (last visited Oct. 5, 2001) [hereinafter CAT website].

141. Part I, Article 1 provides in part the definition of torture.

> [T]he term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason

invocation of torture.[142]

States parties must take effective measures to prevent acts of torture from occurring in their State[143] and must not extradite a person to another State where he or she would be in danger of being subjected to torture.[144] Under CAT, law enforcement personnel are properly trained regarding the prohibition against torture,[145] and torture shall be considered a criminal offense[146] to which the victim has redress.[147]

E. International Covenant on Civil and Political Rights

China became a signatory to the International Covenant on Civil and Political Rights (CCPR) on October 5, 1998.[148] The CCPR promotes human

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based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm (Sept. 6, 2001) [hereinafter CAT].

142. *See* CAT website, *supra* note 140.

143. Part I, Article 2 provides in part:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability [sic] or any other pubic emergency, may be invoked as a justification of torture.

CAT, *supra* note 141.

144. Part I, Article 3 provides in part, "1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." *Id.* The UN states as a key provision that:

States parties have the obligation to prevent and punish not only acts of torture as defined in the Convention, but also other acts of cruel, inhuman or degrading treatment or punishment, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

See CAT website, *supra* note 140.

145. Part I, Article 10 provides in part:

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

CAT, *supra* note 141.

146. Part I, Article 4 provides in part, "1. Each State Party shall ensure that all acts of torture are offences [sic] under its criminal law." *Id.*

147. Part I, Article 14 provides in part, "1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." *Id.*

148. *See* Status of Ratifications, *supra* note 130.

rights and defends the right to life.[149]

The CCPR provides for the right to self-determination,[150] the right to life,[151] the right to liberty,[152] the right to move around within and outside the state,[153] the right to be presumed innocent,[154] the right to be recognized as a person,[155] the right to freedom of thought and religion,[156] the right to hold opinions[157] and the right for every child to be registered.[158] The CCPR does not allow for discrimination[159] or torture of any kind.[160]

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149. See International Covenant on Civil and Political Rights, New York, 16 December 1966 *at* http://untreaty.un.org/English/TreatyEvent2001/9.htm (last visited Oct. 5, 2001) [hereinafter CCPR website]. The CCPR "stipulates that no individual can be subjected to torture, enslavement, forced labour [sic] and arbitrary detention or be restricted from such freedoms as movement, expression and association." *Id.*

150. Part I, Article 1 provides in part, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights *at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Sept. 6, 2001) [hereinafter CCPR].

151. Part III, Article 6 provides in part, "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." *Id.*

152. Part III, Article 9 provides in part:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

Id. Part III, Article 10 provides in part, "1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." *Id.*

153. Part III, Article 12 provides in part, "1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own." *Id.*

154. Part III, Article 14 provides in part, "2. Everyone charged with a criminal offence [sic] shall have the right to be presumed innocent until proved guilty according to law." *Id.*

155. Part III, Article 16 provides, "Everyone shall have the right to recognition everywhere as a person before the law." *Id.*

156. Part III, Article 18 provides in part, "1. Everyone shall have the right to freedom of thought, conscience and religion.... 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." *Id.*

157. Part III, Article 19 provides in part, "1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression." *Id.*

158. Part III, Article 24 provides in part, "2. Every child shall be registered immediately after birth and shall have a name." *Id. See also infra* note 202 and accompanying text.

159. Part II, Article 2 provides in part:

> 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 [sic], sex, language, religion, political or other

F. *International Covenant on Economic, Social and Cultural Rights*

China became a member to the International Covenant on Economic, Social and Cultural Rights (CESCR) on March 27, 2001.[161] The CESCR "provides the most important international legal framework for protecting basic human rights."[162]

The CESCR grants many rights,[163] including the right of self-determination,[164] the right to work,[165] the right to a sufficient standard of living,[166] and the right to an education.[167]

G. *Convention on the Rights of the Child*

China became a member to the Convention on the Rights of the Child (CRC) on March 3, 1992.[168] This is a legally binding instrument that provides

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opinion, national or social origin, property, birth or other status.

Id.

160. Part III, Article 7 provides in part, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.*

161. *See* Status of Ratifications, *supra* note 130.

162. International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966 *at* http://untreaty.un.org/English/TreatyEvent2001/8.html (last visited Oct. 5, 2001) [hereinafter CESCR website].

163. For a list of protected rights, see generally *id.*

164. Part I, Article 1 provides in part, "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Economic, Social and Cultural Rights *at* http://www.unhchr.ch/html/menu3/b/a_cescr.html (last visited Oct. 29, 2001) [hereinafter CESCR].

165. Part III, Article 6 provides in part, "1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." *Id.*

166. Part III, Article 11 provides in part, "1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." *Id.*

167. Part III, Article 13 provides in part:

> 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Id.

168. *See* Status of Ratifications, *supra* note 130.

for the protection of children's rights.[169] The key provisions of the CRC focus on non-discrimination, the best interests of children, the right to life, survival and development, and the views of the children.[170]

Under the CRC, a child is one who has not yet attained the age of eighteen years.[171] This instrument ensures that children have the right to life,[172] that they are registered and acquire a nationality,[173] the right to express their own views,[174] the right to particular freedoms, such as thought and religion,[175] the right to education,[176] the right to enjoy his or her own culture

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169. *See* Convention on the Rights of the Child, New York, 20 November 1989, *at* http://untreaty.un.org/English/TreatyEvent2001/3.htm (last visited Oct. 5, 2001) [hereinafter CRC website]. This Convention is the most rapidly and widely ratified human rights instrument throughout the world. *See id.*

170. *See id.*

171. Part I, Article 1 provides in part, "[A] child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Convention on the Rights of the Child *at* http://www.unhchr.ch/html/menu3/b/k2crc.htm (last visited Oct. 29, 2001) [hereinafter CRC].

172. Part I, Article 6 provides, "1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child." *Id.*

173. Part I, Article 7 provides in part, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents." *Id.*

174. Part I, Article 12 provides:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Id.

175. Part I, Article 14 provides in part, "1. States Parties shall respect the right of the child to freedom of thought, conscience and religion." *Id.*

176. Part I, Article 28 provides:

> 1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
> (a) Make primary education compulsory and available free to all;
> (b) Encourage the development of different forms of secondary education . . . make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
> (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
> (d) Make educational and vocational information and guidance available and accessible to all children;
> (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
> 2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human

if a member of a minority group,[177] and ensures that children are not subjected to torture.[178] This Convention works as a useful tool for society working for the protection and promotion of children's rights.[179]

V. HUMAN RIGHTS VIOLATIONS SINCE CHINESE OCCUPATION

A. *General Discussion About Human Rights Violations*

China argues that the issue of human rights violations[180] in Tibet is an

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dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods.

Id.

177. Part I, Article 30 provides:
In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise [sic] his or her own religion, or to use his or her own language.

Id.

178. Part I, Article 37 provides in part: States Parties shall ensure that:
(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.
(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Id.

179. *See* CRC website, *supra* note 169.

180. The rights denied to the Tibetans include:
1. Life, liberty and security have been violated.
2. Forced labour [sic] has been inflicted on the Tibetans.
3. Torture and cruel and degrading treatment have been inflicted.
4. Rights of home and privacy have been violated.
5. Freedom of movement within a state, and the right to leave and return to Tibet have been denied.
6. Marriages have been forced upon unwilling parties.
7. Property rights have been arbitrarily violated.
8. Freedom of religion and worship have been systematically denied.
9. Freedom of the expression and communication of ideas is totally lacking.
10. Freedom of association is denied.

internal matter and any foreign concern or criticism regarding these abuses is a violation of China's sovereignty.[181] Some human rights violations that are occurring in Tibet are: violations of children's rights; discrimination of the Tibetan people; suppression of religious freedom; population control; torture; and arbitrary arrest and detention.[182] Since China has invaded Tibet, the Chinese have undertaken a campaign of abuses against Tibetans and destroyed the traditional Tibetan culture.[183]

"[T]he U.S. Congress has persistently called on the executive branch to support Tibetan self-determination and to link aid to China with human rights improvements in Tibet."[184] The United States' concerns about the human rights abuses occurring in Tibet is superceded by its desire to maintain civilized relations with China.[185]

B. Population Control[186]

International law allows a person to have the right to find a family,[187] and the Fourth Geneva Convention of 1949 makes it illegal for an occupying power to transfer civilians into the area being occupied.[188] The Chinese government is inundating Tibet with Chinese settlers[189] through a policy

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11. The right to representative government is denied.
12. There is a wanton disregard for the economic rights of man in relation to his country's resources.
13. The right to a free choice of employment is denied.
14. Conditions of labour [sic] do not conform to minimum standards in respect of rest and limitations of hours.
15. The right to an adequate standard of living is denied.
16. The right to a liberal and efficient, non-discriminatory educational system is denied.
17. The right to participate in the cultural life of the community is denied.
18. The limitations imposed on the rights of the Tibetans far exceed any which are reasonably referable to the requirements of public morality, public order and the welfare of society.

ICJ, *supra* note 3, at 58-59.

181. *See* ASIA WATCH REPORT, MERCILESS REPRESSION: HUMAN RIGHTS IN TIBET 2 (1990).

182. *See infra* notes 218-288 and *supra* note 175 and accompanying text.

183. *See* Petersen, *supra* note 5, at 900.

184. Radin, *supra* note 15, at 700.

185. *See* Petersen, *supra* note 5, at 901.

186. For a discussion on population transfer see generally Eric Kolodner, *Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination*, 27 N.Y.U. J. INT'L L. & POL. 159 (1994).

187. *See* UDHR, *supra* note 119. Article 16(1), provides "Men and women of full age, without any limitation due to race . . . have the right to marry and to found a family." *Id.* Article 16(3) states, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." *Id.*

188. *See* PROVING, *supra* note 65, at 83.

189. *See* Radin, *supra* note 15, at 698. This effectively dilutes the Tibetan population. *See id.*

known as population transfer.[190] This is a major threat to the Tibetan population because the policy is curtailing its growth.[191]

Population transfer "allows China to degrade cultural rights in the name of economic expansion."[192] The Chinese encourage population transfer because they feel that the Tibet Autonomous Region's (TAR) population is inadequate to develop Tibet's resources.[193] The Eastern Tibetan regions outside of the TAR have the highest concentration of Chinese settlers.[194] In 1992, China opened Tibet's economy to foreign investments, a move which was designed to encourage more Chinese to settle in Tibet.[195] Because of China's push toward population transfer, the Tibetans are inferior in "economic, political, educational and social spheres."[196]

Coercive birth control measures[197] are also being used to slow the growth of the Tibetan population.[198] Tibetan couples are only allowed to have two children.[199] If the Tibetans have more than two children, up to fifty percent of the worker's pay can be cut and the children are denied ration cards,[200] also known as residence cards.[201] The Chinese employ several measures to reduce the number of births, including sterilization[202] and abortion.[203] The

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190. *See* PROVING, *supra* note 65, at 83. "The aim of this . . . policy is to ensure that the Tibetans are reduced to an insignificant minority in their own country so as to render any resistance against China's rule ineffective." *Id.* For a short discussion on population transfer, see generally ASIA WATCH REPORT, *supra* note 181.

191. *See* PROVING, *supra* note 65, at 83.

192. Radin, *supra* note 15, at 713. Tibetans are not involved in the development of their region and population transfer has ensured that the Tibetans do not receive any direct benefit of economic growth. *See id.*

193. *See* PROVING, *supra* note 65, at 84.

194. *See id.* at 86. These areas were settled soon after the invasion of the Chinese troops in 1949. *See id.*

195. *See id.* at 87.

196. *Id.* at 90. The Chinese settlers have been given the most fertile land within Tibet. *See id.*

197. For testimonials regarding coercive birth control measures see generally THE TIBETAN WOMEN'S ASSOCIATION, TEARS OF SILENCE: A REPORT ON TIBETAN WOMEN AND POPULATION CONTROL (1995) app. A at 45-59. *See also* THE TIBETAN WOMEN'S ASSOCIATION, TEARS OF SILENCE: A REPORT ON TIBETAN WOMEN AND POPULATION CONTROL (1995) Excerpts from "The Temporary Method for the Management of Planned Birth in the Tibet Autonomous Region." (Draft, Version 1, 8 May, 1992) app. B at 60-65.

198. *See* PROVING, *supra* note 65, at 83.

199. *See id.* at 87. This policy was instituted in 1984. *See id.*

200. *See id.* at 88.

201. *See* TIBETAN WOMEN'S ASSOCIATION, *supra* note 197, at 16. Children who do not receive a residence card will have difficulty in "obtaining state-provided schooling, housing, basic foodstuffs, medical treatment and travel." *Id.* The children may also be denied certain political rights, such as voting and citizenship. *See id.*

202. *See* PROVING, *supra* note 65, at 88. Nineteen percent of women in the TAR were sterilized in 1986. *See id.* In the Gansu Parig District, eighty-two percent of the women sterilized were Tibetan. *See id.*

203. *See id.* Teams roam the countryside rounding up women for abortions, and even those who are advanced in their pregnancy are forced to have an abortion and then be sterilized. *See id.* at 88-89. *See also* TIBETAN WOMEN'S ASSOCIATION, *supra* note 197, at 24. When a woman

enforcement of these measures differs from place to place because the Chinese officials are given complete discretion to implement these policies.[204] By imposing these coercive birth control measures, China is violating the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[205] The CEDAW condemns discrimination and allows for the undertaking of certain acts that will eliminate the discrimination against women.[206] The CEDAW also ensures the development and advancement of women,[207] access to family planning advice,[208] access to health care services,[209]

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seeks assistance at a public hospital but does not have the birth document, another form of abortion called infanticide, usually occurs by lethal injection into the soft spot on the head. *See id.*

204. *See* PROVING, *supra* note 65, at 89.

205. *See* Status of Ratifications, *supra* note 130. China became a party to the CEDAW on November 4, 1980. *See id.* Article 16(1)(e) states women have "the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to exercise these rights." Convention on the Elimination of All Forms of Discrimination Against Women *at* http://www.unhchr.ch/html/menu3/b/e1cedaw.htm (last visited Oct. 29, 2001) [hereinafter CEDAW]. For a discussion on laws and conventions relating to population and women, see generally TIBETAN WOMEN'S ASSOCIATION, *supra* note 197.

206. Part I, Article 2 provides in part:

> States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
>
> (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
>
> (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
>
> (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

CEDAW, *supra* note 205.

207. Part I, Article 3 provides:

> States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Id.

208. Part III, Article 10 provides in part, "(h) Access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning." *Id.*

209. Part III, Article 12 provides:

> 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

and rights equal with men in making familial decisions.[210]

China implemented The Maternal and Infant Health Care Law in 1994, which gave the government the right to control marriages and births.[211] These policies are not only enforced by physical force but also by economic force.[212] The Chinese government has implemented a quota system to enforce birth control campaigns in Tibet.[213] An example of a quota system implemented by the State is one that gives a population control target and point system, with the following items being examined: 1) number of births; 2) planned birth rate; 3) spread of two children; and 4) extra plan pregnancy rate.[214] For those meeting the target, officials are given monetary awards, and those who do not meet the target will be criticized and even be demoted or dismissed.[215] These implementations not only violate the CEDAW, but they violate Articles Six and Seven of the CRC[216] and Articles Five and Sixteen of the UDHR.[217]

C. *Violations of Children's Rights*

Many children are subject to detention and torture if the Chinese suspect that the child may be involved in Tibetan nationalist activities, such as peaceful demonstrations.[218] This is in violation of the most elementary human

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2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement, and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Id.

210. Part IV, Article 16 provides in part:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interest of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

Id.

211. *See* TIBETAN WOMEN'S ASSOCIATION, *supra* note 197, at 17. This law avoids breeding of inferior quality by allowing the use of sterilization and abortion and bans marriages to prevent the passing of mental disabilities and disease to children. *See id.*

212. *See id.* at 26.

213. *See id.* at 28. Doctors are given quotas that must be attained each year and each official's performance is measured based on whether they reach the quota. *See id.*

214. *See id.* at 29.

215. *See id.* at 30.

216. *See* CRC, *supra* notes 172-173 and accompanying text.

217. *See* UDHR, *supra* note 124 and accompanying text.

218. *See* INTERNATIONAL COMMITTEE OF LAWYERS FOR TIBET, A GENERATION IN PERIL: THE LIVES OF TIBETAN CHILDREN UNDER CHINESE RULE 18 (2001) [hereinafter ICLT]. This torture usually consists of beatings with metal rods, electric shock, forced labor, deprivation of

rights standards.[219] Children are entitled to special protection because of their age.[220] Children should be afforded due process, presumed innocent until proven guilty, informed of their charges, and be granted legal counsel.[221]

Tibetan children are usually detained for one of three reasons.[222] They are detained for participating in any act that can be construed as political, for attempting to flee the country, or for engaging in much more trivial activities, such as insubordination.[223] Prisons and reform through labor centers, Re-education through labor centers and Public Security Bureau centers are three different types of detention facilities where the police send children.[224] Even though the law details the appropriate location for detention, most children who are sentenced administratively serve their sentences in the Public Security Bureau, which allows the police to exercise long-term authority over the detainees.[225] Re-education through labor[226] authorizes sentences of a period of three years to be handed down by "quasi-judicial government committees."[227] This type of detention violates international law because it constitutes arbitrary detention.[228]

Torture is used to obtain information or to intimidate detained children.[229] The most common forms of torture are electric shocks or beatings.[230] Older girls are raped and more commonly, sexually assaulted as a means of torture.[231] Torture is not only employed in detention centers, but also in schools in the form of corporal punishment.[232] The most common form of corporal punishment is beatings, which in some cases causes cuts that

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nutrients, and suspension in painful positions. *See id.*

219. *See id.* at 19.

220. *See id.*

221. *See id.* at 20. Tibetan children are arbitrarily detained without any due process and without giving them access to counsel or relatives or allowing them to have a legal hearing regarding their detention. *See id.* at 1.

222. *See id.* at 22.

223. *See id.* Children that are detained for fleeing are confined for a shorter period of time than those detained for political activity. *See id.* at 27.

224. *See id.* at 22. Prisons and reform through labor centers hold prisoners who are sentenced criminally; Re-education through labor centers hold prisoners who have been sentenced administratively; and Public Security Bureau detention centers are for prisoners being held for police investigations. *See id.*

225. *See id.* at 23. This type of detention allows for the greater possibility of torture due to the lack of accountability. *See id.*

226. *See id.* at 23-24. This is a form of administrative detention, which is in violation of international law and constitutes arbitrary detention. *See id.*

227. *Id.* Judicial authority does not authorize administrative detention; therefore, many authorities detain citizens for indefinite periods. *See id.* at 24.

228. *See id.*

229. *See id.* at 33.

230. *See id.*

231. *See id.* at 36.

232. *See id.* at 37. Teachers employ corporal punishment, rising to the level of torture, in primary schools located in Tibet. *See id.* Not only are the children physically tortured, but they are also publicly humiliated and subjected to acts of degrading treatment. *See id.*

require stitches.[233] These acts of corporal punishment and torture violate obligations under the Convention Against Torture.[234] These acts are also in violation of the UDHR[235] and the CRC.[236]

D. Discrimination

The occupation of Tibet by China is the main cause of racial discrimination[237] against Tibetans.[238] Although China acceded to the CERD in 1981, racial discrimination, which is still prevalent throughout Tibet, is the source of poor education and employment opportunities for Tibetans.[239] In view of the fact that Tibetans are considered ethnic minorities, international law entitles them to better educational rights.[240]

China acceded to the CERD; therefore, they have an obligation to guarantee the right of everyone to equality before the law in the enjoyment of the right to education.[241] One form of discrimination in education is the difficulty for Tibetan children to access education.[242] This is in violation of the Convention on the Rights of the Child, which allows for the development of the child.[243] There are many reasons why Tibetan children have difficulty accessing education.[244] First, Tibetan educational facilities are inadequate in number and sophistication as compared to Chinese schools,[245] and Tibetan schools receive less government funding.[246] Educational reforms shifted financial responsibility from the central government to the local government,

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233. *See id.* at 38.

234. *See id.* at 41.

235. *See* UDHR, *supra* notes 127, 128 and accompanying text.

236. *See* CRC, *supra* notes 174, 175, 178 and accompanying text.

237. For a general discussion on discrimination see generally PROVING, *supra* note 65. *See also*, ASIA WATCH REPORT, *supra* note 181.

238. *See* DEPARTMENT OF INFORMATION AND INTERNATIONAL RELATIONS, RACIAL DISCRIMINATION IN CHINESE-OCCUPIED TIBET 4 (2001) [hereinafter RACIAL DISCRIMINATION REPORT].

239. *See id.* at 5.

240. *See* ICLT, *supra* note 218, at 45.

241. *See* RACIAL DISCRIMINATION REPORT, *supra* note 238, at 7. *See also* CERD, *supra* note 133. Article 5(e)(v) provides, "The right to education and training." *Id.*

242. See RACIAL DISCRIMINATION REPORT, *supra* note 238, at 8. China concedes that approximately one-third of Tibetan children do not receive an education; whereas the number of Chinese children who do not receive education is only one and a half percent. *See id.* This causes a great disparity in literacy rates where nine percent of Chinese adults are illiterate compared to sixty percent of Tibetan adults. *See id.*

243. *See* CRC *supra* note 171and accompanying text.

244. *See* RACIAL DISCRIMINATION REPORT, *supra* note 238, at 9.

245. See id. at 8-9. China directs most financial assistance to the urban areas of Tibet because they consist mainly of Chinese settlers. *See id.* at 9.

246. *See id.* at 9. "The Chinese schools had computers and a science laboratory whereas the Tibetan school was heated by fire and didn't even have a playground." *Id.*

causing the poorest areas to have the least amount of funds at their disposal.[247] Second, Tibetans are charged fees to attend school.[248] Third, access for Tibetan children may be restricted based upon the parents' ability to pay bribes[249] or their parents' connections with school officials.[250]

Another form of discrimination is the inability of Tibetans to learn about their culture and to practice their native language.[251] The primary goal of education in China is to secure the Tibetans loyalty to the Chinese political movement rather than to educate toward the child's well-being.[252] This monitoring of education by the Chinese government has led to a "suppression of Tibetan culture and history in the education curricula."[253] Since Tibetans are deemed a minority nationality, "international law obliges [China] to permit every Tibetan child 'to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.'"[254] The urban population, which gets most of the financial assistance for education, consists mainly of Chinese settlers, while eighty percent of the Tibetan population lives in the rural areas, which do not receive as much financial assistance.[255] However, teachers and other school officials discriminate against Tibetan children who attend mixed schools.[256]

Tibetans also suffer from employment discrimination, which is shown by the underrepresentation of Tibetans in certain business areas as well as disparities in working conditions between Chinese and Tibetans.[257] This is in

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247. *See* ICLT, *supra* note 218, at 47. Because of these policies, the educational gap has widened between the Tibetan people and the Chinese people. *See id.*

248. *See id.* at 49. Chinese law prohibits charging fees to attend school; however, it does permit and the Chinese government does charge miscellaneous fees, which makes it harder for Tibetan children to attend school. *See id.* at 49. The majority of Tibetans are charged approximately 100 to 200 yuan per month. *See id.*

249. *See id.* at 57. Educational access can be restricted by the teacher's demand for gifts in exchange for favorable treatment. *See id.*

250. *See id.* Educational access is sometimes restricted by whom a child's parents know. *See id.*

251. *See* RACIAL DISCRIMINATION REPORT, *supra* note 238, at 10. "A primary barrier to academic success for Tibetan Children is the overwhelming use of Chinese as the teaching language in most schools in Tibet." *Id.* China resists teaching about the Tibetan history and culture. *See id.*

252. See ICLT, *supra* note 218, at 59. The Chinese want to indoctrinate rather than educate. *See id. See also* RACIAL DISCRIMINATION REPORT, *supra* note 238, at 10. The education curricula for Tibetans is "closely monitored and controlled by the central government." *Id.*

253. RACIAL DISCRIMINATION REPORT, *supra* note 238, at 11.

254. ICLT, *supra* note 218, at 66.

255. *See* RACIAL DISCRIMINATION REPORT, *supra* note 238, at 9.

256. *See id.* at 11. *See also* ICLT, *supra* note 218, at 69. Tibetan children are segregated from Chinese children; Tibetan children pay higher fees; Chinese children receive free food and supplies; and Tibetan children have to pay for these items. *See id.* Some schools offer better classrooms to Chinese children. *See id.*

257. *See* RACIAL DISCRIMINATION REPORT, *supra* note 238, at 12. *See also* CERD, *supra* note 133. Article 5(e)(i) provides, "The rights to work, to free choice of employment, to just and favourable [sic] conditions of work, to protection against unemployment, to equal pay for equal

violation of the International Covenant on Economic, Social and Cultural rights, which provides to everyone the right to work and gain a living through work.[258] This discrimination is related to China's encouragement of Chinese settlement in Tibet.[259] The Chinese are encouraged to settle and work in Tibet by being directly imported into Tibet, and they are offered incentives such as higher salaries, which are not offered to Tibetans.[260] Employment discrimination against Tibetans is shown by the unemployment rates, which are on the rise, and the fact that it is difficult to obtain a job when most businesses are now owned by Chinese.[261] China's failure to eliminate discrimination serves to perpetuate the political powerlessness of the Tibetan people.[262] Due to this discrimination, Tibetans suffer economically because it is harder for them to "maintain their current employment, find new employment and start new businesses."[263]

E. Suppression of Religious Freedom

The Chinese authorities restrict the freedom of religion in Tibet.[264] This is in violation of the International Covenant on Civil and Political Rights.[265] The Chinese authorities believe that Buddhism[266] must be controlled in order

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work, to just and favourable [sic] remuneration." *Id.*

258. *See* CESCR *supra* note 164and accompanying text.

259. *See* RACIAL DISCRIMINATION REPORT, *supra* note 238, at 12. *See also* PROVING, *supra* note 65, at 87. Annual wages for Chinese workers in Tibet are eighty-seven percent higher than in China. *See id.* Vacations for Chinese workers in Tibet are longer than those working in China. *See id.* Finally, "Chinese entrepreneurs receive special tax exemptions and loans at low interests [sic] rates in Tibet, whereas for Tibetans starting an enterprise in their own homeland, even obtaining a licence [sic] is difficult." *Id.*

260. *See* RACIAL DISCRIMINATION REPORT, *supra* note 238, at 12.

261. *See id.* at 13. One example of favoritism of Chinese over Tibetans is in the tour guide field. *See id.* The Chinese have laid down strict requirements, while recruiting more than one hundred Chinese settlers to become tour guides. *See id.* Some of the strict restrictions include the requirement of a middle school certificate and the condition that they pass a political examination. *See id.* The government also refused to renew permits for Tibetan tour guides who visited India without permission. *See id.* at 14.

262. *See* Radin, *supra* note 15, at 697.

263. RACIAL DISCRIMINATION REPORT, *supra* note 238, at 14.

264. *See* ASIA WATCH REPORT, *supra* note 181, at 65.

265. *See* CCPR *supra* note 150 and accompanying text.

266. For a discussion of Tibetan Buddhism, see generally REPORT, supra note 91. *See also* VAN WALT VAN PRAAG, *supra* note 8, at 2. Lamaism, which is practiced in Tibet, is a type of Buddhism that was brought to Tibet by the wives of King Songsten Gampo, Princess Bhrkuti of Nepal and Princess Wen-Cheng of the Tang Dynasty. *See id. See also* REPORT, *supra* note 91, at 110. The Dalai Lama is the most powerful figure in Tibetan Buddhism and the Panchen Lama is the second most powerful figure. *See id. See also* Senate Hearing, *supra* note 1, at 64 (prepared statement of Robert A. F. Thurman). The Buddhist society is an educational society. *See id. See also* People in Tibet *at* http://www.savetibetonline.com/peopleintibet.htm (last visited Sept. 6, 2001) [hereinafter SaveTibet]. Religion is important to Tibetans because "[m]any live for the next life, rather than for the present." *Id.* The elder continuously pray for the liberation-enlightenment by murmuring the mantric prayer. *See id.*

to develop a sense of allegiance to the Chinese state.[267] These checks are done through controlling the availability of propaganda and through "state-imposed limits on monastic ordination."[268] Human rights require that people be allowed to practice their faith as they wish, without state imposition.[269] The Tibetan's freedom to practice Buddhism is also hindered by the Chinese authorities' refusal to allow free expression or dissent on Tibet's political issues.[270]

F. Torture and Political Imprisonment

The region's security forces[271] commonly use torture.[272] This is in violation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires a full and fair investigation of all allegations of torture.[273]

In 1988, China's security chief "announced 'merciless repression' of all forms of protest against Chinese rule in Tibet."[274] The Chinese interrogate Tibetans by using torture, [275] which is in violation of the CAT.[276] Seventy percent of Tibetans imprisoned throughout Tibet die while in custody of the Chinese authorities.[277] Thirty-three different techniques of torture have been described, with new methods continuously being developed.[278]

China imposes arbitrary arrest upon many Tibetans,[279] which is in violation of the UDHR.[280] Political imprisonment is the principal means by

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267. *See* ASIA WATCH REPORT, *supra* note 181, at 65. *See also* REPORT, *supra* note 91, at 111. The Chinese believe religion is the chief obstacle to controlling Tibet. *See id.*

268. ASIA WATCH REPORT, *supra* note 181, at 65.

269. *See id.* at 68.

270. *See id.* at 65. *See* REPORT, *supra* note 91, at 110. Tibetans feel that China's control is an assault on their identity as a religious society because Tibetan's have a strong connection between religion and government. *See id.*

271. *See* ASIA WATCH REPORT, *supra* note 181, at 49.

272. For personal accounts of torture see generally ASIA WATCH REPORT, *supra* note 181.

273. *See* CAT, *supra* note 141.

274. PROVING, *supra* note 65, at 49. *See also* ASIA WATCH REPORT, *supra* note 181, at 30. Even after this "policy" was established, large numbers of Tibetans who had participated in demonstrations were released from prison because the authorities felt their repressive measures had been effective in eradicating dissent or the government began to realize the adverse impact of human rights violations were having on China's international image. *See id.*

275. *See* PROVING, *supra* note 65, at 52.

276. *See id.*

277. *See id.* at 47.

278. *See id.* at 53. These methods of torture include beatings with electric cattle-prods, rifle-butts, sticks, and iron bars. *See id.* at 52-53. Other methods include the use of electric shock, kicking, punching, mutilation, setting guard dogs on prisoners, and cigarette burns. *See id.*

279. *See id.* at 51.

280. Article 9 states, "No one shall be subjected to arbitrary arrest, detention or exile." UDHR, *supra* note 119.

which China imposes its authority upon dissenting Tibetans.[281] Chinese authorities impose sentences upon political prisoners,[282] which are often out of proportion with the degree of the alleged crime.[283] This practice violates the "internationally recognized right to freedom of political belief and to the peaceful expression of such beliefs."[284]

Under Chinese rule, prisoners do not receive the right to be informed about the grounds of their arrest[285] or their legal remedies.[286] Many different activities can give rise to arrest and detention.[287] The right that so many people enjoy, the right to be presumed innocent until proven guilty, does not exist under Chinese law.[288]

VI. SELF DETERMINATION

A. *The right to self-determination*

The right to self-determination[289] has traditionally been described as a "people's quest for greater autonomy and for a separate state."[290] Under

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281. *See* ASIA WATCH REPORT, *supra* note 181, at 29. Security raided a monastery at night and arrested a small group of monks who participated in protests. *See id.*

282. *See* TIBETAN CENTRE FOR HUMAN RIGHTS DEMOCRACY, PRISONERS OF TIBET: PROFILES OF CURRENT POLITICAL PRISONERS 1 (2000). A political prisoner is one who is held in prison for exercising his or her basic human right of expression, which usually is in the form of small, peaceful demonstrations or the distribution of printed materials. *See id.*

283. *See* PROVING, *supra* note 65, at 53.

284. ASIA WATCH REPORT, *supra* note 181, at 29.

285. *See* PROVING, *supra* note 65, at 53. Being told the grounds for arrest is the exception in China rather than the law. *See id.*

286. *See id.* at 51. Because arrest warrants are rarely issued, the prisoner is not legally arrested, so the authorities do not inform the prisoner's family about the initial detention. *See id.* at 52.

287. *See id.* at 51. Some examples of activities that have given rise to arrest include: Tibetans have been arrested for speaking with foreigners, or singing patriotic songs, or putting up wall posters, or possessing copies of an autobiography of the Dalai Lama or some video or audio cassette, or for preparing a list of casualties during Chinese crackdowns on demonstrations, or for 'plotting' and advising friends to wear the traditional Tibetan costume on Chinese national day . . . [or] for no apparent reasons.
Id. at 51-52

288. *See id.* at 53.

289. *See generally* Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255 (1996). One rationale for this right is the need to protect the collective human and democratic rights of minorities and unrepresented peoples. *See id.* at 258.

290. Ediberto Roman, *Substantive Self-Determination: Democracy, Communicative Power and Inter/National Labor Rights Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 53 U. MIAMI L. REV. 943, 944 (1999). This right "is grounded on human rights precepts that recognize that all peoples are 'equally entitled to be in control of their own destinies.'" *Id.* at 945.

international law, "[a]ll peoples have the right of self-determination."[291] The right of peoples[292] to self-determination[293] is recognized under international law as "the right freely to determine, without external interference, their political status and pursue their economic, social and cultural development."[294]

The concept of self-determination[295] originated throughout Europe and the United States in the Eighteenth century.[296] "Under modern international law, the right of peoples to self-determination does not presume a right to secession, but rather aims at the establishment of internal conditions for the enjoyment of all human rights."[297] This right has limitations in place so as to maintain stability and protect the rights of people and societal interests.[298]

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291. Article 1(1) of the CCPR provides, "By virtue of [the] right [to self-determination] they freely determine their political status and freely pursue their economic, social and cultural development." CCPR, *supra* note 150. *See also*, MORTIMER SELLERS (ED.), THE NEW WORLD ORDER: SOVEREIGNTY, HUMAN RIGHTS, AND THE SELF-DETERMINATION OF PEOPLES 10 (1996). This right extends to those who suffer from oppression, domination and exploitation by other governing bodies. *See id.* *See* Simpson, *supra* note 289, at 258. This right has been invoked more often than any other human right and enjoys greater recognition. *See id.*

292. *See* Radin, *supra* note 15, at 711. "A people is broadly defined as a group with a distinct culture, a territorial claim, and self-identification." *Id.* *See also* Julie M. Sforza, *The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonization*, 22 SUFFOLK TRANSNAT'L L. REV. 481, 498 (1999). "The United Nations Economic and Social Coop-eration Organization defines 'peoples' as individuals who relate to one another not just on the level of individual association, but as a separate and identifiable group within a specific territory." *Id.*

293. For a general discussion on the right to self-determination see generally THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES (1997).

294. INTERNATIONAL COMMITTEE OF LAWYERS FOR TIBET AND UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION, THE CASE CONCERNING TIBET: TIBET'S SOVEREIGNTY AND THE TIBETAN PEOPLE'S RIGHT TO SELF-DETERMINATION 3 (Dec. 1998) [hereinafter THE CASE CONCERNING TIBET]. *See also* Radin *supra* note 15, at 705. "The right to self-determination expressly incorporates cultural integrity by guaranteeing the right of peoples to pursue economic, social, and cultural development." *Id.* *See also* MUSGRAVE, *supra* note 293, at 1. Self-deter-mination occurs when the political status of a people is freely determined by the people. *See id.*

295. *See* REPORT, *supra* note 91, at 21. The collective Right of self-determination of people has two aspects: on the one hand, is its original version prohibiting colonialism or foreign rule, and, on the other is its new incarnation which prohibits oppression and arbitrary exercise of any authority, implying thereby respect for human rights and dignity, responsive government, or democracy.
Id.

296. *See* MUSGRAVE, *supra* note 293, at 2. Self-determination has evolved from a political concept prior to World War II to a legal right. *See id.* at 63. This change is due to the association of the right with decolonization. *See id.* at 97. *See also* Sforza, *supra* note 292, at 493. "The principle originated following World War I with the development of the League of Nations Mandate System, which sought to further a goal of leading territory under the control of colonial powers towards self-determination." *Id.* at 492-493.

297. Radin, *supra* note 15, at 696.

298. See SELLERS, *supra* note 291, at 10.

These limitations[299] include territorial integrity[300] and the doctrine of "uti possidetis juris."[301] Self-determination, a concept recognized as a way in which colonies might gain their independence soon became identified with decolonization.[302] However, alternative models, such as national self-determination,[303] democratic self-determination,[304] devolutionary self-determination,[305] and secession have re-emerged to challenge the colonial model.[306]

The Tibetans are a "people"[307] because they have a distinct culture in their language, religion and political structures.[308] Additionally, the Tibetans have held a territorial claim to the area since the Tibetan Empire, and they identify themselves as Tibetans, not as Chinese.[309] According to the United Nations definition of "people", the Tibetans qualify as a "people" because they occupy an area of land that is geographically separate from China.[310] The notion that Tibetans may achieve self-determination[311] raises an issue of

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299. *See id.* at 18. Another limitation on the right to self-determination is in the interpretation of the right. *See id.* When interpreting this right, one must take into account all other principles of the Charter of the United Nations such as the "prohibition of the use of force; prohibition of intervention in the domestic jurisdiction of a state; duty to settle disputes by peaceful means; duty to cooperate with other states; sovereign equality of states; and fulfillment by states of obligations in good faith." *Id.*

300. *See id.* at 19. Territorial integrity is the idea that one must not take action to dismember the territory of an independent state. *See id.*

301. *See* Sforza, *supra* note 292, at 515. "Uti possidetis, often mistaken and confused with the principle of territorial integrity, requires maintenance of existing colonial boundaries upon independence of a non-self-governing territory from its administering power." *Id.* "The principle of uti posseditis works to maintain the territorial status quo at the time of a colony's independence, requiring respect by other nations for the frontiers established in prior international agreements and internal administrative divisions." *Id.* at 500.

302. *See* Simpson, *supra* note 289, at 265. This "transformed decolonization into the only legitimate goal of self-determination. . .." *Id.*

303. *See id.* at 276. This type of self-determination can be seen as powerful in emotional appeal and lacking in intellectual persuasiveness or as a form of self-expression, which is vital to realizing human interests. *See id.*

304. *See id.* at 278. This critique assumes that self-determination presents itself in undemocratic form. *See id.*

305. *See id.* at 280. This type of self-determination includes arrangements that distribute power to local groups. *See id.*

306. *See id.* at 274-275.

307. *See* MUSGRAVE, *supra* note 293, at 102. Ethnic groups claim that they are entitled to the right of self-determination, which grew out of the occurrence of nationalism. *See id.* Modern technology has allowed ethnic groups to have a heightened consciousness of their identity, along with economic interdependence, which corresponds with ethnic divisions. *See id.*

308. *See* Radin, *supra* note 15, at 711.

309. *See id.*

310. *See* Sforza, *supra* note 292, at 499.

311. *See id.* at 492. "It is for the people to determine the destiny of the territory and not the territory the destiny of the people." *Id.*

secession, which "conflicts with the principle of the territorial integrity of states."[312]

United Nations provisions provide,[313] "[M]ember states must act in a manner that does not impede the right to self-determination of non-self-governing territories either by direct suppression of the right, non-action, or support of parties whose acts in this regard contravene U.N. purposes."[314] The Charter of the United Nations[315] requires the well-being and interests of the peoples of non-self governing territories to be of the utmost importance to the governing territory.[316] In the *Case Concerning East Timor*, the International Court of Justice (I.C.J.) stated that entitlement to the right of self-determination "is not extinguished due to forcible intervention by a third party, by the passage of time, or by failed attempts at decolonization."[317] The I.C.J. in *Western Sahara* presented three alternatives for non-self-governing territories: "emergence as a sovereign independent State; free association with an independent State; or integration with an independent State."[318] "[M]any claims for self-determination have arisen because an unjust, state-based, international legal order has failed to respond to the legitimate aspirations of peoples."[319]

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312. MUSGRAVE, *supra* note 293, at 104. "Most states have been very reluctant to recognize secession as a part of self-determination, and therefore deny that ethnic groups have any right to self-determination." *Id.*

313. Paragraph 2 of Article 1 provides, "The Purposes of the United Nations are . . . To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." U.N. CHARTER, *supra* note 115.

314. Sforza, *supra* note 292, at 501.

315. Article 73 provides:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> 1. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
> 2. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions according to the particular circumstances of each territory and its peoples and their varying stages of advancement. . . .

U.N. CHARTER, *supra* note 115.

316. *See id. See also* MUSGRAVE, *supra* note 293, at 124. Self-determination includes the process of decolonization, which occurs by granting self-government to non-self-governing territories and usually creates an independent state. *See id.*

317. Sforza, *supra* note 292, at 510.

318. *Id.* at 495.

319. SELLERS, *supra* note 291, at 10-11.

Human rights are essential in developing the right to self-determination,[320] as shown by the fact that the right is included in the International Covenant on Economic, Social and Cultural Rights[321] and the International Covenant on Civil and Political Rights.[322] Therefore, the legal rules applicable to international human rights law are the appropriate legal framework for the right to self-determination.[323] Self-determination has been criticized because of the inherent tensions between the majority who rules the land and the minority who is separated from the land.[324]

The Dalai Lama proposed a plan that advocated peace but not necessarily complete independence from Tibet.[325] This "five point peace plan" is known as the Strasbourg Proposal.[326]

B. Internal Right to Self-Determination

An internal right to human rights protection and an external right to freedom from domination are incorporated into the right to self-determination.[327] The internal right to self-determination is the entitlement to human rights protection, which "entitles a people to participate effectively in the decision-making process which affects the political, economic, social, and cultural conditions under which it lives."[328] The internal right to self-

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320. *See* SELLERS, *supra* note 291, at 9. This right has been declared a human right in many treaties. *See id.*

321. *See* CESCR, *supra* note 164.

322. *See* CCPR, *supra* note 150.

323. *See* SELLERS, *supra* note 291, at 10. The following general legal rules can be discerned within the international human rights framework:

> (1) Human rights are interpreted in the context of current standards; (2) Any limitations on the exercise of human rights are limitations to protect other rights or limitations to protect the general interests of society; (3) The limitations on human rights are considered narrowly, with consideration given to the circumstances of the relevant society; and (4) A victim of a violation of human rights must bring the claim.

Id. at 14.

324. *See* Guyora Binder, *The Kaplan Lecture on Human Rights: The Case for Self-Determination*, 29 STAN. J. INT'L L. 223, 225 (1993). This right has fused the value of popular sovereignty with the value of national resentment of occupation, which are two incompatible values. *See id.* at 226.

325. *See* REPORT, *supra* note 91, at 109.

326. *See id.* The five points of this plan are as follows:

> [T]ransformation of Tibet into a zone of peace, an end to China's population transfer, respect for the fundamental human rights and democratic freedoms of the Tibetans, protection of Tibet's environment (including the cessation of China using Tibet for nuclear purposes), and earnest negotiations regarding the future of Tibet and the relation of its people with the Chinese.

Id.

327. *See* Radin, *supra* note 15, at 706.

328. Eric Kolodner, *The Future of the Right to Self-Determination*, 10 CONN. J. INT'L L. 153, 159 (1994).

determination is threatened when there is a high level of deprivation.[329] Elimination of racial discrimination is the key to promoting internal self-determination.[330]

The Tibetans are entitled to the internal right to self-determination because the Chinese are neither respecting the Tibetan's human rights nor upholding their promise to give Tibet a certain degree of autonomy.[331]

C. *External Right to Self-Determination*

The external right to self-determination is the freedom from domination, which "entitles a people to decide its international identity and 'to be free from foreign interference which affects the international status of that state.'"[332] The exercise of external self-determination does not involve secession;[333] however, situations may exist in which there is a legitimate claim to the external right of self-determination,[334] so as to protect the interests and rights of the people.[335]

When determining whether a group is entitled to the external right to self-determination, the international community must scrutinize the group by examining objective elements to determine whether the group shares a common background and heritage.[336] Subjective elements must then be examined to determine whether the group perceives themselves as a people within the meaning of self-determination.[337] Once the group's assertion to the

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329. *See id.* at 163. Deprivation must be due to the government's policies that render a people incapable of exercising any level of control over their lives. *See id.* The Chinese prevent the Tibetans from exercising control over their lives by exploiting Tibet's natural resources for the benefit of China, by de-emphasizing the use of the Tibetan language, which is rendering the language obsolete, and minimizing the importance of Tibetan history and culture. *See id.* at 165. China also places a limit on how many monks are able to enter monasteries. *See id.*

330. *See id.* at 163. Discrimination plays a major part in the context of self-determination. *See id.* This discrimination is played out through China's policies that prevent Tibetans from exercising control over their internal right of self-determination. *See id.* at 165.

331. *See* REPORT, *supra* note 91, at 57.

332. Kolodner, *supra* note 328, at 159. Historically, this has been the focus of the international community. *See id.*

333. *See id.* at 160. Rather than seceding from the territory, a people can become loosely federated with another State. *See id.* A people can take care of domestic affairs while allowing another State to control foreign affairs, or it can merge entirely with an existing State. *See id.*

334. *See id.* The Tibetan people being under Chinese control is an example of a situation in which there is a legitimate claim to the external right to self-determination because without the granting of this right, the interests of the Tibetans cannot be protected. *See id.*

335. *See id.* at 160.

336. *See id.* at 161.

337. *See id.* The group as a people must share a sense of values and a common goal for the future of the community. *See id.*

right to self-determination satisfies the two-prong test, it must then be scrutinized according to additional criteria.[338]

VII. CONCLUSION

"A peaceful resolution of the Tibetan struggle will send a message to the world community that international disputes can be resolved peacefully through the rule of law."[339] The Chinese need to take the Tibetan's claims to self-determination seriously because China has caused the Tibetans to live with numerous human rights violations, such as torture, discrimination, arbitrary detention, and coerced birth control.

Due to China's occupation and discriminatory treatment of Tibetans, there is a high level of human rights deprivation, and the Tibetans are unable to practice the culture in which they believe. The best remedy for the Tibetan people would be for China to recognize Tibet's right to self-determination and allow them to secede from China. This is an egregious case in which Tibet should be able to break free from China's rule and become independent in order to protect the Tibetans' interests in their own lives. By exercising this right, the Tibetans will live in a more peaceful world, and the number of human rights violations that are occurring in Chinese-occupied Tibet will decrease.

Regina M. Clark[*]

338. *See id.* This additional criteria includes the degree to which the group can form a working political entity, the consequences on the non-group members of granting the right, the effects upon the region, and the group's commitment to upholding international legal principles. *See id.*

339. International Committee of Lawyers for Tibet *at* http://www.tibeticlt.org/index.html (last visited Sept. 6, 2001).

* J.D. Candidate, 2002, Indiana University School of Law – Indianapolis; B.S., 1999, Business Management, Indiana University. Thank you to my family and friends for all of their love and support. To my mother and father, thank you for being a wonderful source of encouragement in my life. To my fiancé, Brian, thank you for believing in me and for your endless love and support in helping me pursue my dreams. To my friend, Katherine, thank you for sharing your knowledge and making me aware of all the injustice in the world.

THE UN-COMMON LAW: EMERGING DIFFERENCES BETWEEN THE UNITED STATES AND THE UNITED KINGDOM ON THE CHILDREN'S RIGHTS ASPECTS OF THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

I. INTRODUCTION

On November 22, 1999, thirteen Cuban nationals boarded a small boat attempting to reach the United States (U.S.).[1] The boat capsized off the shore of Florida in the midst of strong winds and rough seas, killing eleven of these individuals.[2] One of the survivors was a five year-old boy named Elian Gonzalez.[3] The public attention and legal drama that followed remains fresh in the memory of most of us; often conjuring up a myriad of images and deeply held opinions. Although Elian's case may have forced the public's attention onto the complexities involved in international custody disputes, one unavoidable legacy remains—his case is atypical.[4]

While the Elian Gonzalez case was unfolding, a Florida state court was considering a case more illustrative of typical international custody disputes, albeit with very little publicity. In 1995, Maria Pereria and Ibrahim Shanti married in Miami and moved back to Jordan, where they then had a baby boy.[5] In 1999, Maria and their son returned to Florida on vacation and subsequently refused to return to Jordan.[6] In 2000, ensuing legal action resulted in a Florida court ordering the two year-old boy returned to Ibrahim in Jordan, and further, that the courts in Jordan resolve any custody disputes.[7] It is precisely this type of case which gives rise to the many challenges inherent in international custody disputes.

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1. *See Gonzalez v. Reno*, 212 F.3d 1338, 1344 (11th Cir. 2000), *cert. denied*, 530 U.S. 1270 (2000).

2. *See id.* Also, note there may be some disagreement over the number of individuals that drowned. *See id.*; *see also* Seam D. Murphy, *Contemporary Practice of the United States Relating to International Law: Return of Elian Gonzalez to Cuba*, 94 AM. J. INT'L L. 516 (2000) (stating that only ten of these individuals drowned).

3. *See Gonzalez*, 212 F.3d at 1344.

4. *See* Murphy, *supra* note 2, at 522 n.20. "Most cases concerning the return of children from one country to another involve competing claims by two estranged parents." *Id.*

5. *See Pereira v. Shanti*, 751 So.2d 1291 (Fla. Dist. Ct. App. 2000).

6. *See id.*

7. *See id.* at 1292 The court held that ordering the return of the child was proper because the courts in Jordan (the child's home state) possessed the appropriate jurisdiction to resolve any custody dispute. *See id.*

Rising divorce rates and increasing access to international travel have contributed to a rise in international child abductions.[8] These cases typically involve parents who hope to gain full custody of the child either by avoiding detection, or by establishing residence in a new nation.[9] As a result, the Hague Convention on the Civil Aspects of International Child Abduction of 1980 (Hague Convention) was drafted by the Hague Conference on Private International Law.[10] The Hague Convention was adopted primarily to curtail the tide of international parental abductions.[11] The Hague Convention has been met with both praise and controversy over the years.[12] It is certainly not hard to imagine that the same competing interests often present in domestic custody relations are also present in cases crossing international boundaries. This note will examine this overlap by exploring the principles of the Hague Convention and its impact on the area of children's rights.

The Hague Convention essentially provides that wrongfully abducted or retained children under the age of sixteen should be returned to the nation they resided in prior to abduction, and that any necessary custody hearings must take place in that nation.[13] There are exceptions to the general rule favoring

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8. *See* Marcia M. Reisman, *Where to Decide the "Best Interests" of Elian Gonzalez: The Law of Abduction and International Custody Disputes*, 31 U. MIAMI INTER-AM. L. REV. 323, 324 (2000).

9. *See id.*

10. Hague Conference on Private International Law: *Hague Convention on the Civil Aspects of International Child Abduction of 1980*, 19 I.L.M. 1501 (1980) [hereinafter *Hague Convention*]. The Hague Convention was the final act of the Fourteenth Session of the Hague Conference on Private International Law, and convened at The Hague, Netherlands on October 6, 1980. *See id.* Delegates were present from the following nations: Argentina, Australia, Austria, Belgium, Canada, Czechoslovakia, Denmark, the Arab Republic of Egypt, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, [Y]ugoslavia, Luxemburg, the Netherlands, Norway, Portugal, Spain, Surinam, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and Venezuela; with representatives of the Governments of Brazil, Hungary, Monaco, Morocco, the Union of Soviet Socialist Republics and Uruguay participating by invitation or as an observer. *Id.*

11. *See* June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century's End*, 15 ARIZ. J. INT'L & COMP. L. 791 (1998).

12. For a recent illustration of Hague Convention criticisms, see Thomas A. Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT'L L. & POL. 125 (2000). Mr. Johnson's article was adapted from a presentation made during the New York University Journal of International Politics Annual Symposium, Celebrating Twenty Years: The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which was held in New York City on February 25, 2000. *See id.* at 125 n.a1. Mr. Johnson is an attorney with the U.S. Department of State, and spoke in his personal capacity as the father of a daughter who has been wrongfully retained in Sweden since 1995. *See id.* Mr. Johnson is especially critical of the "blind" compliance of the U.S. on one hand, and the noncompliance of other nations on the other hand. *See id.* at 134.

13. *See Hague Convention*, *supra* note 10, arts. 3, 4, and 12. Article 3 states that the removal or retention of a child is wrongful if such removal or retention violates the custody rights of another while those custody rights were still being exercised. *See id.* Article 4 states: "The Convention shall cease to apply when the child attains the age of 16 years." *Id.* Article

automatic return—most notably two which are articulated in Article 13. The first exception permits a nation to refuse returning a child if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."[14] The second exception permits a nation to refuse returning a child if "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."[15] On its face, each of these exceptions appear to implicate the interests or rights of the child. But how are the world's various judicial bodies incorporating these principles?

This note will examine an emerging difference in application of these exceptions between courts in the U.S. and courts in the United Kingdom (U.K.); particularly in relation to considering the child's views. Part II will provide some information about the Hague Convention, including the purpose and background, the essential elements and concepts, and an overview of the affirmative defenses available. Part III will explore the rights of the child, with specific emphasis on international developments and their relationship with the United Nations Convention on the Rights of the Child (UN Convention).[16] Part IV will discuss the U.S. approach to the Article 13 exceptions, while Part V will examine the U.K. approach. Part VI will attempt to piece together the different approaches used by each nation and explore the consistencies of each approach (or lack thereof) with respect to the purposes of the Hague Convention, children's rights, and the UN Convention.

II. THE HAGUE CONVENTION

> *The states signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access . . . [H]ave agreed upon the following provisions.*
>
> —*Preamble to the Hague Convention*[17]

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12 mandates that if the above two articles apply, then the child must be ordered to return. *See id.*

14. *Hague Convention*, *supra* note 10, art. 13(b).

15. *Id.*

16. *See United Nations Convention on the Rights of the Child*, *infra* note 99.

17. *Hague Convention*, *supra* note 10, pmbl.

A. *Purpose & Background of the Hague Convention*

In 1980, the Hague Convention was drafted with hopes of reducing the rising trend of international child abductions.[18] Article 1 of the Hague Convention states that its objectives are to secure the prompt return of children that have been wrongfully removed or retained and to ensure that custodial and access rights of other nations are respected.[19] Accordingly, a primary aspiration of the Hague Convention is to deter a parent's temptation to abduct his/her child and then take the child to another nation in hopes of receiving a more favorable custody determination in the courts of that nation.[20] The Hague Convention is made up of six chapters and forty-five articles.[21] Currently, only sixty-eight nations are signatory members to the Hague Convention.[22]

The Hague Convention is primarily jurisdictional in nature.[23] Since the Hague Convention envisions the swift return of the child to the nation he/she was abducted from, its language is void of any suggestions pertaining to determinations of custody issues.[24] In fact, its design simply addresses the issue of whether a child has been wrongfully removed from one nation to another (or wrongfully retained in another nation), and if so, provides the procedural basis in which to secure the return of that child to his/her home nation.[25] Critics have argued that this structure ignores the civil rights of the child by assuring that the child's best interests will not be considered.[26]

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18. *See* Starr, *supra* note 11, at 792.

19. *See Hague Convention*, *supra* note 10, art. 1.

20. *See* Starr, *supra* note 11, at 792.

21. *See* Linda R. Herring, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C. J. INT'L L. & COM. REG. 137, 148 (1994). Herring's comment provides an excellent overview of the components of the Hague Convention, as well as a discussion of the Convention's key elements. *See generally id.* at 146-71.

22. *See Hague Convention*, *supra* note 10. The Hague Convention applies in the following nations : Argentina, Australia, Austria, Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada, Chile, China, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark (except the Faroe Islands and Greenland), Ecuador, El Salvador, Estonia, Fiji, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Israel, Italy, Luxembourg, Macedonia, Malta, Mauritius, Mexico, Moldova, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Saint Kitts and Nevis, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Turkey, Turkmenistan, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yugoslavia, and Zimbabwe. *See id.*

23. *See* Herring, *supra* note 21, at 148.

24. *See id.*

25. *See id.* at 148-49.

26. *See* Starr, *supra* note 11, at 830. Professor Starr argued that the Hague Convention appears "retrograde" since it does not act on behalf of the child nor contemplate the civil rights of the child, especially when considering the international community's growing concern with children's rights over the last half century. *See id.*

The heart of the Hague Convention is set out in Articles 3 and 12.[27] Article 3 defines "wrongful removal or retention" as a breach of custodial rights pursuant to the laws of the abducted-from nation, while "Article 12 provides the remedy once a 'wrongful removal or retention' has been found to have occurred."[28]

B. Essential Elements & Concepts of the Hague Convention

In order for the Hague Convention to apply, the following three elements must be present (pursuant to Articles 3, 4, and 35): 1) a child under sixteen years of age; 2) who has been "wrongfully" removed from his/her state of "habitual residence" in breach of a left-behind parent's custody right (which the parent was exercising at the time of removal; 3) while the Hague Convention was in effect. [29] The first element is self-explanatory. In the second element, "wrongful removal" typically occurs when a child is taken to another nation by a non-custodial parent; while "wrongful retention" typically occurs when a custodial parent keeps a child in another nation for a period of time longer than (legally) permitted.[30] Defining "habitual residence" is slightly more complicated. The Hague Convention does not define the term "habitual residence," which according to commentators, was not an oversight.[31] Instead, the drafters regarded this as a question of fact and thought it best to afford some interpretive discretion upon the courts without constraining them with some type of standardized meaning.[32] The common meaning given to the term "habitual residence" is "the place which is the focus of the child's life, where the child is permanently and physically present, and where the child's day-to-day existence is centered."[33] When making this determination, courts have considered factors such as whether a custodial parent was honest about his/her intention to live in a separate nation; whether the custodial parent consented to the other parent leaving the nation with the child; and the amount of time the child has actually been a resident of the abducted-from nation.[34]

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27. *See* Herring, *supra* note 21, at 149.

28. *Id.*; *see also Hague Convention*, *supra* note 10, Articles 3 and 12.

29. *See* Herring, *supra* note 21, at 151. Article 35 of the Hague Convention states: "This convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States." *See Hague Convention*, *supra* note 10, Article 35. Although one of the nations involved in an international custody dispute may not be a party to the Hague Convention, discussion of such ramifications is well beyond the scope of this note. Such cases tend to involve more than jurisdictional issues, often contemplating cultural and political aspects as well. For a good discussion of the concerns that can arise when a child is abducted from, or abducted to, a non-Hague Convention nation, see Starr, *supra* note 11, at 806-28 (discussing non-Hague abduction cases involving Islamic Law nations).

30. *See* Herring, *supra* note 21, at 151-52.

31. *See id.* at 152.

32. *See id.* at 152-53.

33. *Id.* at 153.

34. *See id.*

Commentators refer to this as a "settled purpose."[35] In other words, is there a sufficient degree of continuity in living where one does?[36] If so, habitual residence is likely to be found.[37]

If these elements are met, then Article 12 becomes applicable.[38] Article 12 mandates the judicial authority of the petitioned nation to order the immediate return of the child.[39] Again, this complies with one of the principle objectives of the Hague Convention—to secure the prompt return of wrongfully removed or retained children to the nation from which they have been removed from or kept from returning to.[40]

C. *Affirmative Exceptions Under the Hague Convention*

Based on the foregoing, if a child under the age of sixteen years of age has been wrongfully removed or retained from his/her nation of habitual residence (and a Hague Convention proceeding has been initiated within one year[41]), Article 12 mandates the court in the petitioned-to nation to order the return of the child.[42] However, the Hague Convention does provide six exceptions which permit the petitioned authority in the abducted-to nation to refuse ordering the return of a child.[43] A court may refuse to order the return of a child when: 1) the custodial parent consented or acquiesced to the removal

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35. *Id.*

36. *See id.* at 153-54; *see also* Susan L. Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief—Can Something More be Done?*, 8 N.Y. INT'L L. REV. 95, 106 (1995) (the child's habitual residence is the only place where the custody claim can be heard; and absent such, a court must dismiss an action for lack of jurisdiction). The first U.S. case to address "habitual residence" was the Sixth Circuit's decision in *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (6th Cir. 1993). In attempting to define the term, the Sixth Circuit looked for international assistance, and incorporated principles espoused in the U.K. case of *In Re Bates*. *See id.* The court recognized that instead of establishing detailed or restrictive rules, it should instead look to the facts of the individual cases as well as the past experiences of the child. *See id.* Time is also not determinative, per se, in that the intention of the parents to reside in an area is also a key factor. *See id.* at 1401-02.

37. *See* Herring, *supra* note 21, at 152-53. Habitual residence is not the same as "domicile." *See id.* By regarding the term as a question of fact, the drafters sought to distinguish habitual residence from the rigidity of the term domicile. *See id.* Furthermore, the drafters of the Hague Convention feared that such rigidity, if applicable, would hamper the courts in determining the meaning of habitual residence while trying to maintain consistency with the purposes of the Hague Convention. *See id.* at 154.

38. *See Hague Convention*, *supra* note 10, art. 12. "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." *Id.*

39. *See id.*

40. *See id.* at art. 1.

41. *See id. at* art. 12. In order to invoke the mandate of Article 12, proceedings must be commenced within a year from the date of the wrongful removal or retention. *See id.*

42. *See* Herring, *supra* note 21, at 163.

43. *See id.* at 163-64.

or retention; 2) the custodial parent failed to exercise his/her custodial rights; 3) the child is settled in his/her new environment; 4) the return is not permitted by the requested nation's fundamental principles regarding human rights and fundamental freedoms; 5) the return poses a "grave risk" of exposing the child to physical or psychological harm or an intolerable situation; and 6) the child objects to returning and is old enough and mature enough to make such objections.[44] For purposes of this note, numbers one through four of the aforementioned will be briefly examined, while numbers five and six will remain the primary focus because they directly effect the interests and wishes of the child, and thus, become entangled with the area of children's rights.

First, where the custodial parent actually consented or subsequently acquiesced to the other parent's removal of the child, a ruling court may exercise its discretion in whether or not to order the child's return.[45] The presence of consent or acquiescence actually negates one of the fundamental elements of the Hague Convention—that the removal or retention be "wrongful."[46] Without a wrongful removal the applicability of the Hague Convention is directly at issue, and in such circumstances, courts are not mandated by the Article 12 duty to order the return of the child.[47] However, a claim of consent or acquiescence is narrowly interpreted by the courts, probably in order to refrain from undermining the purpose of the Hague Convention.[48]

Another exception to the Hague Convention's mandatory return ideal involves the issue of whether the petitioning parent was actually exercising his/her custody rights, in which the petitioning parent must establish not only that custody rights existed, but also that those rights were being exercised.[49] This exception is also interlinked with the fundamental determination of

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44. *See id.*; *Hague Convention*, *supra* note 10, arts. 12, 13, and 20.

45. *See Hague Convention*, *supra* note 10, art. 13(a). Notwithstanding the mandate of Article 12, a court is not bound to order the return of a child when the party opposing the child's return establishes that the requesting party "had consented to or subsequently acquiesced in the removal or retention." *Id.*; *see* Herring, *supra* note 21, at 166-67.

46. *See* discussion, *supra* Part II B, at 6. Recall that in order for the Hague Convention to apply the child must be wrongfully removed or retained from his/her place of habitual residence. *See Hague Convention*, *supra* note 10, art. 1.

47. *See* Herring, *supra* note 21, at 166-67.

48. *See id.* Most courts addressing the issue of consent or acquiescence are reluctant to find it. *See id.* Commentators suggest that a broad interpretation may undermine the Hague Convention's purpose by placing a large amount of discretion in the hands of the courts. *See id.* This, then, might lead to abducting parents hoping to exploit the judicial discretion of the courts, which runs counter to one of the essential preventative goals of the Hague Convention. *See id.*; Starr, *supra* note 11, at 792 (an essential goal of the Hague Convention is to deter parents from abducting their children to another nation in hopes of getting a more favorable custody determination by that nation's courts).

49. *See Hague Convention*, *supra* note 10, art. 3(b); Herring, *supra* note 21, at 160.

whether the abduction or retention is wrongful.[50] The Hague Convention presumes that a person who actually has custody rights is also exercising them.[51] The burden in this exception falls on the abductor to prove otherwise, which usually means that "very little is required of the applicant to support an allegation that custody rights were actually being exercised prior to the abduction."[52]

Article 12 also contains a "child is settled" exception to mandatory return, which is dependant upon the time that has elapsed from the moment of abduction or retention to the filing of the Hague Convention petition.[53] The defense is that the child has settled into his/her new environment, and specifically calls into question the legitimacy of the mandate set forth in Article 12.[54] Thus, while Article 12's mandate applying to proceedings that have been commenced within one year appears dispositive, proceedings filed after the expiration of one year are permitted to escape the mandatory order of return if the child is settled in his/her new environment.[55] At issue here is the concern that "if the child remains too long in a new residence, the child will undergo another major uprooting if he or she is returned."[56] Thus, this defense attempts to benefit from a fundamental objective of the Hague Convention—that the child's best interest is to secure his/her prompt return.[57] The less prompt the return, the less likely the Hague Convention's goals are being preserved.

Finally, Article 20 permits a court to refuse to order the return of a child when, to do so, would violate the fundamental human rights principles held by

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50. *See Hague Convention*, *supra* note 10, art. 3(b). In order for the removal or retention to be considered wrongful, Article 3(b) states that: "at the time of removal or retention those rights [meaning custody rights] were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *Id.*

51. *See* Herring, *supra* note 21, at 160. The Hague Convention is built upon the presumption that "the person who has custody rights was actually exercising that custody." *Id.*

52. *Id.* at 160-61; *see also Hague Convention*, *supra* note 10, art. 8(c) (any person filing a petition pursuant to the Hague Convention must include in their application "the grounds on which the applicant's claim for return of the child is based"). This informal requirement is essentially all that is required in order to establish the proper exercise of custody rights. *See Herring*, *supra* note 21, at 160-61.

53. *See Hague Convention*, *supra* note 10, art. 12 (mandating an order of return if, among other things, the proceedings have been commenced less than one year from the date of wrongful removal or retention). If, however, the proceedings have been initiated after the expiration of one year, Article 12 still mandates an order of return, "unless it is demonstrated that the child is now settled in its new environment." *Id.*

54. *See* Herring, *supra* note 21, at 165-66.

55. *See Hague Convention*, *supra* note 10, art. 12.

56. Herring, *supra* note 21, at 166.

57. *See Hague Convention*, *supra* note 10, art. 1 (a primary objective of the Hague Convention is "to secure the prompt return of children wrongfully removed to or retained in any Contracting State"); *see also* Herring, *supra* note 21, at 165-66 ("The Hague Convention operates on the basis that it is in the best interest of the child to be returned to that jurisdiction with a minimum delay and thus emphasizes the immediate restoration of the status quo.").

the petitioned nation.[58] This exception reflects the possibility that cases could arise under the Hague Convention in which an ordered return, although mandated by Article 12, would lead to violations of the child's human rights.[59] However, there is currently no clear definition of what is meant by the terms "human rights" and "fundamental freedoms."[60]

The aforementioned exceptions have been presented for background and clarity purposes. The remainder of this note will focus primarily on the last two exceptions. Although the "human rights" exception of Article 20 also appears to raise the issue of children's rights, it nonetheless remains contingent on the policies of the requested nation (and that nation's stance on matters of human rights) rather than the interests, wishes, or rights of the child. Conversely, the "grave risk of harm" and "child's objections" exceptions[61] are directly connected to the interests of the child—one with respect to the child's views and the other with the child's well-being.

1. Grave Risk Of Harm Exception—Generally

Article 13(b) allows a court to refuse ordering the return of a child when the return poses a "grave risk" of exposing the child to physical or psychological harm or an intolerable situation.[62] This is the most commonly used defense under the Hague Convention.[63] Typically, this exception is construed narrowly, and was intended to be raised when it was established that the child itself (not the abducting parent) would be placed in an intolerable situation if returned to his/her nation of habitual residence.[64] The drafters

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58. *See Hague Convention, supra* note 10, art. 20. A court may refuse to order a child's return "if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." *Id.*

59. *See* Herring, *supra* note 21, at 170-71. During drafting, there was some controversy over the role, if any, that public policy should play in determining whether to order the return of the child. *See id.* Indeed, an earlier alternative draft permitted refusal when the return was "deemed 'manifestly incompatible with the fundamental principles of the law relating to family' issues." *Id.* However, the drafters concluded that such policy discretion could undermine the Hague Convention's effect. *See id.* Thus, the current version reflects a limitation on a nation's discretion by only affording such cultural incompatibility considerations when matters relating to the child's human rights are involved. *See id.*

60. *See id.* For example, as of 1994, there had not been a single case articulating definitions under Article 20. *See id.* ("[T]here has been no case law to date on this provision. [citation omitted] The test of Article 20 in the courts, thus, must come at a later date.").

61. *See* discussion, *infra* Part III B & Part III C, at 21-25.

62. *See Hague Convention, supra* note 10, art. 13(b). Notwithstanding the Article 12 mandate, a court can refuse to order a child's return when the party opposing return establishes that: "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." *Id.*

63. *See* Herring, *supra* note 21, at 167.

64. *See id.* at 168. Moreover, to illustrate the need to narrowly construe this exception, one need only refer to the now-famous "coach and horses" phrase as articulated in the U.K. case of *In Re E*, 19 Fam. Law 105, 106 (C.A. 1989), which pointed out that if this exception were construed broadly:

recognized that in some instances ordering a child to return to the abducted-from nation could be more disastrous than allowing a foreign jurisdiction to decide the matter.[65] Thus, the drafters wanted to afford some discretion to the courts in order to recognize the realities inherent in ordering a child to return to his/her place of habitual residence.[66]

The "intolerable situation" component requires that the posed risk go beyond mere trivial complaints, and calls for the situation to be "extreme and compelling" in nature.[67] Accordingly, courts usually require a high degree of risk that returning the child will likely lead to physical or psychological harm.[68] Simply claiming it would be better for the child (i.e., due to some financial or educational advantages) to stay in the abducted-to nation will not satisfy this requirement.[69]

When considering whether a "grave risk" exists, courts also look to the source of the harm.[70] In other words, is the potential for harm posed by the nation that the child would be returned to, or is the risk posed by the child's return to the non-abducting parent?[71] The general notion regarding this distinction is that if the risk is one posed by being returned to the non-abducting parent, then the issue before the court more closely resembles a custody matter.[72] Since custody determinations often entail findings of parental fitness, courts usually assume that the child's state of habitual residence is better suited to resolve such issues.[73] Thus, the abducting parent bears a heavy burden that requires more than claiming the other parent is unfit.[74] The Hague Convention was designed to deter parents from seeking more favorable international forums to resolve custody determinations, and as

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> [T]he effect would have been to drive a coach and horses through the provisions of this Convention, since it would be open to any abducting parent to raise allegations under [A]rticle 13 and then to use those allegations as a tactic for delaying the hearing by saying that oral evidence must be heard, information must be obtained . . . .

Herring, *supra* note 21, at 168 n.264, *quoting In Re E*, 19 Fam. Law 105, 106 (C.A. 1989).

65. *See* Herring, *supra* note 21, at 168.

66. *See id.*

67. *See id.*

68. *See id.* (courts usually require a strong showing of intolerable harm).

69. *See id.* ("[T]he mere fact that a financial or educational disadvantage is created by the mandate of the child's return does not amount to an intolerable harm.").

70. *See id.* at 169.

71. *See id.*

72. *See id.*

73. *See id.* at 170 ("[I]ssues of parental fitness are appropriate only for the state of habitual residence.").

74. *See id.* Courts have tried to promote the goals of the Hague Convention by requiring a "substantial" showing of a risk of physical or psychological harm in order to demonstrate that the abducting parent will have to do more than simply assert that the other parent is unfit. *See id.*

such, courts are generally not willing to allow an abducting parent to benefit from a situation of their own creation.[75]

The more likely event in which a court will find the Article 13(b) exception to be applicable is when returning a child to his/her nation of habitual residence (not to the parent) poses the grave risk of harm to the child.[76] Practically, this only occurs when the child's return places him/her in danger due to some existent condition, such as war or a recent natural disaster.[77] Critics argue that this unnecessarily restricts the purpose of Article 13(b), since Article 20 permits a court to refuse returning a child in order to protect the child's human rights.[78] However, without such conditions, narrowly construing this exception remains intact in that the child will almost always be ordered to return.

2. *Child's Objection Exception—Generally*

Article 13 also permits a court to refuse to order the return of a child when the child objects to being returned and is old enough and mature enough

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75. *See id.*

76. *See id.* at 169. By framing the "grave risk" exception as to whether the returned-to nation (and not the parent) will pose the risk of harm to the child, courts have created the most narrow view in which to interpret the Article 13(b) exception. *See id.* For example, the Family Court of Australia stated that Article 13(b) "is confined to the 'grave risk' of harm to the child arising from his or her return to a country . . . ." *Gsponer v. Johnstone*, (1988) 12 Fam. L.R. 755 (Austl. Family Reports). Although inappropriate conduct allegations of one of the parents may be an important custodial issue, it has "little or nothing to do with the question of the child's return" in a Hague Convention proceeding. *Id.*

77. *See* Herring, *supra* note 21, at 169 (a grave risk would exist if the nation of habitual residence was at war, going through the aftermath of a nuclear disaster, or experiencing a natural disaster).

78. *See id.* n.269, *quoting* Linda Silberman, *Hague International Child Abduction: A Progress Report*, NORTH AMERICAN SYMPOSIUM ON INTERNATIONAL CHILD ABDUCTION: HOW TO HANDLE INTERNATIONAL CHILD ABDUCTION CASES 7 (July 26, 1993) (criticizing the notion that Article 13(b) should favor the instance where the grave risk is posed by the returned-to nation, rather than the parent). Silberman stated:

> This interpretation though helpful in limiting the scope of 13(b), does not appear to be consistent with 13(b)'s focus on "conduct of the parties and the interest of the child." Moreover, such interpretation appears redundant in light of the Article 20 exception, which excepts return when return is inconsistent with fundamental principles of the requested State relating to protection of human rights and fundamental freedoms. Thus, Article 20—but not 13(b)—is directed to concerns about harms arising from the child's return to a particular country.

Id. Moreover, the concluding paragraph of Article 13 requires that some criteria be considered when applying this exception that is not wholly dependent upon the state of affairs of the abducted-from nation. *See Hague Convention*, *supra* note 10, art. 13 (when considering defenses offered under Article 13, courts must "take into account the information relating to the social background of the child").

to make such an objection.[79] This exception is closely related to the Hague Convention's age requirement.[80] The drafters were aware of the fact that there might be situations where the Hague Convention should be inapplicable to a child otherwise subject to it if, under the laws of the petitioned nation, the child would be free to choose his/her own place of residence.[81] Therefore, the drafters decided, albeit somewhat reluctantly, that the courts should retain some discretion to consider the views of the child.[82] The drafters could not agree on a minimum age trigger, however, but "were unanimous in bestowing discretion in the application of the Child's Objection Clause to the competent authorities."[83] It was believed that affording such discretion was more preferable than lowering the overall age of the Hague Convention's applicability.[84]

The child's objection exception essentially contains two issues that a court must consider: first, whether the child objects; and second, whether the child is old enough or mature enough to have his/her objection considered.[85] Generally, the first issue regarding the nature of the objection requires a demonstration that the child's objection is more than just a mere preference to remain with an abducting parent.[86] This reflects one of the major criticisms of the child's objection exception, which is that the objection could be the product of undue influence by the abducting parent.[87] The second issue involving the age and/or maturity of the child is more complicated. Essentially, a court must determine whether a child has reached an age or maturity level which satisfies the court that the child's views should be considered in the decision-making process.[88] However, since the Hague Convention specifies neither a threshold age nor objective assessment criteria,

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79. *See Hague Convention, supra* note 10, art. 13. The second paragraph of Article 13 states that a court may "refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." *Id.*

80. *See* Herring, *supra* note 21, at 164.

81. *See id.* at n.229; *see also* Rania Nanos, *The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense Under the Hague Child Abduction Convention*, 22 BROOK. J. INT'L L. 437, 443-44 (1996). Nanos argues that the "Child's Objection Clause represents a compromise of two significant competing interests—the desire to expand the scope and application of the Convention versus the situation of children under sixteen who have the right to choose their own place of residence." *Id.*

82. *See* Nanos, *supra* note 81, at 444.

83. *Id.*

84. *See id.* ("[G]ranting judicial discretion was preferable to a lowering of the overall age which would reduce the Convention's scope.").

85. *See Hague Convention, supra* note 10, art. 13.

86. *See* Herring, *supra* note 21, at 164.

87. *See* Nanos, *supra* note 81, at 447. Critics are concerned that the child's objection "may be the product of 'brainwashing' by the abducting parent." *Id.* This exception requires a case by case application of the facts in order to determine "whether the child is in fact expressing an objection that has arisen out of his or her own free will or whether the objection has been influenced by other parties." Herring, *supra* note 21, at 164

88. *See* Herring, *supra* note 21, at 165.

there is legitimate concern that the child's objection exception may be subject to arbitrary application.[89]

Such concern about arbitrary and inconsistent application is not without merit. Indeed, there have been cases holding that nine, ten, and twelve year-olds are not of sufficient age in order to merit consideration of their views under Article 13; while conversely, there have been cases holding that eleven, twelve, and thirteen year-old children are of sufficient age.[90] However, if the exception is to live up to its purpose,[91] then perhaps such decisions do not represent an absence of consistency, but instead reflect an independent application of the facts on a case-by-case basis.[92]

The criticisms of the child's objection exception are plenty, and for the most part are beyond the scope of this note. In addition to the aforementioned concern regarding the true nature of the child's objection (i.e., whether it is "the product of 'brainwashing' by the abducting parent"[93]), one major concern is that the exception could counter the effect of Article 19 and enable a petitioned court to actually resolve the merits of a custody dispute.[94] Perhaps the strongest criticism is the concern that the exception is subject to judicial abuse.[95] Particularly at issue here is the presiding judicial officer's temptation to favor the social and cultural conditions of the petitioned nation.[96] As the preceding indicates, the crux of concern surrounding the child's objection exception lies in the discretion afforded to judicial authorities and the potential for its abuse.[97] However, it is worth restating that the drafters of the Hague

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89. *See id.* (Since the Hague Convention does not set forth a threshold age which triggers automatic consideration, such a determination is reserved to the courts); *see* Nanos, *supra* note 81, at 445. Article 13 fails to establish both a minimum age component and objective assessment criteria, and as a result "invites potential subjective and arbitrary decision making." *Id.*

90. *See* Herring, *supra* note 21, at 165 n.236, *citing Bickerton v. Bickerton*, No. 91-06694 (Cal. Super. Ct. 1991) (holding that a ten year-old boy and twelve year-old girl were not of sufficient age or maturity); *see Sheikh v. Cahill*, 145 Misc.2d 171, 177 (N.Y. Sup. Ct. 1989) (holding that a nine year-old is not of sufficient age, stating: "He is only nine years old."); *see* Herring, *supra* note 21, at 165 ("[I]t should be noted that several cases have refused to return the child, even though the child has expressed an objection, and thus allowed the exception to stand, involving 11, 12, and 13 year-old children.").

91. *See supra* note 81 and accompanying text.

92. *See* Herring, *supra* note 21, at 164 ("[C]onsideration must be given to the particular facts of each case.").

93. *See* Nanos, *supra* note 81, at 447; *see also supra* note 87 and accompanying text.

94. *See Hague Convention*, *supra* note 10, art. 19 (decisions pursuant to the Hague Convention are not dispositive of underlying custody disputes); *see* Nanos, *supra* note 81, at 446-47. Critics argue the child's objection exception "contravenes [A]rticle 19 of the Convention by enabling a tribunal to determine the merits of a custody dispute rather than leaving this resolution to the courts of the child's country of habitual residence." *Id.* (footnote omitted).

95. *See* Nanos, *supra* note 81, at 447.

96. *See id.*

97. *See id.*

Convention intended to bestow discretion upon judicial authorities by this exception's inclusion.[98]

Specific approaches in the way the U.S. and the U.K. courts interpret both the grave risk of harm and child's objection exceptions will be more specifically discussed in Parts IV and V, respectively. Before that, however, some attention must be given to the emergence and international developments surrounding the concept of children's rights.

III. THE RIGHTS OF THE CHILD & THE UNITED NATIONS CONVENTION

> *In all actions concerning children . . . the best interests of the child shall be a primary consideration.*
>
> *—UN Convention on the Rights of the Child*[99]

A. *International Aspects of the Children's Rights Movement*

The children's rights movement is the product of a long struggle, and is predominantly a creature of the twentieth century.[100] Historically, children were often viewed as nothing more than personal property, which is reflected in the legal history of both European and U.S. law and social policy dating back to the Middle Ages.[101] To illustrate this unfortunate historical reality, many point to what is commonly referred to as the "Mary Ellen affair."[102] The Mary Ellen affair involved the prosecution of New York parents in 1874 for chaining their daughter to a bed and giving her only bread and water.[103] Given the lack of legal precedence for child protection, the prosecutor relied heavily on drawing an analogy with an animal cruelty law.[104] This case is often used

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98. *See id.* at 444. After concluding that an exception to consider the views of the child was "absolutely necessary," the drafters of the Hague Convention "were unanimous in bestowing discretion in the application of the Child's Objection Clause to the competent authorities." *Id.*

99. *Convention on the Rights of the Child*, U.N. GAOR, 45th Sess., 61st Plen. Mtg., at art. 3, U.N. Doc. A/RES/44/25 (1989), *at* http://www.un.org/documents/ga/res/44/a44r025.htm (last visited Nov. 12, 2001) [hereinafter *UN Convention*].

100. *See* Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 GEO. J. ON FIGHTING POVERTY 139, 140 (1998) (providing a brief history regarding the rights of children). In 1924, the Declaration of the Rights of the Child was adopted by the Assembly of the League of Nations. *See id.* For the first time in history, an international agreement formally recognized that humanity owed its very best to the child. *See id.* This duty was meant to apply to the "men and women of all nations," as opposed to just States. *See id.*

101. *See id.* Even the period commonly referred to as "childhood" went unrecognized for centuries "because in most societies children were consistently treated as though they were invisible." *Id.*

102. *See id.*

103. *See id.*

104. *See id.*

to demonstrate that in both the U.S. and the U.K, laws against cruelty to animals were enacted before child abuse protection statutes.[105]

Perhaps questioning such social priorities sparked thoughts of reassessment and reflection concerning the area of children's rights. But regardless of rationale, the latter half of the twentieth century has unquestionably shown that the international community is concerned with the rights of children.[106] Many international treaties and procedures were implemented which reflected the growing desire to protect the rights of children.[107] The most significant development in the international advancement and recognition of children's rights occurred in 1959, when the UN General Assembly adopted the Declaration of the Rights of the Child (UN Declaration).[108] The task was not an easy one, and was actually the culmination of a drafting process that began in the late 1940's.[109] Many nations had their reservations, however, with most preferring to limit the declaration to the "essential" rights.[110] Nonetheless, the declaration incorporated fundamental human rights principles from the 1948 Universal Declaration of Human Rights;[111] a notably distinct approach from the days of the Mary Ellen affair.

Most UN member nations opposed the creation of a binding treaty at the time the UN Declaration was adopted.[112] However, in the twenty years that followed the UN Declaration's adoption in 1959, the international community began to recognize a need to focus on the human rights of children.[113] In 1979,[114] the UN formally began the process of creating a "comprehensive

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105. *See id.*

106. *See* Starr, *supra* note 11, at 830.

107. *See id.*; *see also* Rios-Kohn, *supra* note 100, at 140-41 (discussing the progression of international recognition of children's rights from the aforementioned League of Nations Declaration, to the early endeavors of the UN's attempt to adopt a universal declaration regarding basic human rights).

108. *Declaration of the Rights of the Child*, U.N. GAOR, 14th Sess, U.N. Doc. A/RES/1386 (1959), *at* http://www.unhchr.ch/html/menu3/b/25.htm (last visited Jan. 22, 2002) [hereinafter *UN Declaration*]; *see also* Rios-Kohn, *supra* note 100, at 140 (referring to the UN Declaration as representing "a quantum leap in the development of children's rights").

109. *See* Rios-Kohn, *supra* note 100, at 140.

110. *See id.* ("The majority of States expressed a preference for a short text that would include the minimum essential rights").

111. *See id.* The UN Declaration consisted of a preamble and ten human rights principles that were incorporated from the 1948 Universal Declaration of Human Rights. *See id.; UN Declaration, supra* note 108. Among the rights included in the UN Declaration are the rights to adequate nutrition, housing, and medical services; the right to a free education; and the right to be protected from "all forms of neglect, cruelty and exploitation." *UN Declaration, supra* note 108, Principles 4, 7, and 9; *see generally Universal Declaration of Human Rights*, adopted by the UN General Assembly on Dec. 10, 1948, *available at* http://www.un.org/Overview/rights.html (last visited January 22, 2002).

112. *See* Rios-Kohn, *supra* note 100, at 140.

113. *See id.*

114. 1979 was the International Year of the Child. *See id.*

charter that would be binding on States."[115] The task of drafting this charter was assigned to the UN Commission on Human Rights,[116] and would take approximately ten years to complete.[117] The Commission's result was a binding international treaty that boldly introduced the international community to the concept that the child's best interests were now a matter of paramount concern.[118]

B. The United Nations Convention on the Rights of the Child

In 1989, the UN General Assembly unanimously adopted the UN Convention which subsequently went into effect (in record time) by September of 1990.[119] No other international treaty has ever been welcomed with the near universal acceptance that the UN Convention has.[120] In fact, the only UN member nations that have not ratified the UN Convention are Somalia and the U.S.[121] The international accord seeks to "build consensus for the concept of children as holders of their own human rights," and is responsible for changing the "deeply rooted historical attitudes toward children that have prevented them from enjoying their rights."[122] The UN Convention is often regarded as

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115. *Id.*; *see* Starr, *supra* note 11, at 830. Interestingly, this task was assumed during the same time representatives to the Hague Convention were drafting their agreement to deal with the aspects of international child abduction. *See id.* As Professor Starr noted:

> While one group of lawyers and lawmakers was meeting at the Hague in 1980 to draw up a Convention to prevent parental abduction of children to other countries, another group of child advocates and lawmakers . . . was convening to develop a draft copy of the Convention on the Rights of the Child.

Id.

116. *See* Rios-Kohn, *supra* note 100, at 140 (the Commission on Human Rights reported to the Economic and Social Council of the UN). The actual drafting of the UN Convention was assumed by the "Working Group for the Rights of Children," which would meet one week per year just prior to when the UN Commission on Human Rights would meet. *See* Starr, *supra* note 11, at 830.

117. *See* Rios-Kohn, *supra* note 100, at 140.

118. *See* Starr, *supra* note 11, at 831 ("[T]he concept of the child's best interests was boldly introduced to the Convention.").

119. *See id*; *see* Rios-Kohn, *supra* note 100, at 140.

120. *See* Rios-Kohn, *supra* note 100, at 141. "The treaty's importance has been attributed to the speed with which States universally accepted it and its comprehensive nature." *Id.*

121. *See id.* at 140-41. The UN Convention has been "ratified or acceded to by every country in the world with two exceptions: Somalia (which does not currently have a recognized government) and the United States (which has signed but not yet become a State Party to the Convention)." *Id.* U.S. refusal to join the UN Convention is apparently rooted in a policy of reluctance to bind the U.S. to international treaties pertaining to human rights. *See* Barone, *supra* note 36, at 120; *see also id.* at n.211 (expressing U.S. concern over the effect human rights treaties might have on domestic policy); Reisman, *supra* note 8, at 349 (pointing out that the U.S. reluctance to ratify the UN Convention is due to concerns that the provisions might "conflict with national security concerns").

122. Rios-Kohn, *supra* note 100, at 141.

the "most comprehensive and detailed international human rights charter to date."[123]

The UN Convention is made up of a preamble and fifty-four articles.[124] Its logistics reflect an attempt to protect all children as well as to recognize the child as having human rights interests.[125] Essentially, the document combines political, civil, economic, and social rights in order to "improve the situation of children."[126] The UN Convention applies to every child below the age of eighteen (unless a younger age of majority applies), and member nations are required to guarantee the rights set out in the treaty.[127] The heart of the treaty is found in Articles 2, 3, 6, and 12—collectively referred to as the "soul of the treaty."[128] For purposes of this note, articles 3 and 12 are noteworthy.

Article 3 of the UN Convention is widely responsible for solidifying the concept that in all matters which concern a child, the "best interests" of the child are to remain the primary concern.[129] This concept is a frequently employed idea within many nations' family law structures, including custody cases. The term "best interests" is not defined in the UN Convention, but remains one of its "core values", assuring that in every action affecting a child, his/her best interests are given due consideration.[130] The intent of the "best interests" component is not to guarantee that a child's best interests will prevail in adjudicatory proceedings, but rather to ensure that the child's interests are given the appropriate consideration in light of any competing interests.[131] This approach acknowledges the recognition of the child as possessor of certain rights which entitles him/her to consideration of any interests that may be affected.[132] In other words, "best interests" represents the

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123. *Id.*

124. *See UN Convention*, *supra* note 99.

125. *See* Rios-Kohn, *supra* note 100, at 141 (the child is a "holder of human rights and fundamental freedoms").

126. *See id.* at 141-42 (incorporating these rights into the UN Convention "provides a holistic framework to improve the situation of children").

127. *See UN Convention*, *supra* note 99, arts. 1 & 2. Article 1 defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." *Id.* at art. 1. Article 2 sets forth the duty imposed upon signatory nations as one that "shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind . . ." *Id.* at art. 2.

128. Rios-Kohn, *supra* note 100, at 143.

129. *See UN Convention*, *supra* note 99, art. 3. Article 3 states: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." *Id.*

130. *See id.*; Rios-Kohn, *supra* note 100, at 144 (Article 3 "reaffirms a core value of the treaty").

131. *See* Rios-Kohn, *supra* note 100, at 144-45 (noting the difficulty often involved in balancing the competing interests of society, family, and children).

132. *See id.* at 143.

guiding principles upon which primary consideration should be made in all matters affecting the child.[133]

Meanwhile, Article 12 requires that signatory nations create mechanisms to ensure that children have opportunities to be heard and considered in all decision-making procedures which affect their lives.[134] The intent behind this "right to participate" is to make sure that the child's views play a relevant role in the decision-making process during proceedings having a direct affect on a child's life.[135] The fundamental significance of Article 12 is to "stress that no implementation system may be carried out and be effective without the intervention of children in the decisions affecting their lives."[136] Accordingly, the child maintains the right to express his/her views in relation to family matters, which changes the traditional manner that children were viewed in such situations.[137] Indeed, the delicate balance may lie between "the child as the holder of fundamental rights and freedoms and the child as the recipient of special protection designed to ensure his/her harmonious development as individuals and to help the child play a constructive role in society."[138] Thus, what underlies Article 12's significance is its recognition of a child's right (and ability) to participate; sharing the "new vision" that children are no longer viewed as mere by-standers, but instead are "full participants in all activities that affect them."[139]

C. *Incorporated Principles of the UN Convention & the Children's Rights Concept*

The UN Convention's principles overlap with other areas of international law. For example, the child's best interests concept permits a nation to actually play a role in matters arising from the illegal transfer of a child abroad.[140] The child now has the internationally recognized right to express his/her views in all matters that affect him/her in conjunction with that child's age and maturity level.[141] Because of the near universal acceptance of this concept, even nations not participating with the UN Convention may nonetheless incorporate its principles. Indeed, there is suggestion that these

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133. *See id.* at 144.

134. *See UN Convention*, *supra* note 99, art. 12. Article 12 requires that: "State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." *Id.*

135. *See* Rios-Kohn, *supra* note 100, at 143.

136. *Id.*

137. *See id.*

138. *Id.* at n.41, *quoting* Martos Santos Pais, *The Convention on the Rights of the Child*, MANUAL ON HUM. RTS. REPORTING 393, at 75, U.N. Sales No. GV.E.97.0.16 (1997).

139. Rios-Kohn, *supra* note 100, at 143.

140. *See* Starr, *supra* note 11, at 830-31.

141. *See id.*

principles may "move into the realm of universally binding customary international law that will apply irrespective of the treaty basis of children's rights and whether or not a State has ratified or acceded to the [UN] Convention."[142]

In the U.S., the universal nature and acceptance of the UN Convention may afford U.S. courts the ability to use the treaty as persuasive authority.[143] In fact, U.S. courts often use best interests standards in resolving many domestic law custody disputes.[144] However, when the nature of these disputes involve international implications, U.S. courts tend to abandon the UN Convention's persuasiveness even though the Hague Convention may permit such considerations.[145] This approach has led some commentators to suggest that new legislation in the U.S. (maybe legislation which adopts the essential principles of the UN Convention) could help in the area of international custody disputes by recognizing that even when parents do battle, children still have civil rights—"especially the right to have their best interests represented in custody battles."[146] The next two sections of this note take a comparative look at how the overlap of children's rights concepts are evolving with respect to Hague Convention cases in the U.S. and the U.K.

IV. THE UNITED STATES APPROACH

A. *Overview*

The U.S. enacted legislation giving statutory effect to the Hague Convention by passing the International Child Abduction Remedies Act (ICARA) in 1988.[147] Without a doubt the U.S. implements the Hague

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142. Rios-Kohn, *supra* note 100, at 156. The universal nature of the UN Convention may very well place the treaty within the category of customary international law. *See Id.*

143. *See id.* at 160.

144. *See* Starr, *supra* note 11, at 829 (noting that "every state in the U.S. has custody laws enacted that rely on the 'best interests of the child' in making custody determinations").

145. *See Hague Convention, supra* note 10, art. 13. Recall that both the grave risk of harm and the child's objection exceptions both afford discretion upon the court to consider matters affecting the child, which if proper under the circumstances, will permit the court to refuse ordering a child's return to its place of habitual residence. *See id.* However, since the Hague Convention is primarily jurisdictional in nature, the U.S. tends to "punt" on certain aspects of its domestic child custody system. *See* Starr, *supra* note 11, at 832.

146. Starr, *supra* note 11, at 832. Lagging behind in the promotion of children's rights, Starr suggested that new "U.S. federal law could lead the way towards giving children a voice in international custody disputes." *Id.* Others have suggested that the U.S. should adopt the UN Convention. *See* Barone, *supra* note 36, at 120 (suggesting that U.S. adoption of the UN Convention would have the most "significant impact" on children's rights with respect to international child abductions in the U.S.).

147. International Child Abduction Remedies Act (ICARA), 42 U.S.C.A. §§ 11601, *et seq.* (West 2000). The U.S. ratified the Hague Convention in 1986, however, it did not become officially adopted until Congress passed (and President Reagan signed) the ICARA in 1988. *See* Gary Zalkin, *The Increasing Incidence of American Courts Allowing Abducting Parents to*

Convention according to a return the child "at all costs" approach.[148] The trend with respect to the grave risk of harm exception is that even if the potential for harm is found to exist, courts will look to potential safeguards provided by the requesting nation so that it can still send the child back.[149] Denying a return request under the child's objection exception is virtually non-existent in the U.S., with courts ordering the return of children approximately ninety percent of the time in Hague Convention cases filed in U.S. courts.[150] While remaining religiously committed to the Hague Convention's goal of securing the "prompt return" of abducted or wrongfully retained children, U.S. courts tend to neglect one of its other purposes—"to protect the interests of children who have been abducted."[151] Unlike the trend now emerging in the U.K. (which is discussed in Part V), Part IV will illustrate how the U.S. courts pay little attention to the way the interests of the child should be handled in a Hague Convention proceeding.

B. Judicial Interpretations

Judicial holdings in the U.S. interpret the Hague Convention exceptions sparingly in order to avoid dealing with underlying custody issues, to secure the prompt return of the child, and to reinforce the Hague Convention's intent of deterring parents from forum shopping for more favorable treatment.[152] U.S. courts do not adopt a uniform interpretation, and in order to satisfy either the grave risk or child's objection exceptions, the parent objecting to an ordered return must offer clear and convincing evidence.[153]

Use the Article 13(b) Exception to the Hague Convention on the Civil Aspects of International Child Abduction, 23 SUFFOLK TRANSNAT'L L.REV. 265, 273 (1999). For clarity purposes, although Hague Convention cases are initiated in the U.S. pursuant to the ICARA, subsequent reference will be made only to the Hague Convention.

148. *See* Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669, 687-88 (2001) (suggesting the likelihood of dangerous implications resulting from the U.S. "return at all costs" approach; especially since the U.S. is looked upon as a leader in interpreting Hague Convention cases).

149. *See id.*

150. *See* Johnson, *supra* note 12, at 134. Accusing U.S. courts of adopting a "nationally blind" view in Hague Convention cases, Johnson notes that the U.S. "returns roughly 90% of the children in Hague cases brought in U.S. courts and sometimes simply hands over children to foreign parents through ex parte maneuvers not even involving a Hague hearing or any other semblance of due process of law." *Id.*

151. Nelson, *supra* note 148, at 688; *see also Hague Convention*, *supra* note 10, Preamble (the opening line to the Hague Convention acknowledges that "the interests of children are of paramount importance").

152. *See* Zalkin, *supra* note 147, at 273-76.

153. *See* ICARA, 42 U.S.C.A. § 11603 (West 2000); *see also Sheikh v. Cahill*, 145 Misc.2d 171, 177 (N.Y. Sup. Ct. 1989) ("finding that an exception under article 13(b) exists must be based upon clear and convincing evidence"). The *Cahill* case was significant in that it was the first New York case to address the Hague Convention. *See id.* at 172.

1. *Determining Grave Risk of Harm*

The Hague Convention expresses that a requested court is under no duty to order the return of a child if, in doing so, there exists a grave risk of exposing "the child to physical or psychological harm."[154] Where the risk clearly implicates physical harm (i.e. physical or sexual abuse), courts generally agree that this exception is met.[155] However, where the risk posed involves potential psychological harm, the consensus breaks down.[156] This is due in part to the clear and convincing evidentiary standard that must be satisfied, and the subsequent difficulty in meeting this burden that is encountered by many courts.[157] The U.S. approach can be broken down into two realms: 1) the traditional rule as espoused by the Sixth Circuit in *Freidrich v. Friedrich*;[158] and 2) the modern "further analysis approach" recently set forth by the Second Circuit in *Blondin v. DuBois*.[159]

The *Freidrich*[160] decision is an often-cited case on the use of the Article 13(b) exception to the Hague Convention.[161] The *Freidrich* court began its analysis by noting that the exception must be proven by clear and convincing evidence.[162] In addition, the court sought to remain vigilant to the objectives of the Hague Convention by placing emphasis on the use of the term "intolerable situation" within the exception's language.[163] The court refused to interpret the exception as one that looks at which location offers the child greater opportunities or makes the child happiest.[164] Instead, the court opined that "[t]he exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and reserved to the court in the country of habitual residence."[165]

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154. *Hague Convention*, *supra* note 10, art. 13(b).

155. *See* Nelson, *supra* note 148, at 677. "Most courts agree that if the child is physically harmed, through assault or sexual abuse, the grave risk exception is met." *Id.*

156. *See id.* Regarding the psychological harm component, "no one seems to be sure what fits within the exception." *Id.*

157. *See id.* at 677-78.

158. *Freidrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996).

159. *Blondin v. DuBois*, 189 F.3d 240 (2d Cir. 1999).

160. *Freidrich* involved a mother who wrongfully abducted her two-year old child from Germany to Ohio. *See Freidrich*, 78 F.3d at 1063. The mother's Article 13(b) claim relied primarily on the claim that since her son had become so attached to friends and family in Ohio, that returning him to Germany would be too traumatic for him, and that he was much happier living in Ohio. *See id.* at 1067.

161. *See* Zalkin, *supra* note 147, at 277.

162. *See Freidrich*, 78 F.3d at 1067.

163. *See id.* at 1068-69.

164. *See id.* at 1068. The court noted that such considerations are irrelevant by stating: "We are not to debate the relevant virtues of Batman and *Max and Moritz*, Wheaties and *Milchreis*." *Id.*

165. *Id.*

The Eighth Circuit's interpretations are similar; the court is not to consider custody matters or the best interests of the child.[166] It is not relevant whether the abducting parent has a good reason for fleeing.[167] Article 13(b) only "requires an assessment of whether the child will face immediate and substantial risk of an intolerable situation if he is returned."[168] Courts must assume that courts in the abducted-from nations are just as capable of resolving custody disputes as are courts in the U.S.[169] Accordingly, the grave risk of harm exception can exist in only two situations: 1) when return puts the child in imminent danger prior to custody resolution; and 2) in serious cases of abuse or neglect, or when the court in the returned-to country is unwilling or incapable of affording adequate protection to the child.[170] Evidence, therefore, "is only relevant if it helps prove the existence of one of these two situations."[171] Allegations and proof of mere adjustment problems (if the child is ordered to return) simply do not rise to the level of the grave risk exception, and are not to be considered in resolving Hague Convention proceedings.[172]

Building upon these notions, the Second Circuit recently added a subsequent analysis to this approach, specifically in relation to what a court is supposed to do once grave risk is found to exist. In *Blondin*, the court set forth what is referred to as the "further analysis approach."[173] Prior to the *Blondin* decision, most U.S. courts that found a grave risk of harm to exist refused to order the return of the child "if abuse or severe neglect would be awaiting them on return."[174] The Second Circuit began its approach by noting that a paramount purpose of the Hague Convention is to preserve comity among nations, and to deter an abducting parent from crossing international lines seeking more sympathetic courts.[175] The court found that a grave risk of harm did exist,[176] however, this did not end the court's inquiry. The court stated that further inquiry was needed and looked at whether it could nevertheless honor the Hague Convention by affording certain protections

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166. *See Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995).

167. *See id.*

168. *Id.*

169. *See Freidrich*, 78 F.3d at 1068.

170. *See id.* at 1069. The court opined that the grave risk of harm exception could only exist in these two situations. *See id.*

171. *Id.*

172. *See id.* at 1067 (court noted that the mother's allegations amounted to "nothing more than *adjustment* problems that would attend the relocation of most children"); *see Tice-Menley*, 58 F.3d 374, 378 (8th Cir. 1995) ("We instruct the court not to consider evidence relevant to custody or the best interests of the child.").

173. Nelson, *supra* note 148, at 688.

174. *Id.* at 687.

175. *See Blondin*, 189 F.3d 240, 248 (2d Cir. 1999).

176. In *Blondin*, the mother wrongfully removed her two children from France in order to protect them from a physically abusive environment. *See id.* at 242. The mother had been the victim of domestic violence, and the children had been subjected to physical abuse on occasion as well. *See id.* at 242-44.

which allow the custodial decisions to still be made by the home nation.[177] The court opined that for the sake of comity, courts must be able to presume that the courts in another nation will be capable of safeguarding children.[178] In other words, even if the court finds the grave risk of harm exception to be applicable, *Blondin* has imparted an additional duty upon the courts to inquire into potential protective processes that may be available in order to permit the court to return the child to its habitual residence and still allow the resolution of any custody matters to take place there.[179] However, critics worry that this "further analysis" approach only imposes additional limitations on an already limited application of the grave risk exception.[180] It is argued that if the drafters of the Hague Convention had intended an additional analysis, they would have required one in the language of Article 13(b).[181] Nonetheless, the "further analysis" approach reflects the modern trend in interpreting the grave risk of harm exception in the U.S.[182]

2. *Considering a Child's Objection*

Article 13 of the Hague Convention allows courts to refuse ordering the return of a child if that child objects to being returned and is old enough and mature enough to have his/her views considered.[183] In the U.S., analysis under the child's objection exception is fairly straightforward —for the most part, it does not exist. U.S. courts are not likely to defer to a child's objection as a reason for denying a Hague Convention petition.[184] Of course, the unique attribute of this exception is its direct entanglement with principles of the UN Convention.[185] For example, this exception affords a child the opportunity to

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177. *See id.* at 242. The court concluded "that the Hague Convention requires a more complete analysis of the full panoply of arrangements that might allow the children to be returned to the country from which they were (concededly) wrongfully abducted, in order to allow the courts of that nation an opportunity to adjudicate custody." *Id.*

178. *See id.* at 249.

179. *See id.* at 242. The Second Circuit believes that by requiring courts to perform the additional duty of examining all potential safeguards that the requesting nation may have in place to protect children in potentially dangerous situations, U.S. courts can still fulfill the intentions of the Hague Convention by: 1) returning children to their nations of habitual residence; and at the same time 2) protect children from any grave risk of harm they might otherwise be subject to. *See id.*

180. *See* Nelson, *supra* note 148, at 687.

181. *See id.* at 687-88. "It is hard to believe, based on the plain meaning of the [Hague] Convention, that it was the intent of the [Hague] Convention that a further analysis be done after a finding of grave risk. Once grave risk is found, that should be the end of the analysis." *Id.*

182. *See id.*

183. *See Hague Convention*, *supra* note 10, art. 13.

184. *See* Nanos, *supra* note 81, at 448.

185. *See UN Convention*, *supra* note 99, art. 12. Recall that the UN Convention conveys a "right to participate" upon the child. *See id.* A child capable of forming his/her own views has the right to express those views, and to have those views given consideration according to his/her age and maturity. *See id.*

communicate his/her views in a matter that will directly affect his/her welfare.[186] Even though this is a fundamental right according to the UN Convention (of which the U.S. is not a part of), decisions regarding this exception in the U.S. lack any resemblance to suggestive inquiries, and typically "address issues concerning the child's views within the framework of the 'grave risk of harm' exception."[187]

The Hague Convention does not set forth a specific age for when this exception applies, and commentators have suggested that no such threshold age should be applied.[188] Nonetheless, when applying this exception U.S. courts tend to "assume" when a child is mature enough or old enough to have his/her views considered with very little, if any, supporting analysis. For example, in *Tahan v. Duquette*,[189] a New Jersey state court acknowledged that the Hague Convention does not suggest determinations under this exception be made according to any threshold determination on age, but then makes the blanket statement that the maturity and views exception simply does not apply to a nine year-old.[190] In *In re Nicholson v. Nicholson*,[191] a federal court judge in Kansas at least afforded a ten year-old the opportunity for an in-camera interview, but the court cited to *Tahan* regarding the age of the child and then added that the child had no "valid" objection; yet failed to explain why.[192] Likewise, in New York's first Hague Convention case, the court refused to consider the views of a nine year-old child stating simply: "He is only nine years old."[193]

The U.S. approach to the child's objection exception reinforces concerns that critics have expressed concerning the Hague Convention's willing disregard to afford some consideration to the child's point of view.[194] Although the U.S. is not a member, the U.S. approach essentially ignores basic human rights guarantees bestowed upon many nations by the UN Convention. The U.S. appears to be simply unwilling to consider the views of the child in connection with a Hague Convention case. Furthermore, it should be clear from the aforementioned that even if U.S. courts were to begin taking consideration of a child's objections, no process exists by which to gauge the manner such considerations are to be given due consideration.

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186. *See id.*

187. Nanos, *supra* note 81, at 448-49.

188. *See* Herring, *supra* note 21, at 165.

189. *Tahan v. Duquette*, 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992).

190. *See id.* ("This standard simply does not apply to a nine-year old child."). Based on this assumption, the court refused to find that the trial judge erred by refusing to interview the child. *See id.*

191. *In re Nicholson v. Nicholson*, 1997 WL 446432 (D. Kan. 1997) (Unpublished Opinion).

192. *See id.*

193. *Sheikh v. Cahill*, 145 Misc.2d 171, 177 (N.Y. Sup. Ct. 1989).

194. *See* Starr, *supra* note 11, at 830. Arguing that parts of the Hague Convention appear retrograde, Professor Starr stated that the Hague Convention "does not act on behalf of a child, nor does it address the civil and human rights of a child." *Id.*

C. *Selected U.S. Case Law*

Two recent U.S. cases illustrate the trends discussed in Part IV of this note. The first, *Turner v. Frowein*, is a decision that reiterates the *Blondin* "further analysis approach" with respect to the grave risk exception.[195] The second, *England v. England*, demonstrates the continued reluctance of the U.S. to take a child's views into consideration.[196]

In *Turner v. Frowein*, the mother (a U.S. citizen) and father (a Dutch citizen) were married in Connecticut but spent a significant amount of time living apart, splitting their residence between New York City and Connecticut.[197] The couple had only one child who, by the time the Hague Convention proceedings were initiated, was seven years-old.[198] The marriage experienced several episodes of domestic violence over the years, but when the mother indicated she was going to file for divorce, the husband retaliated by taking the child and telling the mother she would never see their son again.[199] However, the couple managed to begin reconciliation and subsequently moved to Holland.[200] What happened next was unconscionable. The father commit-ted several acts of sexual abuse against his son, at which time the mother attempted to institute divorce and custody proceedings in Holland.[201] Finding no success, the mother fled to the U.S. with her son and filed for divorce, at which point the father then initiated Hague Convention proceedings.[202]

The court had no problem recognizing the existence of a grave risk of harm in the form of sexual abuse.[203] However, the court made clear that this would not end the inquiry.[204] Referring to the importance of guaranteeing that a court in the child's place of habitual residence retain proper jurisdiction over custodial matters, the court mandated the adoption of *Blondin's* "further analysis approach."[205] The court held that a judge cannot deny a Hague Convention petition under the grave risk of harm exception unless it has evaluated the "full range of placement options and legal safeguards that might facilitate the child's repatriation under conditions that would ensure his or her

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195. *Turner v. Frowein*, 752 A.2d 955 (Conn. 2000).

196. *England v. England*, 234 F.3d 268 (5th Cir. 2000), *reh'g en banc denied*, 250 F.3d 745 (5th Cir. 2001).

197. *See Turner*, 752 A.2d at 961.

198. *See id.* at 961-62.

199. *See id.* at 962.

200. *See id.*

201. *See id.* at 962-63.

202. *See id.*

203. *See id.* at 968. In review of the record, the court concluded that the mother had proved "by clear and convincing evidence that the defendant had sexually abused his son." *Id.*

204. *See id.* at 969.

205. *See id.* at at 971. The Supreme Court of Connecticut acknowledged that although this was a case of first impression, the court relied heavily on the Second Circuit's decision in *Blondin*. *See id.*

safety."[206] The court further suggested that possible considerations included whether the abducting parent or an acceptable third party could retain supervision if the child were ordered returned, and whether the requesting nation was able to enforce any conditions attached to an order of return.[207] The court then ordered the case remanded for such "further analysis."[208]

In *England v. England*, both parents were U.S. citizens and were married and lived in Texas until 1997.[209] The couple had two daughters, ages thirteen and four.[210] In 1997, the father took a job in Australia and the family moved there.[211] In 1999, the family came back to the U.S. on vacation, but when the mother's father became seriously ill, both the mother and the children remained in the U.S. after the vacation ended while the father returned to Australia.[212] Shortly thereafter, the mother filed for divorce in Texas and advised the father that neither she nor the children would be returning to Australia.[213] The father then commenced Hague Convention proceedings seeking return of his daughters to Australia.[214]

The mother affirmatively employed the grave risk of psychological harm exception and asked the court to consider the express wishes of the oldest daughter.[215] The court quickly disposed of the grave risk of harm claim by noting there must be more evidence presented than simply that ordering the return will somehow unsettle the children.[216] As far as the child's objection exception, the court overruled the lower court's finding that the thirteen year-old, who had clearly objected to being returned to Australia, was old enough and mature enough for the court to consider her views.[217] Moreover, the court's only basis for reaching its conclusion was that since the oldest child was adopted, was diagnosed with Attention Deficit Disorder (ADD), possessed certain learning disabilities, and had prior parental figures in her life, that she must be confused by her present situation.[218]

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206. *Id.* at 969.

207. *See id.* at 974.

208. *See id.* at 978.

209. *See England*, 234 F.3d 268, 269 (5th Cir. 2000).

210. *See id.* Note that the thirteen year-old daughter was adopted—a point that would actually seem somewhat determinative in the court's conclusion that she was not mature enough to have her objections considered by the court. *See id.*; *see infra* note 218 and accompanying text.

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.*

215. *See id.* at 269-70.

216. *See id.* at 271. The court noted that proof of a grave risk of psychological harm must be more than showing that removal would somehow unsettle the children—"That is an inevitable consequence of removal." *Id.*, *quoting Walsh v. Walsh*, 221 F.3d 204, 220 n.14 (1st Cir. 2000).

217. *See id.* at 272.

218. *See id.* at 273.

Concerned about this assumption, the dissenting judge questioned why such little deference was given to the trial court's determination.[219] The dissent was further troubled by the majority's disregard for the fact that if the child's objection exception is "to have any meaning at all, it must be available for a child who is less than 16 years old."[220] The dissent warned of the "frightening precedent that the majority opinion in this case will set," obviously distressed by the majority's indifference to the fact-specific attention enjoyed by the trial court judge.[221]

V. THE UNITED KINGDOM APPROACH

A. *Overview*

The Child Abduction and Custody Act 1985 is the enabling legislation giving statutory effect to the Hague Convention in the U.K.[222] In part, the U.K. approach to the children's rights aspects of the Hague Convention is similar to that of the U.S., but only with respect to the grave risk of harm exception. The courts in the U.K. require the grave risk of harm be of some caliber beyond that caused by the inherent unpleasantries resulting from the abduction.[223] This reiterates the usual concern over not wanting to reward the abducting parent for his/her actions. However, with respect to the child's objection exception, the U.K. is said to provide the most "extensive analysis."[224] Unlike in the U.S., the determination of whether the child is old enough or mature enough to have his/her objections considered is not determined by a judge's interview (or assumptions for that matter) with the child.[225] Instead, a child welfare officer is appointed by the court to examine the child and then present the findings to the court.[226] This is by no means dispositive, though, since even if an objecting child is found to assert a valid

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219. *See id.* (DeMoss, J., dissenting). In dissent, Judge DeMoss stated that the court should show deference "to factual findings and credibility decisions made by the district court" unless the court has clearly erred in making those decisions. *Id.*

220. *Id.* at 274.

221. *Id.* at 277.

222. *See Re M* (Abduction: Psychological Harm), 1 F.C.R. 488 (C.A. 1998). The Child Abduction and Custody Act states: "Subject to the provisions of this Part of this Act, the provisions of that Convention [meaning the Hague Convention] set out in Schedule 1 to this Act shall have the force of law in the United Kingdom." *Child Abduction and Custody Act 1985* (c 60), Part I, Section 1, (2) (1986).

223. *See Re S* (abduction: intolerable situation: Beth Din), 1 F.L.R. 454, (Fam. 2000). In addition to requiring proof by "clear and compelling evidence," the grave risk of harm must be of such severity "which is much in ore than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence." *Id.*

224. *See* Nanos, *supra* note 81, at 450.

225. *See id.* at 451.

226. *See id.*

objection and is old enough or mature enough to have that objection considered, the court retains discretion as to whether or not to order the child's return.[227]

Although, the resulting orders may not differ greatly from the U.S., the U.K. courts certainly afford greater attention to a child's views. Recall that the U.K. has ratified the UN Convention.[228] Thus, one reason for the U.K.'s extensive consideration of a child's views may arise from its duty to guarantee the child's right to participate in matters and proceedings directly affecting the child as enunciated in the UN Convention.[229]

B. Judicial Interpretations

This section of the note will examine several Hague Convention holdings of the U.K. courts[230] in order to compare the U.K. approach with that of the U.S. courts. The differences will become clear with respect to the child's objection exception where, as noted earlier, the U.K. provides perhaps the most detailed analysis.[231] In fact, the general rule used by the U.S. and other nations regarding the child's objection exception was actually espoused by the U.K. in *Re R*, which stated that the child's views had to go beyond the simple "wishes" of the child.[232] However, although this rule is still used by other nations, it has been overruled by the later U.K. decision of *Re S*[233], which is now considered the leading U.K. case involving the child's objection exception.[234]

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227. *See id.*

228. *See* Rios-Kohn, *supra* note 100, at 140-41. Recall that the UN Convention has been ratified by every UN member nation except Somalia and the U.S. *See supra* note 121 and accompanying text.

229. *See UN Convention* , *supra* note 99, art. 12; *see also supra* text accompanying note 139 (discussing the significance of a child's right to participate according to the UN Convention).

230. Most of the U.K. cases discussed herein arise from either the Court of Appeal Civil Division (C.A.) or the High Court of Justice-Family Division (Fam.). For a discussion of how the U.K. courts are structured with respect to dealing with children, see Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239 (1992). The High Court of Justice has a rich history dating back to the Norman Conquest, and is divided into three divisions: Queen's Bench, Chancery, and the Family Division. *See id.* at 258. The High Court of Justice-Family Division "exercises jurisdiction over private law actions of matrimony, paternity, adoption and guardianship, and exercises appellate jurisdiction over adoption, child custody and child protection actions . . ." *Id.*

231. *See* Nanos, *supra* note 81, at 450.

232. *See Re R* (A Minor: Abduction) 1 F.L.R. 105 (Fam. 1992). The court held that the "word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute." *Id.*

233. *See Re HB* (Abduction: Children's Objections), 1 F.L.R. 392 (Fam. 1997), *citing Re S* (A minor)(Abduction: Custody Rights), Fam 242 (C.A. 1993).

234. *See Re HB* (Abduction: Children's Objections), 1 F.L.R. 392 (Fam. 1997). In *Re HB*, the court noted two particular points of significance in the holding in *Re S*:

> The main points in that decision are first that this part of Art[icle] 13 is quite

Similar to the approach taken in the U.S., the child's best interests are not paramount in a Hague Convention case because it is presumed that the child's best interests are best served by returning the child to his/her place of habitual residence.[235] U.K. courts do attempt to avoid the underlying custody issues involved in Hague Convention proceedings by framing the fundamental issues in which they are confronted with to focus on whether the abducting parent should be compelled to start at the point that he/she "should" have started in the first place, rather than deciding who is entitled to custody.[236] Thus, the purpose of the Hague Convention is to protect children from the harmful effects caused by their wrongful removal, not to protect the child's personal interests.[237] Accordingly, while the U.K. courts' adherence to the Hague Convention's purposes may closely resemble the principles articulated by the U.S. courts, the bottom-line remains that the U.K. analysis is more exhaustive than the U.S. approach.

1. Determining Grave Risk of Harm

In the U.K., the grave risk of harm determination is not equated with considering the welfare of the child—the judge is not deciding where the child should live.[238] Instead, the courts adopt an approach similar to the U.S. *Blondin* approach; that the paramount concern is limited to the extent courts can guarantee protection for the child until the courts of the other nation can determine the custody matters.[239] Again, the presumption is that all nations participating in the Hague Convention are capable of ensuring principles of fundamental fairness in determining a custody situation.[240] This jurisdictional

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> separate from Art[icle] 13(b) and does not therefore depend on there being a grave risk of physical or psychological harm or the children being placed in an intolerable situation if their views are not respected; and, secondly, that the words are to be read literally without any additional gloss, such as the suggestion made in an earlier case of Re R [citation omitted], that an objection imports a strength of feeling going far beyond the usual ascertainment of the wishes of a child in a custody dispute.

Id.

235. *See Re M* (A minor)(child abduction), 1 F.L.R. 390 (C.A. 1994).

236. *See Re B* (children)(abduction: new evidence), 2 F.C.R. 531 (C.A. 2001).

237. *See K v. K* (child abduction), 3 F.C.R. 207 (Fam. 1998).

238. *See Re: K* (Abduction: Child's Objections), 1 F.L.R. 977 (Fam. 1995). In *Re: K* the mother abducted her two daughters from the U.S., upon which her husband then commenced Hague Convention proceedings. *See id.* The court noted that a claim under Article 13(b) was a high one. *See id.* The judge stated: "I am not deciding where and with whom these children should live. I am deciding whether or not they should return to the USA under the [Hague] Convention for their future speedily to be decided in that jurisdiction." *Id.*

239. *See B v. B* (Abduction: Custody Rights), 1 F.L.R. 238 (1993). A petitioned court's concern "should be limited to giving the child the maximum possible protection until the courts of the other country... can resume their normal role in relation to the child." *Id.*

240. *See Re: K* (Abduction: Child's Objections), 1 F.L.R. 977 (Fam. 1995), *quoting P v. P* (Minors)(Child Abduction) 1 F.L.R. 155, 161 (1992) (the assumption is that Hague Convention nations are capable of providing "that both parties receive a fair hearing, and that

deference is strong, and the claimant's high burden requires proof greater than a mere disruption or inconvenience to the child or abducting parent.[241] Indeed, the abducting parent cannot generate the potential psychological harm by refusing to return to the requested nation if ordered.[242] In *K v. K*, the mother fled Greece with her two young children due to a domestic violence situation.[243] Rejecting the mother's Article 13(b) claim, the court made clear that it was not ordering a return to the abusive husband, but instead was ordering a return to Greece, which according to a faithful examination by the court, was the proper forum for determining custody of the minor children.[244]

Essentially the U.K. courts view the grave risk of harm exception in the same manner the *Freidrich* and *Blondin* courts did in the U.S.[245] The courts are primarily concerned with whether an order of return will expose the child to physical or psychological harm in the abducted-from nation, and place additional emphasis on the seriousness or immanency of such harm that an order of return would create.[246] Therefore, as is the case in the U.S, establishing the grave risk of harm exception in the U.K. remains an equally difficult task indeed.

2. *Considering a Child's Objection*

Considering a child's objection is the area where the U.S. and the U.K. approaches differ. Unlike the often unsupported presumptions made by judges in the U.S., the U.K. approach is much more involved. *Re R* (a case relied on by many other nations when applying this exception) held that the word "objects," as used in Article 13, suggested more than simply accounting for the child's wishes in relation to a custody dispute.[247] However, *Re S* subsequently

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all issues of child welfare receive a skilled, thorough and humane evaluation." *Id.*

241. *See Re S* (abduction: intolerable situation: Beth Din), 1 F.L.R. 454, (Fam. 2000).

242. *See K v. K* (child abduction), 3 F.C.R. 207 (Fam. 1998). In *K v. K*, the court stated:

> Is a parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return.

Id.

243. *See id.*

244. *See id.*

245. *See supra* note 170 and accompanying text. Recall that in addition to the "further analysis" approach generated by the *Blondin* court, the *Freidrich* court envisioned only two situations that could conceivably satisfy an Article 13(b) claim. *See id.*

246. *See Re: K* (Abduction: Child's Objections), 1 F.L.R. 977 (Fam. 1995). A petitioner will likely only satisfy an Article 13(b) defense if he/she can show that an order of return creates a serious risk "of exposing the children to physical injury or serious psychological harm" in the returned-to nation. *Id.* Furthermore, the drafters of the Hague Convention must have meant to cast a certain degree of severity or seriousness to the risk posed, which is reflected in Article 13(b) by use of the words "otherwise place the child in an intolerable situation." *K v. K* (child abduction), 3 F.C.R. 207 (Fam. 1998).

247. *See supra* note 232; *see* Nanos, *supra* note 81, at 450.

overruled this interpretation and held that the child's objection exception is completely separate from the grave risk of harm section of Article 13, and should be read literally.[248] To determine whether the child is old enough or mature enough, the U.K. employs the use of a court welfare officer.[249] The court welfare officer (as opposed to separate representation) is utilized for objectivity purposes.[250] It is believed that this officer can objectively assess the child's views and thus convey those views to the court for consideration.[251]

Although the U.K. adheres to the idea that the Hague Convention conveys no threshold age for application of the child's objection exception, the courts have suggested as a guidepost that the younger the child is the less likely it is that he/she will possess the requisite maturity which allows the court to take his/her objections into account.[252] The U.K. courts will not rely on blanket assumptions concerning the maturity level of a child, but instead will analyze the views and maturity levels of the children who claim this defense by using the independent court welfare officer. However, this is not dispositive. The objections of the child, even if mature enough and old enough to matter, must be balanced against the purpose of the Hague Convention.[253] In other words, finding a child old enough and mature enough to have his/her views considered merely "unlocks the door" for the court's ability to exercise its discretion.[254]

When applying the child's objection exception, U.K. courts adopt a two-step process. The first step is determining whether the child objects to being returned.[255] This will be determined by the court welfare officer and will usually be determined rather easily.[256] If the child does object, the second step is determining whether the child is of an age and maturity level for which it is appropriate to consider the child's views.[257] Again, the court welfare officer will report these findings to the court, and will look to such factors as whether

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248. *See supra* note 233; *see* Nanos, *supra* note 81, at 450.

249. *See Re M* (A minor)(child abduction), 1 F.L.R. 390 (C.A. 1994).

250. *See id.*

251. *See id.* The benefit in using the court welfare officer is the belief that he/she "can perform the dual role of assessment and conveying the children's views to the court." *Id.*

252. *See The Ontario Court v. M and M* (Abduction: Children's Objections), 1 F.L.R. 475 (Fam. 1997), *quoting Re R* (Child Abduction: Acquiescence), 1 F.L.R. 716, 729 (1995) ("the younger the child is the less likely is it that it will have the maturity which makes it appropriate for the court to take its objections into account").

253. *See Re: K* (Abduction: Child's Objections), 1 F.L.R. 977 (Fam. 1995). The judge has to consider the facts of the case and then balance the child's objection "against the purpose of the Convention which itself imports the concept that it is in the interests of children for them to be promptly returned to their country of habitual residence for their future to be decided there." *Id.*

254. *See id.*

255. *See Re HB* (Abduction: Children's Objections), 1 F.L.R. 392 (Fam. 1997).

256. *See id.* (The objection is to be read literally, with "no additional gloss.").

257. *See id.*

the "intellectual and emotional development" of the child is appropriate for his/her age.[258]

If the child is old enough or mature enough to have his/her views considered, then the court must exercise its discretion in determining whether to still order the child's return.[259] Some factors the court will consider are: whether the child's views are unduly influenced by the abducting parent (i.e., are the child's views sincere/genuine?); and whether the child's objections are valid (i.e., are the reasons why the child does not want to return based on objecting to returning to the nation or to the non-abducting parent?).[260] Typically, if the reasons seem more in the nature of a custodial dispute (like objecting to being returned to the non-abducting parent), then the court is likely to side with the general assumptions of the Hague Convention and order the child's return.[261] Either way, the court must balance the child's objections against the interests and policies set forth by the Hague Convention.[262] Regardless of the result, the U.K. approach to the child's objection exception is more comprehensive than the approach taken by U.S. courts.

C. *Selected U.K. Case Law*

Two relatively recent U.K. cases highlight the trends discussed in Part V of this note. The first, *Re S*, is a progressive decision in the area of children's rights that went so far as to suggest children might actually be entitled to separate representation in certain Hague Convention cases.[263] The second, *Re M*, is a decision which shifted the traditional Hague Convention focus by acknowledging that the effect on, and interests of, the child are factors that must be considered by the court.[264]

Re S involved two children, ages fourteen and twelve, and two parents with a long history of "strife and litigation."[265] The mother was a British citizen, the father from New Zealand, and the couple was married in England.[266] The children were born in New Zealand, where they resided until the marriage began to break down.[267] Both children held tremendous amounts of hostility toward their father, but nonetheless, the New Zealand courts

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258. *See id.* For example, it would be "difficult indeed to suggest that a 13-year-old of normal intelligence and maturity should not have his views taken into account." *Id.*

259. *See id.*

260. *See id.*

261. *See id.*

262. *See id.* (The child's objections must be balanced against the "whole policy of the [Hague] Convention.").

263. *See Re S* (Abduction: Children: Separate Representation), 1 F.L.R. 486 (Fam. 1997).

264. *See Re M* (Abduction: Psychological Harm), 1 F.C.R. 488 (C.A. 1998).

265. *Re S* (Abduction: Children: Separate Representation), 1 F.L.R. 486 (Fam. 1997).

266. *See id.*

267. *See id.*

refused to allow the mother to move back to England with the children.[268] The mother utilized some rather extravagant means and took the children to England.[269] The father then commenced Hague Convention proceedings seeking return of the children.[270] The court welfare officer reported that the children had strong objections to returning to New Zealand, and believed them to be old enough and mature enough to have their views considered.[271] The court noted that this case was somewhat unusual since if ordered to return to New Zealand, the children would likely return to a foster home situation due to the strained relationship with their father, while in England the mother had remarried and the children apparently had new step-siblings.[272] Because of this, the court became especially concerned with the interests of the children and noted the need "for the children to have a voice independent of their mother."[273] The court drew an analogy to domestic proceedings which would entitle the children to separate representation, and ordered that the children be afforded such representation and then joined as parties to the proceedings.[274] In this case, the court clearly found the child's objection exception applicable.[275] As a result, not only did the court exercise its discretion to refuse ordering the children's return to New Zealand, but the court also incorporated consideration of the children's best interests.[276] Although the court did not say so specifically, it appears the court incorporated principles of the UN Convention by guaranteeing that the children were active participants in the proceedings that would certainly affect their immediate futures.[277]

In *Re M,* the parents had two children, ages nine and eight, and were married and resided in Greece until their marriage fell apart.[278] This case actually represents the second time the mother wrongfully removed the children from Greece and had Hague Convention proceedings commenced against her.[279] The court first stated that in order to successfully use the child's

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268. *See id.*

269. *See id.* The mother apparently obtained passports with false names for the children and had the children removed via Hong Kong en route to England. *See id.*

270. *See id.*

271. *See id.*

272. *See id.*

273. *Id.*

274. *See id.* The judge noted that if these proceedings were brought under a conventional domestic custody dispute, "I have no doubt at all that these children would be separately represented." *Id.*

275. *See id.* The court found "not only that the children clearly object to being returned but that they are of an age and degree of maturity at which it is appropriate to take account of their views." *Id.*

276. *See id.*

277. *See UN Convention, supra* note 99, art. 12; *see also* Rios-Kohn, *supra* note 100, at 143 (the significance of Article 12 is its recognition of children as active participants in all matters which affect them).

278. *See Re M* (Abduction: Psychological Harm), 1 F.C.R. 488 (C.A. 1998).

279. *See id.*

objection exception, the defending party must first make a prima facie showing, at which point the court then must "consider in the exercise of its discretion whether to send the child back."[280] The court clearly accepted that the children were objecting to being returned and were mature enough to understand their situation.[281] Moreover, the court appeared concerned over the psychological harm that could result if the children were returned to Greece.[282] Given the children's deep attachments to their mother and their unquestionable objections to returning to Greece, the court concluded that a "return at this stage to Greece is of greater consequence than the importance of the court marking its disapproval of the behaviour of the mother by refusing to allow her to benefit from it."[283] Thus, the court balanced the goals of the Hague Convention against the needs of the children, and further acknowledged its strong disapproval toward the behavior of the mother.[284] However, the court noted that the reality of Hague Convention cases involves more than just the conduct of parents.[285] The fact that the drafters included provisions such as those in Article 13 indicates that sometimes the specific welfare of a child outweighs the need to preserve comity.[286]

VI. ANALYSIS & CONCLUSION

The distinguishing characteristic emerging between the U.S. and U.K. approaches to the children's rights aspects of the Hague Convention revolve around the consideration—or lack thereof—of the child's views in accordance with Article 13. Usually the Hague Convention focuses on jurisdictional issues and remains inept in the promotion of civil rights for children.[287] With respect to the grave risk of harm exception, both the U.S. and U.K. seem willing to show a tremendous amount of deference to the guarantees and safeguards afforded by the petitioning nation. Thus, the spirit of comity (which is undoubtedly necessary for the success of any international agreement) remains intact. However, each nation's approach to the child's objection exception highlights a growing-apart. The U.K. approach is more exhaustive and is consistent with the Hague Convention, the UN Convention, and U.K. law. The U.S. approach, however, is arguably inconsistent with the Hague Convention, U.S. law, and is certainly incompatible with the UN Convention.

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280. *Id.*
281. *See id.*
282. *See id.*
283. *Id.*
284. *See id.*
285. *See id.*
286. *See id.* This court appeared rather unpleased with the Hague Convention's structure itself—referring to its "adherence to the summary return of children whose needs should be dealt with in another jurisdiction" as "Draconian." *Id.*
287. *See* Starr, *supra* note 11, at 832.

The U.S. approach to the child's objection exception is troubling in that the courts tend to pay little attention to it—offering little, if any, legal analysis to support decisions claiming to consider a child's objections. By not ratifying the UN Convention (or at least adopting certain key principles) children will be frequently left without a voice in the U.S. in matters pertaining to international child abductions. At a minimum, U.S. courts should consider showing some consistency by affording some attention to the impact these cases have on children; as it undoubtedly would if the matter were purely domestic. The U.K. approach is more progressive and is consistent with the children's rights premise. Although not dispositive, the U.K. courts are increasingly analyzing and considering the child's views in accordance with the child's degree of maturity and age—principles recognized by both the Hague Convention and the UN Convention.

The emerging differences between the approaches taken in the U.S. and the U.K. are not dependent upon whether the child is actually ordered to return despite his/her objections, but rather, involves the level of consideration given to the child's views. The U.K. approach is more exhaustive and finds children as young as nine years-old to be considered mature enough to have their views considered.[288] The U.S. appears unwilling to adopt a similar position, doing little to refute what some critics have dubbed the "return at all costs" mentality.[289] This approach does little to support the rights of children who, through no fault of their own, have become entangled in the jurisdictional nightmares often inherent in resolving international custody disputes.

By Brian S. Kenworthy[290]

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288. *See Re M* (Abduction: Psychological Harm), 1 F.C.R. 488 (C.A. 1998) (finding a nine year-old and an eight year-old mature enough and old enough to have their objections considered by the court).

289. *See* Nelson, *supra* note 148, at 687-88.

290. J.D. Candidate, 2002, Indiana University School of Law—Indianapolis; B.A., Political Science, 1996, Indiana University—Fort Wayne. I would like to thank my wife, Susan, and my family for their support and guidance. I would also like to thank my editors for their invaluable assistance during the editing process.

SINK OR SWIM: THE DEADLY CONSEQUENCES OF PEOPLE SMUGGLING

I. INTRODUCTION

> *Deep in the maze of teeming bazaars to the north of Peshawar, where they sell stolen televisions, large blocks of hashish and cheap Kalashnikov assault rifles, is a new breed of travel agents. Their business is discreet, effective and illegal, and the profits are enormous.*[1]

The kachakbar[2] greet Afghan refugees who stream across the border at Khyber Pass[3] into the refugee camps[4] promising a new life in the West.[5] In an interview with a British journalist, smugglers describe how they inform those they smuggle to say that they come from a part of Afghanistan ruled by the Taliban,[6] and while most of these people are genuine refugees some of them are not even Afghans.[7]

"For as long as there have been people there has been migration;"[8]

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1. Rory McCarthy, et al., *Asylum Crisis: The Voyage: Hazardous, Long and Costly: the Refugees' Lonely Odyssey: Only the Smugglers are Certain Winners in the Escape Business,* THE GUARDIAN, Sept. 1, 2001, at A4. In the past two decades six million Afghan people have fled their country to escape war. *See id.* Hundreds of thousands of Afghans continue to flee after a vicious drought in the past few years, and the rise of the Taliban regime. *See id.*

2. Kachakbar translates to refugee smuggler. *See id.*

3. "Khyber Pass" ENCYCLOPEDIA BRITANNICA ONLINE, *at* http://search.eb.com/bol/topic?eu=46429&sctn=1&pm=1 (last visited Nov. 17, 2001). The Khyber Pass is the most important pass connecting Afghanistan and Pakistan. *See id.* Khyber Pass extends northwest through the Safid Kuh mountain range near Peshawar, Pakistan for about fifty-three kilometers to Kabul, Afghanistan. *See id.* For centuries the Khyber Pass was used to invade India. *See id.*

4. *See* BBC NEWS, Tom Housden, *Tampa Case Highlights Afghan Crisis*, Sept. 4, 2001, *at* http://news.bbc.co.uk/hi/english/world/south_asia/newsid_1525000/1525264.stm. The people in refugee camps are reduced to an underclass, thus some turn to begging and prostitution for survival. *See id.*

5. *See* McCarthy, et al., *supra* note 1, at A4.

6. *See The Taliban and Afghanistan: Implications for Regional Security and Options for International Action*, UNITED STATES INSTITUTE OF PEACE, *available at* http://www.usip.org/oc/sr/sr_afghan.html (1998). "The Taliban, whose name means 'students,' have their roots in the Pakistan-based seminaries established for Afghan refugees during the Soviet occupation." *Id.* The Taliban practice a very strict version of Islam inflicting it upon all citizens of Afghanistan. *See id.*

7. *See* McCarthy et al., *supra* note 1, at A4. Smugglers earn a forty percent profit for each smuggled person. *See id.*

8. Adam Graycar & Rebecca Tailby, *People Smuggling: National Security Implications*, Australian Defence College Canberra, Aug. 14, 2000, *available at* http://www.aic.gov.au/conferences/other/smuggling.pdf, at 1.

however, illicit illegal migration continues to rise at an alarming rate.[9] The International Organization for Migration[10] estimates that the current level of illegal migrants is four million per year.[11] As these refugees so fear for their lives that they are forced to leave the only home they have ever known, they turn to the people smuggler for transportation.[12] The economic and physical cost of travel is overwhelming,[13] while the length of the journey is far from

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9. *See* ICC Commercial Crime Services, *Warning to Ship Agents Against Conspiracies to Ship Illegal Immigrants,* Sept. 26, 2001, *at* http://www.iccwbo.org/ccs/news_archives/2000/illegal_immigrants.asp. The ICC Commercial Crime Series is a division of the International Chamber of Commerce. *See id.* The ICC is the world business organization that promotes an open and international trade, the investment system, and the market economy. *See id.*

10. *See* International Organization for Migration (IOM) home webpage, *at* http://www.iom.int/ (last visited Feb. 15, 2002). The IOM is the leading international organization working with migrants and governments providing human responses to migration challenges. *See id.* Established in 1951, the IOM aids in resettling European migrants and refugees. *See id.* IOM Member States as of Nov. 30, 2001 are: Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Belize, Benin, Bolivia, Bulgaria, Burkina, Faso, Canada, Cape Verde, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Gambia, Georgia, Germany, Greece, Guatemala, Guinea, Guinea-Bissau, Haiti, Honduras, Hungary, Iran (Islamic Republic of), Israel, Italy, Japan, Jordan, Kenya, Kyrgyzstan, Latvia, Liberia, Lithuania, Luxembourg, Madagascar, Mali, Morocco, Netherlands, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Sri Lanka, Sudan, Sweden, Switzerland, Tajikistan, Thailand, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Yemen, Yugoslavia (Fed. Rep. of), and Zambia. *See* Members and Observers, Feb. 16, 2002, *at* http://www.iom.int/en/who/main_members.shtml. The following are Observer States: Afghanistan, Belarus, Bhutan, Bosnia and Herzegovina, Brazil, Cambodia, China, Cuba, Estonia, Ethiopia, Ghana, Holy See, India, Indonesia, Ireland, Jamaica, Kazakhstan, Malta, Mexico, Mozambique, Namibia, Nepal (the Kingdom of), New Zealand, Papua New Guinea, Republic of Moldova, Russian Federation, Rwanda, San Marino, Sao Tome and Principe, Somalia, Spain, The former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, Viet Nam, Zimbabwe. *See id.* International Governmental Organizations Holding Observer Status include: United Nations; International Labour Organisation; Food and Agriculture Organization of the United Nations; United Nations Educational, Scientific and Cultural Organization; World Health Organization; International Bank for Reconstruction and Development; International Maritime Organization; United Nations Industrial Development Organization; Council of Europe; Organisation for Economic Co-operation and Development; European Union; Organization of American States; Inter-American Development Bank; Italian-Latin American Institute; International Centre for Migration Policy Development; Community of Portuguese Speaking Countries; Organization of African Unity; A organisation Internationale de la Francophonie; Asian-African Legal Consultative Committee; International Committee of the Red Cross; Union du Maghreb Arabe. *See id.*

11. *See id.*

12. *See* BBC NEWS, William Horsley, *Analysis: Solving the Refugee Problem,* Sept. 3, 2001, *at* http://news.bbc.co.uk/hi/english/world/newsid_1523000/1523897.stm.

13. *See* Glenn Mitchell & Jim Dickins, *Trading in Tragedy,* HERALD SUN, Oct. 27, 2001, at 21. Often the people being smuggled are highly educated middle class professionals who sell every asset they own in order to pay between $16,000 and $20,000 for travel. *See id.*

swift.[14] But, for $12,000 and two passport-sized photographs, a smuggler will sign a contract guaranteeing travel from Pakistan to Australia.[15] Similarly, the 433 people aboard the MV Tampa,[16] who for ten days after being rescued at sea became the center of an international controversy between Norway, Indonesia, and Australia, faced this dark beginning to their own voyage.[17]

This Note examines the Australian government's management of the MV Tampa incident to determine the effect its decision will have on Australia's battle against people smuggling. In addition, this Note analyzes the people smuggling epidemic in Europe and global initiatives to stop people smuggling. Part II focuses on the effects of people smuggling on refugees who are seeking asylum in Australia. In Part III, the Note addresses Australia's response to increased people smuggling. Part IV analyzes the MV Tampa incident. The Note addresses, in Part V, effects of the Australian court's decision, including the continuing arrival of boat people[18] to Australia, and Australia's policy of transporting the boat people to other Pacific nations. Finally in parts VI through VII, this Note examines Europe's difficulties with people smuggling and global initiatives to stop people smuggling.

II. PEOPLE SMUGGLING: A ROADBLOCK TO REFUGEES

A. *People Smuggling in General*

The organized illegal movement of groups or individuals across international borders, usually for payment, is commonly known as people smuggling.[19] The smuggling[20] and trafficking[21] of human beings is increasing throughout the world, and is "exacerbated" in size and seriousness by the

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14. *See* McCarthy, et al., *supra* note 1, at A4.

15. *See id.* The smuggler's goal is to be picked up by authorities at a remote territorial outpost, Christmas Island or Ashmore Reef, instead of mainland Australia. *See id.*

16. *See* discussion *infra* Part IV.

17. *See* ABC NEWS, Leela Jacinto, *Forced Entry Troops Board Illegals Ships, International Concern Mounts*, Sept. 2, 2001, *at* http://abcnews.go.com/sections/world/DailyNews/boatpeople_2_010829.html.

18. *See* Josh Briggs, *Sur Place Refugee Status in the Context of Vietnamese Asylum Seekers in Hong Kong*, 42 AM. U.L. REV. 433, 437 (1993). The term boat people was derived in the 1970's when asylum seekers secretly and illegally departed Vietnam on crowded, tiny, unseaworthy boats in search of asylum. *See id.*

19. *See* Department of Immigration Multicultural and Indigenous Affairs Fact Sheet: 73 People Smuggling, *at* http://www.immi.gov.au/facts/73smuggling.htm (last updated Dec. 2, 2001)[hereinafter DIMIA Fact Sheet].

20. *See* United Nations General Assembly: Convention Against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and Protocol Against the Smuggling of Migrants by Land, Sea and Air, 40 I.L.M. 335 (2001). Smuggling is the procurement of illegal entry of a person into a State of which the latter person is not a national with the objective of making a profit. *See id.* at 384.

21. Trafficking is the recruitment, transportation, or receipt of persons through deception or coercion for the purposes of sexual exploitation or forced labour. *See id.* at 378.

involvement of organized crime.[22] People smuggling is the third largest moneymaker for organized crime after drug and gun trafficking,[23] thus making people smuggling a very lucrative enterprise.[24]

In addition, the smugglers frequently change routes and methods of arrival in order to remain hidden from authorities;[25] however, "[e]stablished smuggling routes are known to exist in Amman and Bangkok."[26] Because people smugglers continually change ports of departure and use alias identification, it is difficult for countries to intercept them.[27]

However, while the smuggler earns a profit,[28] smuggled persons seek survival,[29] and should not be blamed for pursuing protection from persecution.[30] Many smuggled persons are refugees.[31]

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22. *See* Graycar & Tailby, *supra* note 8, at 1.

23. *See* Media Release, Senator The Honorable Christopher Ellison, Mar. 13, 2001, *at* http://www.law.gov.au/aghome/agnews/2001newsjus/e41_01.htm.

24. *See* CNN.com, *People Smuggling Tops Euro Agendas*, Feb. 9, 2001, *at* http://europe.cnn.com/2001/WORLD/europe/france/02/09/britain.illegals. The trade in illegal immigrants is worth more than $30 billion a year. *See id. See also* Graycar & Tailby, *supra* note 8, at 3. Smuggling by organized crime represents the greatest risk to Australia since organizations are well financed, use local criminals, and have the flexibility to escape law enforcement. *See id.* at 3. People smuggling by organized crime is normally characterized by:

> well-equipped forgery workshops to create the essential travel documents; the ability to modify their operations to adapt to changing risks by using different routes, entry schemes, and conveyances; operation centres, accommodations, and hideouts in transit countries and potential transit countries; the economic wealth for substantial bribes and the best in technology. . . an ability to use violence to obtain payment or services from the undocumented migrants.

Id. at 3. *See also* Mitchell & Dickens, *supra* note 13, at 21. While people smuggling is just as profitable as drug trafficking, the penalties are much less. *See id.*

25. *See* DIMIA Fact Sheet, *supra* note *19*.

26. *Id.* Boat arrivals depart from several points in Indonesia including Kupang, Lombock, Sumbawa, and Flores. The usual route to Australia is through Indonesia. *See id. See* Housden, *supra* note 4. People fly to Jakarta, transfer to another island, and then take a boat to Australia. *See id.*

27. *See* Mitchell & Dickens, *supra* note 13, at 22.

28. *See* Amnesty International Australia, Aug.-Sept. 2000 Newsletters, *at* http://www.amnesty.org.au/airesources/index-73.html (Sept. 29, 2001). The lives of refugees and unauthorized immigrants being smuggled are at very high risk since smugglers use unseaworthy boats, cramming them with hundreds of people, in order to extract a considerable profit. *See id.*

29. *See* Graycar & Tailby, *supra* note 8, at 2. People who are smuggled have many motivating factors including, "escape from extreme poverty and unemployment; improve earnings and standard of living; escape from persecution, conflict or war; escape from ecological crisis or degradation." *Id.*

30. *See id.*

31. *See Refugees by Numbers*, *available at* http://www.unhcr.ch (2001). In 2001, the United Nation High Commission of Refugees (UNHCR), the organization mandated by the United Nations to lead and coordinate international action for the worldwide protection and resolution of refugee problems, approximated that there were 22.3 million persons of concern. *See id.* The ten largest groups included, Afghanistan with estimated 2.5 million; Iraq with 572,500; Burundi with 525,700; Sierra Leone with 487,200; Sudan with 467,700; Somalia with 451,600; Bosnia-Herzegovina with 448,700; Angola with 350,600; Eritrea with 345,600; and

Under the Refugee Convention[32] and the Refugee Protocol,[33] a refugee is defined as any person who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.[34]

Croatia with 340,400. *See id.* at 8.

32. *See* Convention Relating to the Status of Refugees, July 28, 1951, 138 U.N.T.S. 150 [hereinafter 1951 Convention].
The Preamble States:

> CONSIDERING that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,
>
> CONSIDERING that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercise of these fundamental rights and freedoms,
>
> CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,
>
> CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Id. Signatory nations include: Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Egypt, France, Federal Republic of Germany, Greece, Holy See, Iraq, Israel, Italy, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland (also representing Liechtenstein), Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, and Yugoslavia. *See id.*

33. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267[hereinafter 1967 Protocol]. The purpose of the Protocol is stated in the preamble:

> Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951, Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention, Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951. . . .

Id.

34. 1951 Convention, *supra* note 32, at 152. The Refugee Convention was the first major international agreement to offer refugees legal protection. *See* DIMIA Fact Sheet 61: Seeking Asylum within Australia, *at* http://www.immi.gov.au/facts/61asylum.htm, last visited (Feb. 1, 2002).

Refugees face dire circumstances when approached by smugglers, and thus are easy prey for smugglers who promise the fortunes of the West.[35]

B. Smuggling Refugees in Australia

A person illegally arrives in Australia if they arrive without travel documents, or if the documents are found to be fraudulent upon presentation.[36] According to the Department of Immigration Multicultural and Indigenous Affairs (DIMIA),[37] "Australia has experienced an influx of boat people, mainly from the Middle East, a region where people smuggling networks are operating."[38] In 1998-99, forty-two unauthorized boats arrived carrying 921 people into Australia;[39] however, in the first four months of 2000, seventy unauthorized boats carrying 3,941 people arrived in Australia, an increase of more than 328 percent.[40]

Australia has resettled[41] over 600,000 refugees and displaced persons in

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35. *See* BBC NEWS, Barnaby Phillips, *Refugee Numbers 'Expected to Grow'*, Sept. 4, 2001, *at* http://news.bbc.co.uk/hi/english/world/africa/newsid_1525000/1525549.stm. Even "if you are sitting in a slum every day, you can still see through the media how richer people are leading their lives in other countries." *Id.*

36. *See* DIMIA Fact Sheet, *supra* note 19. If a person arrives in Australia without identification, they are required by law to be placed in immigration detention until their situation is resolved. *See id.*

37. *See generally* Department of Immigration Multicultural & Indigenous Affairs web page *at* http://www.immi.gov.au (Sept. 26, 2001)[hereinafter DIMIA webpage]. The DIMIA manages the migration of people into and out of Australia, including refugees. *See id.* The DIMIA is in charge of Australia's Humanitarian Program, which provides protection through resettlement to refugees and others in need from all over the world. *See id.* The Humanitarian Program is comprised of two components: an offshore resettlement program for persons overseas and an onshore protection for those already in Australia. *See id.* The offshore resettlement program consists of two categories: 1) Refugee- people who have been recognized as refugees and in conjunction with the UNHCR are identified in need of resettlement; 2) Special Humanitarian Program- People outside their home country who have suffered discrimination "amounting to gross violation of human rights" having an application supported from an Australian citizen or resident. *See id.* The main focus of the Offshore Resettlement Program in 2001-2002 will be the Middle East, South-West Asia, and the former Yugoslavia with approximately 4000 places set aside for the Refugee competent and 3000 for the Special Humanitarian Program. *See* Australian Immigration Statistics, *at* http://www.immi.govau/statistics/refugee.htm,(last visited Oct.3, 2001). The onshore resettlement program consists of 1) Special Assistance Category- People who do not meet the requirements of the Special Humanitarian Program, but are facing situations of discrimination, displacement, or hardship; 2) Onshore Protection Visa Grants- People who have a need to protection under the UN Refugee Convention and are granted protection visas in Australia. *See id.*

38. DIMIA Fact Sheet, *supra* note 19.

39. *Id.*

40. *See id.* The people comprising the arrivals were mostly from the Middle East. *See id.*

41. *See* UNHCR & Refugees, *at* http://www.unhcr.ch/un&ref/who/whois.htm (last visited Sept. 5, 2001)[hereinafter UNHCR website]. "Resettlement in a third country is sometimes the only possible way to guarantee international protection of a refugee who is being denied adequate protection in the country of asylum." *Id.* There are only ten resettlement countries out

the past fifty years.[42] Today, nearly half of all migration to Australia comes from Asia.[43] This phenomenon did not occur until the late 1970's after a flood of Vietnamese citizens, seeking asylum, began arriving on boats coining the term boat people.[44] The increase of Asian citizens seeking asylum was in contrast to the Australian Immigration policy at that time.[45] Historically, Australia's immigration policy has been described as follows:

> while not racially exclusive, [it] was to increase the population without changing its dominantly European composition, or at least to change it slowly. The boat people were not part of the policy. They had not been processed thousands of kilometres away by skilful immigration officials. Reflecting population pressures and political turmoil near at hand, they simply turned up, uninvited, asking for refuge. For Australia, history and geography had merged, causing a shiver of apprehension.[46]

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of the 185 member states of the United Nations including: United States of America, Canada, Australia, New Zealand, Norway, Finland, Sweden, Denmark, Switzerland, and the Netherlands. *See id.*

42. *See* DIMIA Fact Sheet 60: Australia's Refugee and Humanitarian Program, *at* http://www.immi.gov.au/facts/60refugee.htm (last updated Dec. 2, 2001).

43. *See* W. COURTLAND ROBINSON, TERMS OF REFUGE: THE INDOCHINESE EXODUS AND THE INTERNATIONAL RESPONSE 151 (Zed Books 1998). Migration to Australia in the nineteenth and early twentieth century mainly came from the United Kingdom. *See id.* This was in part due to the 'White Australia' policy passed by the Federal parliament in 1901 under the Immigration Restriction Act. *See id.* Non-whites were only allowed to enter Australia on a temporary basis under a permit. *See id.* The *Bulletin*, a supporter of Australian nationalism, wrote in 1901:

> [i]t is impossible to have a large coloured alien population in the midst of a white population without a half-caste population growing up between the two. India proves that; would prove it much more conclusively only the white population isn't large enough to be a very extensive parent to the Eurasian mongrel. Spanish and Portuguese America show it. The United States show it., Queensland [by importing Pacific Island labour] shows it already to an alarming extent. And Australia thinks highly enough of its British and Irish descent to keep the race pure.

GEOFFREY SHERINGTON, THE AUSTRALIAN EXPERIENCE AUSTRALIA'S IMMIGRANTS 91 (1980). *See also* Bulletin, 22 June 1901, *quoted in*, ATTITUDES TO NON-EUROPEAN IMMIGRATION 98, (A.T. Yarwood ed.,1968).

44. *See* Robinson, *supra* note 43, at 152. More than 2,000 Vietnamese boat people beached themselves on the Australian shores using more than fifty-one vessels during late 1977 to the middle of 1978. *See id.* Most of these vessels stopped in Singapore, Malaysia, or Indonesia for food and water along the way. *See id.* Thus, the people aboard avoided seeking asylum at the country of first arrival and instead sought asylum in Australia. *See id.*

45. *See id.*

46. BRUCE GRANT, THE BOAT PEOPLE: AN 'AGE' INVESTIGATION 179 (Penguin Books 1979).

The arrival of so many asylum seekers[47] by boat suggested that Australia had become not only a resettlement country, but also a country of first asylum.[48] Continued concern over the number of illegal migrants arriving in Australia by boat is questionable, considering that currently 50,000 illegal migrants are estimated to be living in Australia simply by overstaying[49] their visas.[50]

People smuggling not only threatens the amount of migrants Australia can accept each year, it also raises concerns of domestic security, increases economic consequences, and places strains on international relations.[51] In addition, if the international community perceives Australia as "soft" on illegal immigration, people smugglers will more relentlessly target Australia, thus increasing the problem of illegal migration.[52] When migrants illegally enter Australia, the Australian government is limited in its power to decide who is

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47. *See* Unauthorized Arrivals and Detention Information Paper, *at* http://www.immi.gov.au/illegals/uad/01.htm (last updated Nov.7, 2001). [hereinafter Unauthorized Arrivals]. "People who apply for recognition as refugees are called asylum seekers. They are not refugees until their claims for protection are assessed against the 1951 UN Convention and the 1967 Protocol relating to the Status of Refugees, and they are accorded such status." *Id.*

48. *See* UNHCR website, *supra* note 41. Under the Refugee Convention, after refugees leave their country of origin, asylum should be sought in the first country available. *See id.*

49. *See* DIMIA FACT Sheet 86, Overstayers and People in Breach of Visa Conditions in Australia, *at* http://www.immi.gov/au/facts/86overstayers.htm (last updated Dec. 10, 2001)[hereinafter Overstayers in Breach]. Upon requesting a visa to Australia, a person signs a contract stipulating that they will leave by a certain date, and anyone who stays past this date is an overstayer. *See id.*

50. *See* Andrew N. Langham, *The Erosion of Refugee Rights in Australia: Two Proposed Amendments to The Migration Act*, 8 PAC. RIM L. & POL'Y J.651, 657 (1999). According to Professor Mary Crock, "concern about the phenomenon of uninvited refugees and asylum seekers is quite out of proportion to the actual number of persons who seek refuge here. The level of misunderstanding in the community is high, prompted in many cases by poor reporting or blatant scare mongering tactics in the media." *Id. See also* Overstayers in Breach, *supra* note 49. As of June 30, 2001, Australia estimated that 60,103 people overstayed their visas. *See id.*

51. *See* Graycar & Tailby, *supra* note 8, at 7.

National security is threatened by people smuggling in the following ways:

> ***First***, illegal entrants are not scrutinised against immigration's character requirements. Thus, 'undesirables' or persons posing threats to national security are not screened out offshore, but may enter the country undetected, or if they arrive by boat with no identification papers their identity is very difficult to ascertain and thus their threat to security is unknown.
>
> ***Second***, illegals may come from countries whose political and cultural climate are very different to our own, eg. ethnic tension, violence, religious or political fundamentalism. . . . [I]llegals may find it difficult to adapt to our culturopolitical climate and may continue with their own cultural/political practices. . .
>
> ***Third***, there are some rumors of terrorists or persons of concern posing as refugees to enter Australia illegally and unidentified. . .
>
> ***Fourth***, one of the most serious threats to Australia's security stems from the increasing involvement of **criminal syndicates** in smuggling people to Australia. . . .

Id.

52. *See id.* at 7.

allowed entrance into the country.[53]

III. AUSTRALIA'S RESPONSE TO PEOPLE SMUGGLING

Determined to strengthen its response to the number of illegal migrants in 1999, Australia allotted funding of over 124 million dollars[54] to improve the Coastal Surveillance Task Force, increase prosecution of smugglers, and launch an overseas information campaign aimed at stopping illegal arrivals.[55] In addition, Australia announced the exclusion of unauthorized arrivals from accessing permanent residence,[56] elimination of migrants who have refugee protection overseas from gaining protection in Australia, and utilization of fingerprinting and other biometric tests to ascertain the identity of asylum seekers.[57]

In 2000-01, Australia spent over 211 million dollars[58] on detention, legal assistance, protection determination, and review and litigation costs for people who arrived unlawfully.[59] In response to the continuing problem of illegal migration and people smuggling, Australia announced a new approach to

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53. *See id.*

54. *See Australian Dollar, at* http://www.x-rates.com/d/AUD/table.html (last visited Nov. 14, 2001)[hereinafter Australian Dollar]. The Australian dollar exchange rate with the American dollar on Nov. 14, 2001 equals 0.5186 AU$ for one US$. *See id.*

55. *See* DIMIA Fact Sheet, *supra* note 19. The funding allotted was used to improve, "Coastwatch, Customs, and Navy capabilities to detect pursue, intercept, and search boats carrying unauthorized arrivals." *Id.* The changes to the Migration Act included detaining and prosecuting all crewmembers for smuggling people illegally into Australia. *See id.* The penalties for smuggling were increased to up to twenty years in prison and up to a $220,000 fine. *See id. See also* BBC NEWS, Red Harrison, *Australia Cracks Down on People Smuggling*, Dec. 23, 1999, *at* http://newsvote.bbc.co.uk/hi/english/world/asiapacific/newsid_575000/57597. The campaign entitled "Pay a people smuggler and you'll pay the price", included posters warning people of the penalties, "You will NOT be welcome, you WILL be kept in detention centers, thousands of kilometers from Sydney and you could LOSE all your money and be sent back." *Id.* Australia spends approximately $50,000 for every unauthorized arrival from their time of arrival to departure. *See id.*

56. *See* Philip Ruddock, *2002-2003 Migration and Humanitarian Programs-A Discussion Paper The Humanitarian Program, at* http://minister.immi.gov.au/consultations/discpaper4a.htm (last visited Jan. 31, 2002). Temporary Protection Visas (TPV) are issued to applicants whom Australia owes protection obligations but either arrived unauthorized or were found to have fraudulent documents. *See id.* Unlike permanent visas, a TPV does not confer rights to family reunion, to return if they leave Australia, or to the full range of settlement services, including welfare assistance. *See id.* TPV's provide the basic services required under the Refugee Convention, allowing recipients to stay in Australia for up to three years, seek employment, and seek basic services. *See id.* All unauthorized arrivals are held in detention facilities until they leave or are granted a stay in Australia. *See id.*

57. *See* DIMIA Fact Sheet *supra* note 19. The use of biometric tests, including DNA testing, face, palm, or retinal recognition testing, and voice testing will ensure that the boat people do not have protection somewhere else, or have previously been denied refugee status overseas. *See id. See also* DIMA Fact Sheet 88 Processing Unlawful Boat Arrivals, *at* http://www.immi.gov.au/facts/88process.htm (Nov. 14, 2001).

58. *See* Australian Dollar, *supra* note 54.

59. *See* Ruddock, *supra* note 56.

handling the situation, including minimizing outflows from countries of origin, working internationally to disrupt people smugglers, and setting up a new reception point for unauthorized arrivals.[60] The increase in unauthorized arrivals to Australia has threatened Australia's ability to adequately take part in resettlement of refugees who apply through the United Nations High Commission for Refugees (UNHCR).[61]

In order to protect Australia from the influx of illegal migrants, especially refugees, the Australian Parliament has passed several new laws.[62] In 1999, Parliament amended the Migration Act of 1958[63] to allow prosecution of groups bringing non-citizens unlawfully into Australia.[64] This amendment

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60. *See* Press Release MPS 131/2001 Philip Ruddock, *Background Paper on Unauthorised Arrivals Strategy,* Sept. 6, 2001, *at* http://www.minister.immi.gov.au/media_releases/media01/r01131.htm
[hereinafter Background Paper]. Mr. Ruddock stated:

> Government's approach comprises three major elements: 1. prevention of the problem by minimising the outflows from countries of origin and secondary outflows from countries of first asylum; 2. working with other countries to disrupt people smugglers and intercept their clients en route to their destination, while ensuring that those people in need of refugee protection are identified and assisted as early as is possible; and 3. developing appropriate reception arrangements for unauthorised arrivals who reach Australia, focusing on the early assessment of the refugee status of the individual, the prompt removal of those who are not refugees, or who are refugees but can access effective protection elsewhere, and the removal of additional benefits not required by the Refugees Convention to minimise the incentive for people to attempt illegal travel to Australia.

61. *See Ruddock, supra* note 56.

62. *See* DIMA Unauthorized Arrivals and Detention, *at* http://www.immi.gov.au/illegals/uad/02.htm (*last updated* Nov. 7, 2001).

63. *See* Migration Act, 1958, (Austl.)[hereinafter Migration Act]. The long title of the Act reads: "An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons." *Id.* The purpose of the Migration Act is described in section 4:

> (1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
> (2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.
> (3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.
> (4) To advance its object, this Act providesfor the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.

Id. at c. 4.

64. *See id.* at c. 232A. The Migration Act states:

> A person who:
> (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
> (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia; is guilty of an offence punishable, on conviction, by imprisonment for

was enacted to deter individuals who are paid by criminal organizations to cease bringing illegal persons into Australia.[65] While under this new amendment[66] a handful of people have been convicted,[67] people smuggling

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20 years or 2,000 penalty units, or both.

Id. *See also* Migration Act c. 233, which states:

Persons concerned in bringing non-citizens into Australia in contravention of this act or harbouring illegal entrants:

(1) A person shall not take any part in:
   (a) the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act;
   (b) the concealing of a non-citizen with intent to enter Australia in contravention of this Act; or
   (c) the concealing of an unlawful non-citizen or a deportee with intent to prevent discovery by an officer.

(2) A person is guilty of an offence if:
   (a) the person harbours another person; and
   (b) the other person is an unlawful non-citizen, a removee or a deportee.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

Id.

65. *Id.* at c. 233A. The statute for prosecuting those who bring illegal persons into Australia states:

(1) A person must not, in connection with:
   (a) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include that person), or of any member of such a group; or
   (b) an application for a visa or a further visa permitting a group of 5 or more non-citizens (which may include that person), or any member of such a group, to remain in Australia;

   do any of the following:
   (c) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document that the person knows is forged or false;
   (d) make, or cause to be made, to an officer or a person exercising powers or performing functions under the Act a statement that the person knows is false or misleading in a material particular;
   (e) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise furnish, or cause to be furnished, for official purposes of the Commonwealth, a document containing a statement or information that the person knows is false or misleading in a material particular.

(2) A person must not transfer or part with possession of a document or documents:
   (a) with the intention that the document or documents be used to help a group of 5 or more people, none of whom are entitled to use the document or documents, or any member of such a group, to gain entry into or remain in Australia, or to be immigration cleared; or
   (b) if the person has reason to suspect that the document of documents may be so used.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Id.

66. *Id.* at c. 233C. The new amendment provides for harsher penalties and longer incarceration periods, such as:

Mandatory Penalties for certain offences

networks continue to thrive.

Furthermore, the Migration Amendment (Excision from Migration Zone) Act 2001[68] aims to remove Cocos Island,[69] Christmas Island,[70] Ashmore

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(1) This section applies if a person is convicted of an offence under section 232A or 233A, unless it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
(2) The court must impose a sentence of imprisonment of at least:
  (a) 8 years, if the conviction is for a repeat offence; or
  (b) 5 years, in any other case.
(3) The court must also set a non-parole period of at least:
  (a) 5 years, if the conviction is for a repeat offence; or
  (b) 3 years, in any other case.
(4) In this section:
  (a) *non-parole period* has the same meaning as it has in Part 1B of the *Crimes Act 1914*; and
  (b) a person's conviction for an offence is for a *repeat offence* if, on a previous occasion after the commencement of the section, a court:
    (i) has convicted the person of another offence, being an offence against section 232A or 233A; or
    (ii) has found, without recording a conviction, that the person had committed another such offence.

Id.

67. *See generally R v. Feng Lin* (2001)60071/00 BC 200100204(Austl).

68. *See* Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill, No., 2001, (Austl.) "A Bill for an Act to make consequential provision for dealing with unauthorised arrivals in places excised from the migration zone under the *Migration Act 1958* for purposes related to unauthorised arrivals, and for related purposes." *Id.* One of the major amendments includes instructions for officers who suspect that a person may be attempting to enter Australia illegally. *See id.* The amendment of Migration Act 1958 section 189, (4) states: "If an officer reasonably suspects that a person in Australia but outside the migration zone: (a) is seeking to enter an excised offshore place; and (b) would, if in the migration zone, be an unlawful non-citizen; the officer may detain the person." *Id.* In addition, under an amendment to section 198A,

> An officer may take an offshore entry person from Australia to a country in respect of which a declaration is in force under subsection (3). (2) The power under subsection (1) includes the power to do any of the following within or outside Australia: (a) place the person on a vehicle or vessel; (b) restrain the person on a vehicle or vessel; (c) remove the person from a vehicle or vessel; (d) use such force as is necessary and reasonable. (3) The Minister may: (a) declare in writing that a specified country: (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and (iv) meets relevant human rights standards in providing that protection; and (b) in writing, revoke a declaration made under paragraph (a).

Migration Act, *supra* note 64, at c. 198A.

69. *See* Commonwealth Dept. of Transport and Regional Services, *at* http://www.dotrs.gov.au/terr/cocos/index.htm (last visited Oct. 25, 2001). Cocos Islands, also referred to as the Keeling Islands, are located approximately 900 kilometers south west of Christmas Island. *See id.* Cocos Islands consists of twenty-seven coral islands in the eastern Indian Ocean. *See id.* In April of 1984 Cocos Islands voted to integrate with Australia. *See id.*

Reef,[71] and Cartier Reef[72] from the Australian Migration Zone under the Migration Act of 1958.[73] By removing the outermost territories from the Migration Zone,[74] Australia prevents smugglers from attempting to bring asylum seekers to these points for processing in Australia, therefore asylum seekers who did embark on these places would not "jump the queue."[75]

Likewise, the Border Protection Act[76] provides authority to prevent arrival in, and remove a vessel from, Australia's territorial waters.[77] To effectively stop people on boats from entering Australia illegally, coastal officials will prevent arrival and remove vessels from Australian waters without a legal proceeding.[78] Thus, Australia will avoid processing people

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The total population according to the 1996 Census was 655 people. *See id.*

70. *See* Commonwealth Dept. of Transport and Regional Services, *at* http://www.dotrs.gov.au/terr/xmas/index.htm (last visited Oct. 25, 2001). Christmas Island is located 1,565 kilometers to the northwest of Australia. *See id.* The island was named on Christmas Day 1643. *See Id.* The United Kingdom transferred sovereignty to Australia on October 1, 1958, under the Christmas Island Act of 1958. *See id.*

71. *See* Ashmore Reef National Nature Reserve, *at* http://www.ea.gov.au/coasts/mpa/ashmore (last visited Oct. 25, 2001). Ashmore Reef consists of three small islands, the largest about one kilometer long. *See id.* The reef is located 600 kilometers northwest of the mainland and about 100 kilometers south of Indonesia. *See id.* Ashmore Reef became a National Nature Reserve in August of 1983. *See id.* The reef has a variety of marine habitats, thus it is able to support the greatest number of species on the Western Australia coast. *See id.* The Reef itself is not inhabited, but an Australian Customs vessel patrols the reef to watch for illegal activity and illegal entry. *See* Karen McCormick, *Customs Protecting an Environment 'magnifique', Manifest,* Vol. 4 (May 2001), *available at* http://www.customs.gov.au/media/manifest/May2001/html/p10.htm (last visited Feb. 1, 2002).

72. *See* Commonwealth Dept. of Transport and Regional Services, *at* http://www.dotrs.gov.au/terr/ashcart/ (last visited Oct. 25, 2001). Cartier Island is a small uninhabited island covered with grass located 320 kilometers northwest of Australia and 144 kilometers south of the Indonesian Island of Roti. *See id.*

73. *See* Migration Act, *supra* note 63.

74. *See id.* at c. 5. Migration zone consists of the States, the Territories, Australian resource installations, Australian sea installations, and to avoid doubt includes:

> (a) land that is part of a State or Territory at mean low water; and
> (b) sea within the limits of both a State or a Territory and a port; and
> (c) piers, or similar structures, any part of which is connected to such land or to ground under such sea; but does not include sea within the limits of a State or a Territory but not in port

Id.

75. John Zubrzycki, *UN Attacks Refugee Bungling,* THE AUSTRALIAN, Oct. 22, 2001, at 8. UN officials "have also repudiated claims that Afghan asylum-seekers were queue-jumpers and economic refugees. . . ." *Id.* A senior official for the UNHCR stated, "[t]his whole thing about queue-jumping is nonsense. The only refugees who get in the queue are extreme cases, those who might be killed, and Australia's bureaucracy is too slow and cumbersome to process them in time." *Id.* Australia processed only 109 refugee visas for Afghans in 2000, even though more than tens of thousand were awaiting resettlement. *See id.*

76. *See* Border Protection (Validation and Enforcement Powers) Act 2001 No. 126, 2001 (Austl.)[hereinafter Border Protection Act]. The Act's title reads: "[a]n Act to validate the actions of the Commonwealth and others in relation to the *MV Tampa* and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes." *Id.*

77. *See id.*

78. *See id.*

aboard vessels, which have been turned away.[79]

IV. ANALYSIS OF THE MV TAMPA INCIDENT

A. *Introduction*

On August 26, 2001, after receiving a call from Australian authorities to assist a vessel[80] in distress, the Norwegian Ship, MV Tampa,[81] rescued 433 people[82] located approximately 140 kilometers north of Christmas Island.[83] The Australian Coast Guard did not provide the Captain of the MV Tampa, Arne Rinnan, with a point of disembarkation for the "rescuees;"[84] thus, the MV Tampa continued to Indonesia.[85] Captain Rinnan changed course for Christmas Island after several of the "rescuees" threatened to jump over board.[86] Before entering Australian waters, but close to Christmas Island, Australian authorities requested that the MV Tampa change course for Indonesia.[87] As a precautionary measure, Australian authorities closed Christmas Island's only port, Flying Fish Cove, to prevent private boats from accessing the MV Tampa.[88]

The DIMA[89] contacted Captain Rinnan by radio on August 27, 2001,

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> If an officer detains a ship or aircraft under this section, any restraint on the liberty of any person found on the ship or aircraft that results from the detention of the ship or aircraft is not unlawful, and proceedings, whether civil or criminal, in respect of that restraint may not be instituted or continued in any court against the Commonwealth, the officer or any person assisting the officer in detaining the ship or aircraft.

Id. See also Migration Act 1958 c. 245f(9).

79. *See id.*

80. *See Victorian Council for Civil Liberties Inc. v. Hon. Ruddock, Minister for Immigration & Multicultural Affairs; Vadarlis v. Hon. Ruddock, Minister for Immigration & Multicultural*(2001) F.C.A. 1297, ¶ 14. The vessel was a twenty-meter wooden fishing boat. *See id.*

81. *See id.* ¶ 15. The MV Tampa is a 49,000-ton container ship registered in Norway and licensed to carry no more than fifty people. *See id.* The Tampa was sailing from Fremantle to Singapore, carrying a crew of twenty-seven with more than twenty million dollars of cargo aboard. *See id.*

82. *See id.* ¶ 17. Captain Rinnan had been informed that only eighty people were on the sinking ship. *See id.*

83. *See id.* ¶ 16.

84. *See id.* ¶ 17. Those rescued could not be acknowledged as refugees until they were processed, thus the court adopted the term rescuees. *See id. See also* Unauthorized Arrivals, *supra* note 47.

85. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001)F.C.A. 1297, ¶ 18.

86. *See Ruddock v. Vadarlis* (2001) F.C.R. 1329, ¶ 18.

87. *See id.*

88. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 20. The Harbor Master posted a signed order that "all boat movements in an out of the cove is prohibited." *Id.* In addition public and local authorities were notified that the port was closed. *See id.*

89. *See* DIMIA webpage, *supra* note 37. The DIMIA was called the DIMA at the time

requesting the MV Tampa to remain at its current position until further advised by the Australian government.[90] Captain Rinnan informed Australia that the medical situation on board the MV Tampa was becoming critical.[91] On August 29, 2001, Captain Rinnan sailed the MV Tampa into Australian territorial waters, stopping four nautical miles from Christmas Island.[92] Within two hours of entering Australian waters, forty-five Special Armed Services troops from the Australian Defense Force left Christmas Island and boarded the MV Tampa.[93] The purpose of the troops was to provide security for the crew, render medical assistance, and facilitate the MV Tampa's departure from Australian waters.[94] On August 30, 2001, the Norwegian Ambassador boarded the MV Tampa and received a letter stating in part, "[w]e do not know why we have not been regarded as refugees and deprived from rights of refugees according to International Convention (1951). We request from Australian authorities and people, at first not to deprive us from the rights that all refugees enjoy in your country."[95] The letter was signed "Afghan Refugees Now off the

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of the MV Tampa incident. *See id.*

90. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶21. "[T]he Australian Government at the highest level formally requests that you not approach Christmas Island and that you stand off at a distance at least equal to your current position - 13.5 nautical miles from the island." *Id.*

91. *See id.* ¶22. A conversation between the solicitor, (attorney of the owners of the MV Tampa and Captain Rinnan), and Australia was confirmed via fax. *See id.*

> [T]he medical situation on board is critical. **If it is not addressed immediately people will die shortly.** . . . The ship has now run out of the relevant medical supplies and has no way of feeding these people. . . . It is a simple matter to send a boat from shore to collect the sickest people, supply food and medical assistance. . . . At the request of the Australian Government the vessel is currently just off shore of Christmas Island. If the situation is not resolved soon more drastic action, may have to be taken to prevent loss of life.

Id.

92. *See id.* ¶25.

93. *See id.* ¶26.

94. *See id.*

95. *Id.* ¶28. The letter presented to the Norwegian Ambassador read as follows:

> You know well about the long time war and its tragic human consequences and you know about the genocide and massacres going on in our country and thousands of us innocent men, women and children were put in public graveyards, and we hope that you understand that keeping view of above mentioned reasons we have no way but to run out of our dear homeland and to seek a peaceful asylum. And until now so many miserable refugees have been seeking asylum in so many countries. In this regard before this Australia has taken some real appreciable initiatives and has given asylum to a high number of refugees from our miserable people. This is why we are wholeheartedly and sincerely thankful to you. We hope you do not forget that we are also from the same miserable and oppressed refugees and now sailing around Christmas Island inside Australian boundaries waiting permit to enter your country. But your delay while we are in worst conditions has hurt our feelings. We do not know why we have not been regarded as refugees and deprived from rights of refugees according to International Convention (1951). We request from Australian authorities and people, at first not to deprive us from the rights that all refugees

coast of Christmas Island."[96]

The Victoria Civil Liberties Union[97] and Mr. Eric Vadarlis[98] commenced legal proceedings in Australia's federal court on August 31, 2001, arguing that the Migration Act[99] applied to the "rescuees."[100] However, on September 1, 2001, the Solicitor-General for the Commonwealth announced[101] that the "rescuees" on the MV Tampa would be moved to the HMAS Manoora[102] for

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> enjoy in your country. In the case of rejection due to not having anywhere to live on the earth and every moment death is threatening us. We request you to take mercy on the life of 438 men, women and children.

Id.

96. *Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297. ¶ 28.

97. *See id.* ¶ 9. The Victorian Council for Civil Liberties is incorporated under the Associations Incorporations Act of 1981. *See id.* It is a non-governmental organization committed to advocating and protecting fundamental rights and freedoms. *See id.*

98. *See id.* Vadarlis is a solicitor practicing in Melbourne who seeks to offer legal assistance to asylum seekers on a pro-bono basis. *See id.*

99. *See* Migration Act, *supra* note 63. "The Migration Act gives the government very wide powers to detain and remove unlawful non-citizens who are about to enter or who are in Australia." *Id.*

100. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 29. The respondents included: The Minister for Immigration and Multicultural Affairs, the Commonwealth, and William Farmer, Secretary and Chief Executive Officer of the Department of Immigration and Multicultural Affairs. *See id.*

101. *See id.* ¶ 32. The announcement made by Prime Minister John Howard in regard to the MV Tampa situation was as follows:

> I am announcing today that we have reached agreement with the Governments of New Zealand and Nauru for processing of the people rescued by the MV Tampa. Under the terms of the agreement, the rescuees will be conveyed to Nauru and New Zealand for initial processing. New Zealand has agreed to process 150 of those aboard the Tampa. It is envisaged that this will include family groups involving women and children. Those found to be genuine refugees in New Zealand would remain there. The remainder of the rescuees will be assessed in Nauru and those assessed as having valid claims from Nauru would have access to Australia and other countries willing to share in the settlement of those with valid claims. Australia will bear the full cost of Nauru's involvement in this exercise. Arrangements will be made to safely transship the rescuees through a third country. We are currently in discussions with appropriate countries to effect this. We are also working closely with the International Organisation for Migration and the UNHCR to ensure that these arrangements are managed carefully and that the rescuees receive appropriate counseling and assistance. Australia will continue to ensure that the rescuees receive all necessary humanitarian assistance while these arrangements are put in place. I would like to take this opportunity to express my Government's gratitude to the Governments of Nauru and New Zealand for their ready and constructive humanitarian assistance.

Id.

102. *See id.* ¶ 40. Prime Minister Howard's comments at a press conference were as follows:

> The proposal is that the people should be transferred from the Tampa to the amphibious troop ship Manoora which is a very large vessel capable of travelling [sic] six thousand kilometres. It's a large troop ship that has extensive medical facilities on board including I understand two operating theatres. Troops remain on this ship for weeks on end. It is within the inevitable constraints of any vessel

transport to the islands of Nauru[103] and New Zealand.[104]

B. *Federal Court Decisions*

1. *Justice North*

The Victorian Civil Liberties Union and Mr. Valdaris argued that the "rescuees" were detained unlawfully and should have been granted a writ of habeas corpus.[105] Because the asylum seekers aboard the MV Tampa did not hold visas entitling them to enter Australia, they were deemed unlawful non-citizens under the Migration Act[106]. According to testimony by Mr. Farmer,

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> quite comfortable and it can adequately accommodate all of the people who will be taken from the Tampa. . . . The Manoora is now ready to take people on board. The idea is they should be transferred to the Manoora then the Manoora will sail to Port Moresby and then they will be transferred to aircraft that will take them to Nauru and to New Zealand. . . . We have achieved an [sic] humanitarian outcome. All of the people can be properly cared for. . . . This is a truly Pacific solution to a problem which involved the governments of Australia, New Zealand, Nauru and Papua New Guinea and they have all worked together and I again express on behalf of the Government and the Australian people our thanks to the governments and the people of those three countries for their willingness to cooperate.

Id.

103. *See* BBC NEWS, *Pacific States Step into the Breach*, Sept. 3, 2001, *at* http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1520000/1520388. Nauru is a small island (twenty-one square kilometers) that lies almost on the equator, north of Fiji, and east of the Solomon Islands. *See id.* The population of Nauru is approximately 11,000. *See id.* Nauru depends on imports for all of its food and water. *See id.*

104. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001)F.C.A. 1297, ¶ 40.

105. BLACK'S LAW DICTIONARY 715 (7th ed. 1999). Writ of Habeas Corpus is defined as: "A writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal." *Id.*

> The writ of habeas corpus, by which the legal authority under which a person may be detained can be challenged, is of immemorial antiquity. After a checkered career in which it was involved in the struggles between the common-law courts and the Courts of Chancery and the Star Chamber, as well as in the conflicts between Parliament and the crown, the protection of the writ was firmly written into English law by the Habeas Corpus Act of 1679. Today it is said to be 'perhaps the most important writ known to the constitutional law of England....' Charles Alan Wright, *The Law of Federal Courts* § 53, at 350 (5th ed. 1994) (quoting *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603, 609).

Id.

106. *See* Migration Act, *supra* note 63. Under the Migration Act 1958 section 14, unlawful non-citizens:

> (1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.
>
> (2) To avoid doubt, a non-citizen in the migration zone who, immediately before 1 September 1994, was an illegal entrant within the meaning of the Migration Act as in force then became, on that date, an unlawful non-citizen.

Secretary and Chief Executive Officer of DIMA, Australia's position during negotiations was that the "rescuees" aboard the MV Tampa were the responsibility of Norway and Indonesia.[107] Yet, this situation was completely different from typical illegal entry cases. Usually, those rescued at sea were brought to Christmas Island by locals or by the Australian federal police and processed under section 189 of the Migration Act,[108] without the involvement of the highest level of government.[109] In fact, the government maintained control of the "rescuees" in all respects by directing the MV Tampa where it was allowed to go, closing the harbor ensuring isolation, stopping communication, and failing to consult with the refugees about the plans for departure made by Australia.[110]

Australia argued that the "rescuees" were not detained because at least three avenues of escape were available to them.[111] However, the suggestion that the "rescuees" simply could have left is preposterous. After Australia had closed the only port on Christmas Island, no one was allowed access to the MV Tampa to take the "rescuees" anywhere.[112] Likewise, the notion that the "rescuees" could have left on the MV Tampa is erroneous. Not only did the MV Tampa have a limited number of supplies, but it was a commercial ship

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Id.

107. *See id.* ¶ 74.

108. *See* Migration Act, *supra* note 63, c.189.

Detention of unlawful non-citizens

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone (other than an excised offshore place); and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

(3) If an officer knows or reasonably suspects that a person in an excised offshore place is an unlawful non-citizen, the officer may detain the person.

(4) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter an excised offshore place; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer may detain the person.

(5) In subsections (3) and (4) and any other provisions of this Act that relate to those subsections, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defense Force.

Id.

109. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297 ¶ 75.

110. *See id.* ¶ 81.

111. *See id.* ¶ 69. "One of the means of escape was to leave with anybody who was prepared to take them from the MV Tampa." *Id.* ¶ 70. Another means of escape was to simply leave on the MV Tampa. *See id.* ¶ 71. Finally, "rescuees could leave pursuant to the Nauru/NZ arrangements. . . ." *Id.* ¶ 73.

112. *See id.* ¶ 81.

not licensed to carry all of the "rescuees."[113] In fact, Australia had initiated the MV Tampa's aiding the "rescuees."[114] It was a miscarriage of justice to expect the MV Tampa alone to provide care and safe haven for the "rescuees."[115] Finally, the "rescuees" had no choice in the decision about whether they were going to be processed in New Zealand or in Nauru.[116] It is notorious that a significant number of asylum seekers are from Afghanistan,[117] thus Australia was aware that some of the people aboard the MV Tampa qualified as refugees.[118] Nauru is not a signatory to the Refugee Convention;[119] hence refugees processed there would not be protected by "refoulment."[120]

Rather than rely on statutory authority to expel the "rescuees" from Australian waters, Australian officials argued that the expulsion of the "rescuees" was an exercise of prerogative power.[121] History has shown that "[w]hether the exclusion and expulsion of friendly aliens was permissible under the prerogative is doubtful."[122] International law does recognize the power to exclude or expel aliens as a sign of sovereignty over territory.[123]

> One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex, what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in

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113. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001)F.C.A. 1297, ¶ 70.

114. *See id.* ¶ 16.

115. *See id.* ¶ 72.

116. *See id.* ¶ 79.

117. *See id.* ¶ 67.

118. *See id.* ¶ 66. The Prime Minster of New Zealand stated to the media on September 1, 2001 concerning the "Pacific Solution" :

> [A]sylum seekers from Afghanistan flee from one of the world's most repressive regimes. Human rights abuses are common, one quarter of children die by the age of five and 3.6 million Afghans have become refugees. The next planned refugee arrivals in New Zealand under its quota arrangements with the UNHCR are also Afghans.

Id.

119. *See* 1951 Convention, *supra* note 32.

120. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 79. *See generally* 1951 Convention, *supra* note 32. Refoulement is the process of returning refugees to a country where their life or freedom would be threatened. *See id.*

121. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 110.

122. *Id.* ¶ 112. (*quoting* Harry Street & Rodney Brazier, *de Smith Constitutional and Administrative Law* 149-50(5th Ed) Penguin Books, 1985); *See also id.* (quoting Robtelmes v. Brenan (1906) 4 C.L.R. 395, 414-5.)

> Whether expulsion in Great Britain or in one of her self-governing Colonies or States, requires statutory authority has, no doubt, been the subject of some hesitation on the part of eminent lawyers, but it is not necessary for us to decide that question. It does not arise. The question here is, first, whether the statutory authority exists, and next, whether it has been properly exercised?

Id. ¶ 113.

123. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297 ¶ 119.

> the State opposed to its peace, order, and good government, or to its social or material interests.[124]

Nevertheless, Australian case law stipulates that the common law prerogative power does not govern entry of persons into Australia.[125] Justice North examined the ruling in *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* which stated that "[u]nder the common law of Australia and subject to qualifications in the case of an enemy alien in time of war, an alien who is within this country, whether lawfully or unlawfully, is not an outlaw."[126]

In addition, the title of the statutory provision concerning the removal of aliens does not include the use of prerogative power.[127] Because the Migration Act is the authoritative law on entrance of persons into Australia, the Australian government could not claim a prerogative power to expel the "rescuees".[128] Consequently, by way of habeas corpus, Justice North ordered the Commonwealth to release the 433 "rescuees" on September 11, 2001.[129]

2. *Full Bench*

On appeal, a majority of the full bench[130] ruled that the Commonwealth acted within its executive power under section sixty-one of the Australian Constitution.[131] Power to determine who may enter Australia is so central to Australia's sovereignty it seems unreasonable that the Government lacked the power to prevent aliens from entering Australia.[132] According to the Full Bench, the issue presented in the MV Tampa incident was not whether the

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124. Vattel, Law of Nations, book 1, section 231; book 2, section 125. *See also Robtelmes v. Brennan* (1906) 4 C.L.R. 395. "It cannot be doubted that a nation state has sovereign power to exclude illegally entering aliens from its borders, and to legislate for this purpose." *Id.*

125. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297, ¶ 121(quoting *Minister for Immigration and Ethnic Affairs v. Mayer* (1984) 4 F.C.R. 312 at 316. "At the present time the law with respect to the entry of persons to Australia and with respect to their expulsion is regulated by statute." *See id. See also Minister for Immigration and Ethnic Affairs v. Mayer* (1985) 7 FCR 254.

126. *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 C.L.R. 1, ¶ 19.

127. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297 ¶ 122. "The long title of the act is '[a]n Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.'" *See also* Migration Act, *supra* note 63.

128. *See Victorian Council v. Ruddock & Vadarlis v. Ruddock* (2001) F.C.A. 1297.

129. *See id.* ¶ 95.

130. *See Ruddock v. Vadarlis* (2001) F.C.A. 1329. Chief Justice Black, Justice Beaumont and Justice French presided. *See id.*

131. *See* Austl. Const. ch. II, pt. V. § 61. "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." *Id.*

132. *See Ruddock v. Vadarlis,* (2001) F.C.A. 1329, ¶ 193.

government had the executive power to expel, but whether at common law the "rescuees" had a legal right to enter Australia.[133] At the time the incident involving the MV Tampa arose, and since then, Australian courts have never granted aliens a common law right to enter Australian territory.[134]

The common law does not address whether in the absence of statutory authorization the Constitution confers upon the Executive a power to exclude or prevent the entry of a non-citizen to Australia.[135] Therefore, to determine whether the Australian government overstepped its boundaries, the court looked to the Migration Act.[136] The court found that the Australian government acted within its scope of executive power by preventing the "rescuees" from entering the migration zone.[137] In addition, the Full Bench ruled that the "rescuees" were not detained in such a way as to qualify for a writ of habeas corpus.[138]

3. *High Court*[139]

On October 29, 2001, Justice Kenneth Hayne[140] heard arguments on why the appeal of the Federal Court's ruling on the "rescuees" should be expedited.[141] There was concern that because the "rescuees" had been

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133. *See id.* ¶ 111.

134. *Id.* ¶ 112. "[A] grave question [arises] as to the plaintiff's right to maintain the action. He can only so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right." *Musgrove v. Chun Teeong Toy* (1891) A.C. 272, 282. *See also Johnstone v. Pedlar* (1921) 2 A.C. 262, 276, "No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given." *Id. See also Koon Wing Lau v. Calwell* (1949) 80 C.L.R. 533 at 555-56, "As far as aliens are concerned, they can be excluded and prevented from remaining in the country at common law or by the authority of a statute: see Musgrove v. Chun Teeong Toy; Attorney-General for Canada v. Cain and Gilhula; R. v. Bottrill." *Id.*

135. *See Ruddock v. Vadarlis, supra* note 130, ¶ 179.

136. See *id.* ¶ 109. "[T]he Act, by its creation of facultative provisions, which may yield a like result to the exercise of executive power, in this particular application of it cannot be taken as intending to deprive the Executive of the power necessary to do what it has done in this case." *Id.*

137. *See id.* ¶ 204.

138. See *id.* ¶ 206. "Partial restraint was to be distinguished from detention. To obstruct a person from going in a particular direction, it was argued, does not constitute detention. The rescuees were only prevented from going to their preferred destination." *Id.*

139. *See generally* High Court of Australia homepage *at http://www.hcourt.gov.au,* (last visited Nov. 1, 2001). The High Court is the highest court in the Australian judicial system. *See id.* Section 71 of the Australian Constitution established the Court in 1901. *See id.* Current Members of the Court include Chief Justice Gleeson, Justice Gaudron, Justice McHugh, Justice Gummow, Justice Kirby, Justice Callinan, and Justice Hayne. *See id.*

140. Justice Kenneth Madison Hayne was appointed to the High Court in September of 1997. *See id.* Formerly he was a judge of the Court of Appeal of Victoria having been appointed one of the foundation judges of the Court in 1995. *See id.*

141. *See* Vadarlis v. MIMA & Ors M93/2001, High Court of Australia Transcripts, *at* http://www.austlii.edu.au/au/other/hca/transcripts/2001/M93/1.html (last visited Feb. 7, 2002).

transported from Australia to other nations and that they may be further dispersed they would be outside the jurisdiction of the Australian government.[142] This concern was reasonably justified because the solicitor's request for relief was a reinstatement of Justice North's decision, which allowed the "rescuees" to be released and processed in Australia.[143] Justice Hayne granted the expedition since the issue was the illegal detention of the "rescuees" by the Commonwealth.[144]

On November 27, 2001, the High Court[145] heard arguments concerning whether the relief requested on behalf of the "rescuees" should be granted.[146] The Court focused on the issue of whether the "rescuees" could indeed be brought back to Australia if relief was granted.[147] The Australian government argued that the entire issue of habeas corpus was moot, as the "rescuees" were no longer located in Australian territory.[148] The Court held that essential claim of detention made at trial and in the Full Court of the Federal Court, could no longer be made because the "rescuees" were no longer under Australian jurisdiction.[149] The Court further explained that if the "rescuees" were currently detained they would be detained in a foreign country subject to that country's law.[150]

C. *Australian Courts Decision in Comparison with the Convention on the Law of the Sea and the Convention on the Status of Refugees*

1. *United Nations Convention on the Law of the Sea*[151]

This hearing provided Justice Hayne with information on why the *Vadarlis* appeal should be expedited to December 14th, 2001, thus pushing aside other legal claims to be heard by the High Court. *See id.*

142. *See id.* Most of the boat people from the MV Tampa are in Nauru where they are undergoing processing through the UNHCR to determine their refugee status. *See* Norrie Ross, *Judge Allows Tampa Hearing,* HERALD SUN,(Oct. 30, 2001), at 13. If the boat people are resettled in a third country, then the current litigation would become moot. *See id.*

143. *See* Vadarlis v. MIMA & Ors M93/2001, High Court of Australia Transcripts, *at* http://www.austlii.edu.au/au/other/hca/transcripts/2001/M93/1.html (last visited Feb. 7, 2002).

144. *See id.*

145. Justice Gaudron, Justice Gummow, and Justice Hayne presided. *See id.*

146. *See* Vadarlis v. MIMA & Ors M93/2001, High Court of Australia Transcripts, *at* http://www.austlii.edu.au/au/other/hca/transcripts/2001/M93/3.html (last visited Feb. 7, 2002).

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.* All "rescuees" from the MV Tampa had been moved to Nauru or New Zealand at the time of the High Court. *See id.*

151. United Nations Convention on the Law of the Sea, Nov. 23, 1982, 21 I.L.M. 1261 (entered into force Dec. 10, 1982)[hereinafter Law of the Sea]. The purpose of the Convention is outlined in the preamble:

> Prompted by the desire to settle, in a spirit of mutual understanding and co-operation, all issues relating to the law of the sea and aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world,

It is the duty of every ship "to render assistance to any person found at sea in danger of being lost. . . ."[152] Therefore, when the Australian authorities

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Noting that developments since the United Nations Conferences on the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable convention on the law of the sea,

Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole,

Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment,

Bearing in mind that the achievement of these goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked,

Desiring by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared *inter alia* that the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States,

Believing that the codification and progressive development of the law of the sea achieved in this convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter,

Affirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law,

Id. at 1271.

152. *Id.* at 1288. The duty to render assistance is outlined in Article ninety-eight of the Law of the Sea:

(1) Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
   (a) to render assistance to any person found at sea in danger of being lost;
   (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
   (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.

(2) Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

Id.

called the MV Tampa to render assistance, under international law the ship progressed to aid the "rescuees."[153] The International Law of the Sea Convention, however does not address where passengers are to be taken after rescue at sea.[154] Additionally, no binding international convention relating to stowaway asylum-seekers exists, thus the practice varies widely throughout the world.[155] These problems were highlighted in the MV Tampa incident when Norway, Indonesia, and Australia[156] refused to take responsibility for the "rescuees."[157] The actions taken by Australia during the MV Tampa standoff deters ships' masters from assisting people at sea in distress.[158]

Likewise, Australia's new legislation,[159] which allows ships to be chased down if Australian authorities request admittance, is in direct contrast to the Law of the Sea Convention, which allocates a right of innocent passage.[160]

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153. *See* Inter-Governmental Maritime Consultative Organization: International Convention for the Safety of Life at Sea, 14 I.L.M. 959, Nov. 1, 1974. Maritime tradition is that vessels go to the nearest port in an emergency. *See id.* Signatories to the Convention include: Argentina, Belgium, Bulgaria, Byelorussian Soviet Socialist Republic, Chile, China, Congo, Czechoslovakia, Democratic Yemen, Denmark, Egypt, France, Federal Republic of Germany, Ghana, Greece, Hungary, Iceland, Indonesia, Iran, Israel, Liberia, Mexico, Monaco, Norway, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Spain, Sweden, Switzerland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, and Yugoslavia. *See id.*

154. *See* UNHCR & Refugees, *Who is a Refugee*, *at* http://www.unhcr.ch/un&ref/who/whois.htm (last visited Sept. 5, 2001).

155. *See id. See also* BBC NEWS, Tom Housden, *Maritime Conventions Tested*, Aug. 30, 2001, *at* http://news.bbc.co.uk/hi/english/world/asia-pacific/newid_1514000/1514912. According to Professor Guy Goodwin Gill, a specialist in international refugee law, "[t]here are gaps in the international regime of refugee protection. Although on the one hand the ship's master has a duty to rescue anyone in distress-including a refugee-there is no international rule governing how [they] should be treated thereafter." *Id.*

156. *See* Law of the Sea, *supra* note 151, at 1286. Article 87 acknowledges the principle of freedom of the high seas:

> 1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:(a)freedom of navigation;(b)freedom of overflight;(c)freedom to lay submarine cables and pipelines, subject to Part VI;(d)freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;(e)freedom of fishing, subject to the conditions laid down in section 2;(f)freedom of scientific research, subject to Parts VI and XIII.
> 2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Id.

157. *See* Jacinto, *supra* note 17.

158. *See* Housden, *supra* note 155.

159. *See* Border Protection Act, *supra* note 76.

160. *See* Law of the Sea, *supra* note 151, at 1287. "No State may validly purport to subject any part of the high seas to its sovereignty." *Id.*

Australia's new policy to deter people smuggling is in direct contrast to the Law of the Sea.[161]

2. *Convention on the Status of Refugees*

The MV Tampa incident is an "example of growing global tensions over the fate of millions of refugees and migrants criss-crossing the globe to escape persecution, war, poverty, or hunger."[162] While international law imposes an obligation upon a coastal state to provide humanitarian assistance to vessels in distress, there is no concurrent obligation requiring the coastal state to resettle those individuals.[163]

Nevertheless, under the 1951 Convention, it makes no difference if a refugee arrives in a country legally or illegally.[164] Once the "rescuees" on the MV Tampa conceded that they were possible refugees, Australia should have immediately processed their claims.[165] Another viable solution included Australia processing the "rescuees" claims with a guarantee of resettlement in Norway for those who qualified as refugees.[166]

Australia was in the best position to take a global lead in aiding refugees during the MV Tampa incident.[167] Yet, Australia's hesitation suggests that people smugglers may actually be doing a better job than the Australian government in assisting refugees.[168] Similar to the "rescuees" on the MV Tampa, the vast majority of recent boat people are from Afghanistan and Iraq.[169] Most asylum seekers from these two countries have qualified as "Convention refugees."[170] However, the asylum seekers who resort to smuggling themselves to sanctuary, seriously compromise their refugee claims in many countries, including Australia.[171]

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161. *See id.*

162. Elizabeth Neuffer, *Australia Urged to End Refugee Plight Standoff 438 Aboard Ship*, THE BOSTON GLOBE, Aug. 30, 2001, at A1.

163. *See id.*

164. *See id. See also* 1967 Protocol, *supra* note 33.

165. *See* Jean-Pierre Fonteyne, *Australia's Obligations Quite Clear; Jean-Pierres Fonteyne Explains why Refugee Claims by those on the Tampa must be processed*, THE CANBERRA TIMES, Aug. 31, 2001, at A11.

166. *See* ABC NEWS, *Annan: Australian Boat People Plan Acceptable*, Sept. 2, 2001, *at* http://abcnews.go.com/wire/World/reuters200110902_193.html.

167. *See id.* United Nation officials stressed that the MV Tampa should have been allowed to dock immediately, as they believed those on board were more likely to be refugees than illegal migrants. *See id.*

168. *See* William Maley, *Working Paper No. 63 Security, People-Smuggling and Australia's New Afghan Refugees*, Mar. 2001, Australian Defence Studies Centre, at 10.

169. *See id.*

170. *Id.* Convention refugees are defined in the 1951 Refugee Convention. *See* 1951 Convention, *supra* note 32.

171. *See* Erika Feller, *The Institute for Global Legal Studies Inaugural Colloquium: The UN and the Protection of Human Rights: The Evolution of the International Refugee Protection Regime*, 5 WASH. U.J.L. & POL'Y 129, 137 (2001).

V. PEOPLE SMUGGLING IN THE SOUTH PACIFIC AFTER THE MV TAMPA

After the MV Tampa incident, boat people continue to flock to Australia.[172] In October 2001, the HMAS Adelaide attempted to block the entrance of a new group of migrants off the coast of Christmas Island, but the vessel would not stop.[173] Gunshots were fired across the bow of the asylum seekers boat to prevent the vessel from entering Australian waters.[174] Approximately two hours after the gunfire, the Australian Coast Guard witnessed children being thrown overboard.[175] According to the Australian government, the warning shots were "totally unrelated to people jumping overboard."[176] The act of throwing children into the ocean, in order to be picked up by the HMAS Adelaide, is just one demonstration of the desperate measures people smugglers will use to transport their human cargo to Australia.[177] In addition, less than two weeks later, over 353 asylum seekers bound for Australia died off the coast of Java after their boat sank in rough seas.[178] This was the "worst loss of life in the history of boat people traffick from Indonesia. . ."[179]

Australia's response to people smuggling continues to send a message to the smugglers that Australia will remove people who have no right to stay.[180] To achieve this goal, Australia has entered into multi-million dollar[181] deals with Nauru[182] and Papua New Guinea[183] to keep asylum seekers off-

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172. *See Stranded Boat People allowed to Land,* THE CANBERRA TIMES, (Oct. 31, 2001). Australia was forced to allow 220 asylum-seekers to land on Christmas Island after their boat sank on October 29, 2001. *See id.*

173. *See* Andrea Mayes & Kevin Ricketts, *Wrap-PNG agrees to take boat people on Adelaide,* AAP NEWSFEED, Oct. 10, 2001, at Financial News. The Australian navy rescued over 187 people after their vessel sank off the coast of Christmas Island. *See id.* Those rescued were transported to Papua New Guinea. *See id.*

174. *See id.*

175. *See id.*

176. *Id.*

177. *See id.*

178. *See* Reuters, *Migrants' Boat Sinks Off Java; 350 Drown; Asylum Seekers Were Headed to Australia,* THE WASHINGTON POST, Oct. 23, 2001, at A18. Those that were killed included Iraqis, Iranians, Afghans, Palestinians, and Algerians. *See id. See also* Don Greenlees, *Overload kills on voyage of doom,* THE AUSTRALIAN, Oct. 24, 2001, at 5. The vessel "was overloaded with fuel and had more than four times the number of passengers it could safely carry. . . ." *Id.*

179. *Id.*

180. *See* Phillip Ruddock, *Rebuttal of Four Corners Program,* Aug. 16, 2001, *at* http://www.minister.immi.gov.au/media_releases/media01/r01118.htm.

181. *See* Australian Dollar, *supra* note 54.

182. *See* Ian McPhedran, *Nations in Pacific fear boat people instability,* THE ADVERTISER, Oct. 30, 2001, at 2. The brokered deal between Australia and Nauru is for twenty million dollars. *See id.*

183. *See id.* The Australian government has promised to pay one million dollars to Papua New Guinea. *See id.*

shore.[184] Furthermore, an Australian processing center for asylum seekers will be built at Australia's expense on Papua New Guinea.[185] The International Organization for Migration will operate the center with assistance from Australia.[186]

By transporting illegal migrants to other Pacific Island nations, Australia risks injuring their island neighbors. The substantial increase in population endangers the already limited resources of the islands.[187] For example, Nauru and Papua New Guinea are not equipped to handle the economic, social, and security issues that arise in accepting illegal migrants.[188] By transporting the boat people to other nations, Australia diverts illegal migrants without stopping the people smuggling.[189]

VII. EUROPE'S DIFFICULTIES WITH PEOPLE SMUGGLING

Australia is not alone in dealing with an increase in illegal migrants. Each year, "[c]riminal rings and individuals smuggle hundreds of thousands of illegal immigrants by planes, trucks, and boats into Europe, taking advantage of relaxed visa regulations and unpatrolled coastlines."[190] In addition, it is estimated that since 1997 over 6,000 people have died attempting to illegally enter Europe.[191]

Italy, like Australia, faces an onslaught of boat people.[192] The Italian government attempted to discourage people smuggling by imposing tougher

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184. *See id.* In addition, Australia is negotiating with Fiji, Kiribati, and Palau. *See id.*

185. *See Mayes & Ricketts, supra* note 173.

186. *See id.*

187. *See* McPhedran, *supra* note 182. According to Pacific Islands Forum secretary-general Noel Levi, "[s]uch a substantial population influx places extreme pressure on our already very limited resources, exposing our small and vulnerable economies to further social and economic problems which we can ill afford." *Id.*

188. *See* Statement by Mr. Peter Schatzer, *Global Migration Trends-An Era of International Migration,* (Oct. 10, 2001).

> Discussion on migrants pre-11 September focused on issues such as prevention of illegal border crossings, matching migrants with labour market needs, integration in host societies, multiculturalism etc., much of the focus now is on security. For some time to come, the migration debate will be viewed through a magnifying lens that has "combating terrorism" written on its handle.

Id.

189. *See* Don Greenlees et al., *$14,000 to Hire Boat,* THE AUSTRALIAN, Oct. 30, 2001, *at* http://www.theaustralian.news.com.au/common/story_page/0,5744,3146906%5E2702,00.html.

190. Jennifer Johnson, *International Branch,* 12 GEO. IMMIGR. L.J. 423, 423 (1998).

191. *See* Newsweek, Rod Nordland, *Storming Fortress Europe,* Aug. 13, 2001, *at* http://www.msnbc.com/news/609718.asp. United for Intercultural Action has documented 2,406 deaths throughout Europe since 1996. *See id.* Many deaths go unaccounted for as people have frozen to death attempting to cross Kosovo's mountains of the damned, drowned trying to wade across the Morva River, suffocated in trucks crossing the English Channel, or even fallen from the sky after hiding in aircraft landing gear. *See id.*

192. *See id.*

criminal sentences.[193] According to an Italian police officer who regularly tracks smugglers, "[H]uman life has no value to these traffickers, it's like they're selling oranges or something."[194] Consequently, the people smugglers routinely toss people overboard rather than risk apprehension by authorities.[195] Thus, for many the Adriatic Sea has literally become a final resting place.[196]

Similarly, Great Britain faces an increase of illegal migrants.[197] In the fall of 2001, the Channel Tunnel connecting Britain to mainland Europe faced numerous temporary closings as officials searched for illegal migrants who had boarded freight trains.[198] The Channel Tunnel's entrance in France is within walking distance of the Sangatte Refugee Center.[199] Euro- tunnel[200] estimates it has stopped 18,500 refugees from reaching Great Britain through the tunnel in the first half of 2001.[201] Britain and Italy discussed mutually increasing penalties for people smuggling, but the difficulty is that most smugglers operate outside of the countries' borders.[202]

Since 1989 more than five million people have applied for asylum in European Union states.[203] The European Union, stressing the importance of free movement of persons between member states, created the Schengen Accords, an agreement allowing movement between European countries without presenting a passport or visa.[204] Yet, the Schengen Accords do not take

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193. *See id.*

194. *Id.*

195. *See* CNN.com, Robin Oakley, *Human Trade: The Fastest-Growing Crime*, Sept. 26, 2001, *at* http://asia.com.cnn.com/SPECIALS/2001/immigration/stories/human.trade. "There is evidence that traffickers have thrown women and children, many of whom cannot swim, into the Adriatic to avoid detection by police patrol boats." *Id.*

196. *See* Nordland, *supra* note 191. In late 1996, 283 people mostly Sri Lankan Tamils and Liberians, died in a shipwreck in the Adriatic Sea. *See id.* Authorities never searched for the remains even after fishermen began repeatedly catching corpses in their nets. *See id.* A private diver located the boat in the summer of 2001. *See id.*

197. *See* Horsley, *supra* note 12.

198. *See id.*

199. *See* The Associated Press, *Freight Train Travel Halted in Eurotunnel after Illegal Immigrants try to Slip into Britain*, Oct. 30, 2001, *at* http://abcnews.go.com/wire/World/ap20011030_984.html. The Red Cross administrates the Sangatte center. *See id.* The center was opened in 1999, and was meant to house 650 people. *See id.* The population in September of 2001 was 1,670 persons. *See id.* "The center has become a magnet for refugees, mostly Kurds and Afghans, trying to make it to Britain, which has comparatively lax immigration law." *Id.*

200. Eurotunnel is the regulatory agency that services and patrols the Channel Tunnel. *See id.*

201. *See id.* Freight train traffic was halted as one hundred asylum seekers attempted to enter the tunnel. *See id.*

202. *See* Oakley, *supra* note 195.

203. *See* Horsley, *supra* note 12.

204. *See* Belgium-France-Federal Republic of Germany-Luxembourg-Netherlands: Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, 30 I.L.M. 68, 69, 73, 84 (in four parts), Jan. 1991. The Schengen Agreement was concluded on June 14, 1985. *See id.* The Schengen was Convention concluded on June 19, 1990. *See id.* Signatories include, Germany, France, Belgium, the

into account the prevalence of illegal immigration and international crime.[205] In response, western governments have made it harder for asylum seekers to enter their countries.[206] Consequently, refugee agencies criticize European governments for attempting to build "Fortress Europe" to keep out genuine asylum seekers.[207]

VI. GLOBAL INITIATIVE TO STOP PEOPLE SMUGGLING

The United Nations Protocol Against Smuggling of Migrants by Land, Sea and Air,[208] is the beginning of global acknowledgment that smuggling is a grievous problem in need of immediate attention.[209] "The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants."[210] The Protocol calls for international involvement, including information sharing and cooperation between countries.[211] In addition, the Protocol allows countries that suspect vessels of smuggling migrants, to notify flag states[212] for authorization to board and search the vessels.[213] The Protocol calls for specialized training to improve the security and quality of travel documents, increase recognition of fraudulent documents, and strengthen efforts to gather criminal intelligence.[214]

Whereas the United Nations Protocol attempts to curb people smuggling, or at least raise awareness, some officials argue that the best way to halt smugglers is to modify the 1951 Convention.[215] The argument for modification

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Netherlands, Luxembourg, and Italy. *See id.*

205. *See* Johnson, *supra* note 190, at 425.

206. *See* Horsley, *supra* note 12.

207. *See* Nordland, *supra* note 191.

208. *See* United Nations General Assembly: Convention Against Transnational Organized Crime; Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; and Protocol Against the Smuggling of Migrants by Land, Sea and Air, 40 I.L.M. 335. [hereinafter Protocol Against Smuggling] The Preamble reads as followed: "[d]eclaring that effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels. . . ."
Id. at 383.

209. *See id.* at 384.

210. *Id.*

211. *See id.*

212. *See id.* at 386. Each vessel that sails on the high sea, flies the flag of the country of origin. *See id.* Authorization from the flag state provides not only permission, but alerts the flag state of any wrongdoing by one of their ships. *See id.*

213. *See id.* at 386-87.

214. *See* Protocol Against Smuggling, *supra* note 208, at 389.

215. *See* Marilyn Achiron, *A 'Timeless Treaty Under Attack,'* REFUGEES, vol. 2, 123 (2001), at 7. "The United Kingdom is taking the lead in arguing for reform, not of the Convention's values, but of how it operates." *Id. See generally* United Nations homepage, *at* http://www.un.org (last visited Nov. 19, 2001).

stems from the fact that the 1951 Convention is outdated, unworkable, and irrelevant in today's ever-changing world.[216] However, "[T]he 1951 convention was never conceived as an instrument of migration control."[217]

The world's system of protection for asylum seekers is threatened unless western countries offer assistance.[218] When western countries create visa restrictions to limit migration, people smuggling increases because refugees are denied the opportunity for legal migration.[219] For now, the world seems content in "[b]uilding walls higher and higher only to find people tunneling under them and dying in the process." [220]

VI. CONCLUSION

People smuggling is on the rise and will continue to grow without an international response to the epidemic. Australia's answer has been to punish the smuggler by not allowing those rescued at sea to be brought to shore. This policy forces the smuggler to turn to more drastic measures, such as throwing people overboard, or sinking the ship to gain access to the country.

Australia has relied on other Pacific Islands to aid in detaining the illegal migrants. The building of the housing center in Papua New Guinea demonstrates that Australia would rather pay off another country than face the illegal migration problem itself. This center will divert boat people away from Australia for the time being, but this is not a responsible or reasonable long-term answer to people smuggling.

Those that are smuggled are not looking for a free pass to the West. Each person who pays a smuggler risks his or her life in order to have some sense of freedom. Whether the freedom is one of peace, prosperity, or release from suffering, increasing fines and moving detention centers will not stop illegal arrivals.

Over 200 years ago people were smuggled into the "new world." History refers to this period as the slave trade. If smuggling continues, we are not only encouraging a practice that ended in the civilized world over a century ago, but supporting it.

People smuggling is the third most lucrative enterprise for organized crime. Many people on this planet are becoming very rich at others' suffering. Some might refer to this as the capitalist system, but it is far from it. Increased interaction between countries in order stop people smuggling must be accomplished. The United Nations Protocol Against Smuggling is only a beginning. International law itself is difficult to enforce; but out of simple

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216. *See* Feller, *supra* note 171, at 136.

217. *Id.*

218. *See* Alan Travis, *Asylum System in Peril: UN warning as 100 Storm Channel Tunnel*, THE GUARDIAN, (Sept. 3, 2001), at 1.

219. *See* Maley, *supra* note 168, at 6.

220. Nordland, *supra* note 191.

respect for human life, governments should be willing to eliminate the people smuggling trade.

There may not be an exact answer to end people smuggling. For as long as each country has borders, the world is still occupied by Europeans, Africans, Asians, Australians, and Americans. Though migration quotas, detention centers, and the right to refuse entry are rights of all sovereign nations, these nations cannot ignore the horrors that harsh regimes inflict on their citizens. We must pursue people smuggling organizations directly, but never forget, that those who are smuggled are looking for a glimmer of light in a dark world.

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