SEEKING JUSTICE IN TRANSITIONAL SOCIETIES: AN ANALYSIS OF THE PROBLEMS AND FAILURES OF THE JUDICIARY IN NIGERIA

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ABSTRACT

The attainment of justice represents one of the enduring promises of constitutional democracy. Democracy offers opportunities for citizens to reclaim and enjoy the rights and liberties denied them by military dictatorships that have dominated Africa’s political landscape for the better part of the last century.

Despite the establishment of constitutional democracy, however, the path to justice is strewn with social, cultural and institutional problems that make it exceedingly difficult, if not impossible, for citizens to realize the promises of justice contained in their country’s constitution. More problematic for citizens who seek justice is the fact that judges, driven by lust for power and wealth, often align themselves with the rich and the powerful in society to frustrate the search for justice. These faithless judges defer to and are often controlled by government officials, party stalwarts, and influential private citizens who have strong incentives to manipulate the judicial process to suit their preferences. The few upright judges who have the integrity to resist attempts of undue influence by the government and other private citizens are disabled from efficiently dispensing justice by prevailing environmental factors, including inadequate facilities, intimidation, and harassment.

This Article examines the problems that disable the judiciary from effectively discharging a Nation’s eminently important tasks of fairly and impartially adjudicating disputes, protecting citizens’ rights and constraining the excesses of both the executive and the legislature. It offers suggestions for addressing the problems and inadequacies of the judiciary. Ultimately, the Article argues that establishing an efficient judiciary

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requires the appointment and retention of competent and upright judges who will be challenged and encouraged by the proper balance of education and disciplinary regimes to remain faithful to the ideals of justice. It will also require the political elites to change their attitude toward the judiciary. Their commitment to the independence of the judiciary must go beyond mere symbolism. The judiciary cannot fairly and efficiently dispense justice if political elites continue the charade of masquerading as champions of liberty and defenders of judicial independence while striving to interfere with, intimidate and manipulate the judiciary.

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I. INTRODUCTION

The mood of Nigerian society at the end of military dictatorship was understandably ecstatic. Nigerians based their optimism on the premise that democracy offers opportunities, liberties and freedoms unimaginable in a dictatorship. Citizens hoped that democracy would read-

1. Nigeria returned to constitutional democracy after fifteen years of military interregnum in 1999. See generally Rotimi T. Suberu & Larry Diamond, Institutional Design, Ethnic Conflict Management, and Democracy in Nigeria, in THE ARCHITECTURE OF DEMOCRACY 400 (Andrew Reynolds ed., 2002) (discussing Nigerian political history since 1960). Nigeria has been ruled by brutal, repressive and often visionless military despots for all but fourteen years of its forty-four years as an independent nation. Id.

2. The enjoyment of these rights and privileges distinguishes a democracy from dictatorial and tyrannical regimes. See Robert A. Dahl, Democracy and Human Rights Under Different Conditions of Development, in HUMAN RIGHTS IN PERSPECTIVE: A GLOBAL ASSESSMENT 235, 235 (Asbjørn Eide & Bernt Hagtvet eds., 1992). Justice Olajide Olatawura, retired Supreme Court Justice and former Administrator of the National Judicial Institute, described the state of the law and the attitude of the government to civil rights under the military:

During the Military regime the law became weak as a result of ouster clauses and suspensions of our Constitution and existing laws which gave us liberty and freedom. The Constitutional duty to protect the liberty and freedom of the citizens by the state was regularly breached by those entrusted with that sacred duty . . . . The rights of citizens were not only ignored but trampled on.


The clamour today for democracy and good governance in Africa stems from two broad reasons. First, the denial of fundamental human rights, the presence of arbitrariness and the absence of basic freedoms for the individual have in the main remained familiar traits of a majority of governments in Africa. The strain of these styles of governance has prompted a demand and a clamour for new approaches to the resolution of various national questions. In consequence, Africans are clamouring for greater responsiveness on the part of their political leadership, respect for human rights, accountability and a two way flow of information between the people and their leadership. They are also clamouring for an adequate legal system and for the laws and the independence of the Judiciary and a free press, which together can serve as a bulwark against the oppression of government, and especially a corrupt or unpopular government.
ily translate into respect for rights and liberties and that they would be able to seek justice unburdened by the restraints and limitations imposed by military dictators.4

The right to a fair trial is perhaps the most fundamental tenet of constitutional democracy and has been recognized as a universal human right. It is central to a Nation’s search for social equilibrium and justice because all of the rights guaranteed by a constitution mean nothing if citizens do not have the right to a fair trial. Without securing the right to a fair trial, citizens might resort to extra legal means to secure their interests and protect their rights. Moreover, economic growth and social development will be impeded if foreign and local investors lack confidence

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3. Citizens who endured tremendous hardship and brutality under the military are demanding respect for their rights and liberties with relentless vigor. See, e.g., Joseph Ogunsemi & Sulaymon Abdulkareem, Mass Rally, Rights and Limits of Rights, DAILY TIMES (Nig.), May 3, 2004, 2004 WLNR 6927224. The Chief Justice of Nigeria, Mohammed Uwais, expressed the view widely held by Nigerians: “Nigerians now agree that democracy is the best form of government and that real democracy will offer a ready solution to all the political and social ills of the country.” Chief Justice M.L. Uwais, Address to the All Nigeria Judges’ Conference (Nov. 5–9, 2001), in NAT’L JUD. INST., ALL NIGERIA JUDGES’ CONFERENCE 2001 at xxix, xxx (2003).


5. The right to a fair trial has been described as “the most fundamental of all freedoms.” Estes v. Texas, 381 U.S. 532, 540 (1965). In England, the right to a fair trial has always been viewed as a vital element of the justice system. As one English court stated, “the right to a fair trial . . . is as near to an absolute right as any which I can envisage.” Regina v. Lord Chancellor, Ex parte Witham, (1997) Q.B. 575, 585.


7. See Dahl, supra note 2, at 235 (arguing that in order for a country to be classified as a democracy certain rights must realistically exist).

in the ability of the legal process to fairly and impartially resolve disputes.9

The Nigerian Constitution and other laws10 contain substantive and procedural safeguards designed to assure a fair trial.11 These safeguards cover all stages of judicial proceedings, from pre-trial through appeal.12 Some of the pre-trial safeguards include prohibitions against arbitrary arrest,13 the right to be brought before a judge within a reasonable time


11. Specifically, the Constitution provides:

> In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.


12. Fair trial rights do not necessarily begin and end with court proceedings. They attach whenever the legal process is set in motion. For example, in criminal trials, fair trial rights start with arrest, and continue until the final disposition of the case either at the court of first instance or by courts of appeal. See Criminal Procedure Act, (1990) Cap. 80 (Nigeria); Oluymemisi Bamgbose, *Women’s Rights and the Nigerian Criminal Justice System: A Sorry Tale*, Paper presented at the 7th International Interdisciplinary Congress on Women, Tromsø, Norway (June 20–26, 1999), http://www.skk.uio.no/WW99/papers/Bamgbose_Oluymemisi.pdf.

and a prohibition against *ex post facto* laws. The safeguards applicable during trials include the presumption of innocence, the right to confront and cross-examine witnesses, proof of guilt beyond a reasonable doubt, protection against self-incrimination, the right to counsel, the right to a public trial before an impartial and independent court and the suppression of illegally obtained evidence. Post-trial safeguards grant an aggrieved party the right of appeal to a higher court and protection against double jeopardy. Despite these lofty safeguards, the path to justice is strewn with social, cultural and institutional problems that make it exceedingly difficult, if not impossible, for citizens to realize the ideals of a fair trial. In Nigeria, the troubling legacies of military rule, especially corruption, executive control and manipulation of the judiciary, continue to undermine the ability of courts to effectively secure fair trial rights. These legacies create three major obstacles to a fair trial in Nigeria.

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15. The Constitution provides, “Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.” Id. art. 36(5).
16. Id. art. 36(6)(d).
17. Section 138(1) of the Evidence Act provides that “if the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.” Evidence Act, (1990) Cap. 112, § 138(1) (Nigeria).
19. Id. art. 36(6)(c).
20. Id. art. 36(1), (3).
21. For example, confessions obtained by inducement, threat or promise are generally excluded. See Evidence Act, (1990) Cap. 112, § 28 (Nigeria).
23. Id. art. 36(9).
24. Professor Adedokun Adeyemi identifies the following as the major obstacles to the administration of justice: inadequate funding for judicial institutions; poor and inadequate physical facilities; shortage of and obsolescence in equipment; shortage of and inadequate utilization of staff; inadequate or total lack of training; poor conditions of service; delay and congestion in courts; dishonest practices and corruption; culturally incompatible laws and procedures and lack of adequate information systems. Adedokun A. Adeyemi, *The Challenges of Administration of Justice in Nigeria For The Twenty-First Century*, in Perspectives in Law and Justice: Essays in Honour of Justice Eze Ozobu 195, 196–204 (I.A Umezulike & C.C. Nweze eds., 1996).
25. Late dictator Abacha’s scathing indictment of the judiciary fairly reflected prevailing public sentiments about the judiciary. He stated while inaugurating a panel to investigate the judiciary:
The first, and by far the most debilitating, is corruption. Honest and impartial decision making, so vital to the credibility and effectiveness of the judiciary, is palpably absent in Nigeria. The judiciary, which should "exemplify the nation’s best and most just virtues," now reflects the worst aspects of moral decadence in Nigeria. Some judges have succumbed to the despicable belief that amassing wealth matters more than anything else, including honor and integrity. These dishonest judges subordinate their commitment to justice to the desire to amass wealth. Anyone who can pay or influence a judge’s judicial career can dictate the

The political crises which necessitated the re-entry of the Military do not absolve the Nigerian Judiciary. In the public eye, the Judiciary was neck-deep in the cross-current which sounded the death knell of the emerging Third Republic. The perception was unmistakable that the Judiciary did not rise above the conflicting partisan conflict, the Judiciary seemed to have embarked on an odyssey of self-ridicule which abridged its integrity and cast aspersion on its credibility.


26. The Nigerian judiciary that admirably discharged its duties during the early post-independence years now shows signs of weakness, inadequacy and corruption. Because of the mutual benefits of corruption, the corrupt judge and the bribe giver have no interest in reporting the crime. Corruption only gets to the surface when one of the parties feels cheated or chooses to display an uncommon sense of duty and comes forward to report on corruption. It is therefore difficult to estimate the actual extent of judicial corruption. My familiarity with the Nigerian scene, discussions with my colleagues, and newspaper accounts all indicate that judicial corruption is endemic and pervasive.


28. Dr. Maduagwu attributes the prevalence of corruption in Nigeria to the prevailing culture that condones and even encourages corruption:

Corruption thrives in Nigeria because the society sanctions it. No Nigerian official would be ashamed, let alone condemned by his people, because he or she is accused of being corrupt. The same applies to outright stealing of government or public money or property. On the contrary, the official will be hailed as being smart. He would be adored as having ‘made it’; he is ‘a successful man’. And any government official or politician who is in a position to enrich himself corruptly but failed to do so will, in fact, be ostracised by his people upon leaving office. He would be regarded as a fool, or selfish, or both.

court’s decision.29 Trials often turn into charades where powerful litigants, aided by unethical lawyers and faithless judges, manipulate the judicial process to achieve preordained outcomes.30 Citizens, lawyers and even eminent jurists now openly acknowledge that the judicial system is no longer a realistic forum for obtaining justice, especially for citizens who lack the resources and social connections to influence the outcome of judicial proceedings.31

29. In a system festooned with corruption, justice is often determined by the depth of a party’s willingness to take advantage of his or her status in the society. A corrupt judge is driven by the desire to amass wealth and is willing to bend the law to accommodate complaining parties who grease his palm. Nigerian Supreme Court Justice Niki Tobi aptly described the mindset and modus operandi of a corrupt judge:

[A] judge who is corrupt is the greatest enemy of the judicial process. A corrupt judge is blind to the truth. He is incapable of searching for the truth in the judicial process. His mind is diseased and he is incapable of doing justice in the matter before him. He likes the party who has given him the bribe. He hates the party who has not given him the bribe. He therefore, gives judgment to the party he likes and gives judgment against the party he hates.


30. Alhaji Nahu Ribadu, the Chairman of the Economic and Financial Crimes Commission, a body charged with investigating and prosecuting economic and financial crimes in Nigeria, recently directed his ire at judges and lawyers who help the rich to escape accountability. He stated:

[A]ny time we commence full prosecution, lawyers to these 419 kingpins will use the court to stall prosecution . . . . It is only the poor that go to prison. It is high time we brought the rich who are criminals to justice. They have money and use their money to buy their way out. Today, there is no rich man in Nigerian prisons.


31. Several organizations, including Human Rights Watch, Amnesty International and the U.S. State Department have documented problems of fair trial rights in Nigeria. The U.S. State Department Country Report on Human Rights Practices 2003 found:

[T]he judicial branch remained susceptible to executive and legislative branch pressure . . . . The judiciary was influenced by political leaders particularly at the state and local levels. Understaffing, underfunding, inefficiency, and corruption continued to prevent the judiciary from functioning adequately. Citizens encountered long delays and frequent requests from judicial officials for small bribes to expedite cases.

While corruption is the first major obstacle to a fair trial, the second is the attitude of the government toward the judiciary. The judiciary in post-independent states has had a troubled relationship with the government. See, e.g., Comment, The Judiciary: The Pain of Transition, Sunday Mirror (Zimb.), July 23, 2002. African governments, whether military or civilian, have been ambivalent toward the judiciary. They need the judiciary to act as a stabilizing force in enforcing law and order and yet at the same time resent the judiciary for checking executive excesses. See, e.g., Philip Ogunmade, Democracy: Rule of Law Still a Mirage, This Day (Nig.), Aug. 25, 2005, 2005 WLNR 13465952. Ghanaian Professor Amissah’s characterization of the relationship between the government and the judiciary in most African states is still relevant today:

It would seem that on the whole governments in the newly independent countries hanker after the simplicity of the colonial arrangement, with the primary aim of the courts being to uphold the power of the state, enforce its laws and provide stability. The courts’ function of protection of the individual from the abuse of power is relatively new and less well appreciated. In any event until the people develop values to guide their court, other than that of upholding state power, the constitutional enactment of the separation of powers is bound to remain largely a declaration of intent.


32. See infra Part II.C.

sion of the executive branch of government.\textsuperscript{35} This mindset encourages attempts to control and manipulate the judiciary and to turn judges into “pliable instruments of state power.”\textsuperscript{36} The pervasive influence of the executive, its powers of retaliation and ability to advance or hamper a judge’s career\textsuperscript{37} make it difficult for judges to adjudicate disputes without fear or favor as required by their oath.\textsuperscript{38} Judges concerned about their careers and even their personal safety “temper justice with self preservation.”\textsuperscript{39}

The third impediment to a fair trial right is the attitude of the public toward the judiciary.\textsuperscript{40} In Nigeria, there exists a perceptible popular distrust of the judiciary’s integrity and its ability to protect civil rights and constrain the excesses of elected officials.\textsuperscript{41} For most Nigerians, the judicial process is nothing more than an auction in which justice goes to the highest bidder.\textsuperscript{42} Convinced that judges decide cases on the basis of con-
nections and gratification without regard to the legal merits of the case, citizens seek to influence the outcome of cases either by “settling the judge,” or intimidating judicial officers. Far worse, negative perceptions about the justice system encourage citizens to resort to violent, extralegal and possibly criminal practices to secure their rights. Popular distrust of the judiciary has fueled needless attacks on the integrity and the institution of the judiciary.

Rights guaranteed by the constitution mean nothing unless they are enforced by fair, impartial, independent and good judges. The Nigerian database (“Such perception makes the average Nigerian believe that the judiciary is corrupt, and so they expect that corruption is part of the pricing component of our justice system.”).

43. Settlement is a euphemism for bribery. In most parts of the country, for example, citizens do not have faith in the justice system and are less inclined to resolve conflicts through the courts. Those who go to court feel the need to engage in corrupt practices like bribery or intimidation to level the playing field. See generally Francis A. Okongwu, Nigeria’s Judiciary Requires Sanitation, DAILY CHAMPION (Nig.), July 13, 2004, available at Westlaw: Africa News database.

44. See infra Part II.B.


46. See, for example, a concerned layman’s appreciation of the problems of justice in Nigeria as stated by Francis Okongwu, a Lagos-based pharmacist:

[T]he judiciary allowed itself to be adulterated by the politics of past military democracy with the mentality of settlement, corruption, nepotism, man-know-man, and thus lost the freedom to dispense justice. Today justice is so expensive beyond the reach of the common man. In fact, it is a cash and carry affair. Interlocutory injunctions are issued with reckless abandon, black market judgements dispensed with ease, kangaroo courts sit and deliver kangaroo judgements, even at night. The Judiciary has lost the will power to resist pressure from [the] political class . . . .

Okongwu, supra note 43.

47. I adopt retired Nigerian Supreme Court Justice Nnaemeka-Agu’s definition of a good judge:

“[A] judge” means “a good, Judge”, that is a Judge who, by good general and professional education, experience and expertise exhibits on continuing bases, a sound exposition of the law; who has such a high index of good character that he is capable of, and seen as, resolving the issues in controversy coming before him with absolute sense of justice—im impartially and uninfluenced by bias or prejudice or any extraneous considerations.
judiciary must be fundamentally reformed both to better protect citizens’ rights and to preserve itself against institutional contempt in the eyes of an increasingly cynical Nigerian public. Public contempt for the justice system can be overcome only by providing fair and efficient machinery for the administration of justice. A fair, efficient and accessible judicial system is necessary not just to protect citizens’ rights but also to consolidate and deepen the democratic process. The judiciary must therefore be staffed by competent and honest judges who have the resources and sufficient independence to carry out the Nation’s important tasks of adjudicating disputes, protecting legal rights, and reviewing executive and legislative decisions.

This paper examines the institutional and personal problems that disable the judiciary from meaningfully assisting citizens to secure the right

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48. The Attorney General of the Federation, Chief Akinlolu Olujinmi, SAN, underscored the relationship between justice and democracy:

Justice is the ligament, which holds civilized society together. Any threat to the administration of justice is a threat to the corporate existence of the society. The essence of democracy is justice. Every democracy ought therefore to strive to provide access to justice for all and protect the rights of the citizenry. The destiny of our country lies in making the system of justice work smoothly and efficiently.


49. See E.O. Ayoola, *The Importance of the Rule of Law in Sustaining Democracy and Ensuring Good Governance*, in *All Nigeria Judges’ Conference 2001*, supra note 3, at 47, 58. Justice Ayoola, retired Justice of the Nigerian Supreme Court, succinctly described the values of a well-functioning judiciary to the democratic process:

Fundamental to strengthening the cause of democracy and good governance is an efficient judicial system. Democracy will be a sham; (i) if the implication of the fundamental principles indicated in the constitution cannot readily be determined in the contemporary or practical of constitutional adjudication; (ii) if the power of judicial review of exercise of powers cannot readily be invoked either because of the inherent weakness of the system or because of the procedural obstacles to access of justice; or (iii) if there is widespread societal distrust of the judicial process because of delay, inefficiency of the process, lack of transparency of the operators of the system and other like reasons.

Id.

to a fair trial.\textsuperscript{51} This paper is divided into two parts. Part II examines the problems that disable the judiciary from fairly and efficiently dispensing justice. These problems require urgent attention and include judicial corruption, intimidation and manipulation of judges, delays, and inadequate infrastructure.\textsuperscript{52} Part III examines the changes necessary to make the judiciary virile, efficient and independent. It demonstrates that the culture and conditions that make the judiciary efficient, namely judicial independence, honesty and public confidence,\textsuperscript{53} are at best extremely tenuous.\textsuperscript{54} To give meaning to the constitutional requirements of a fair trial and regain public confidence in the justice system, Nigeria must cultivate and entrench the practices that undergird public confidence in the judiciary.\textsuperscript{55} The problems with the judiciary are systemic, deeply rooted and

\begin{footnotesize}
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\item \textsuperscript{51} In writing this paper, I have drawn on my background and experience as a law teacher, a practicing lawyer in Nigeria and as a human rights activist on the front lines of the struggle for justice in Nigeria.
\item \textsuperscript{52} See Ebun-Olu Adegboruwa, \textit{The State of Law and Legal Practice in Nigeria 2, VANGUARD (Nig.), Sept. 19, 2003, available at Westlaw: Africa News database.}
\item \textsuperscript{53} Aharon Barak, \textit{Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 HARV. L. REV. 16, 53 (2002) (stating that while the preconditions that must exist in a legal system to realize the proper judicial role vary from system to system, independence of the judiciary, judicial objectivity, and public confidence in the judiciary are among the preconditions common to all democratic systems of law).}
\item \textsuperscript{54} Joseph Otteh, Executive Director of Access to Justice, a non-governmental organization, stated:
\begin{quote}
We understand that for meaningful reform to take place, the judiciary needed a full turn around maintenance. As it were, at the time of transition from military rule, every independent report on the Nigerian judiciary spoke eloquently and uniformly of the inundating prevalence within the justice system of corruption, unethical and unprofessional behavior, mediocrity, nepotism, incompetence, abuse of office, perversion of justice and a host of other weaknesses that clearly eroded the moral authority and functional integrity of Nigeria’s justice delivery system.
\end{quote}
Andrew Ahiante, \textit{Government Urged to Reform Judiciary, THIS DAY (Nig.), Nov. 7, 2003.}
\item \textsuperscript{55} The meaning of public confidence in the justice system was eloquently described by Chief Justice Murray Gleeson of Australia:
\begin{quote}
Confidence in the judiciary does not require a belief that all judicial decisions are wise, or all judicial behavior impeccable, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare. What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism and that, within the limits of ordinary human frailty, the system pursues those values faithfully.
\end{quote}
\end{itemize}
\end{footnotesize}
intertwined; cosmetic and superficial changes will not work. There must be a wholesale restructuring of the justice system to cleanse the judiciary of corruption and free the judiciary from the overweening grip of the executive and other powerful Nigerians. Secondly, I argue that constitutional provisions designed to guarantee judicial independence are


56. The African Governors of the World Bank urged African countries to embark upon a comprehensive reform of their legal system, noting:

- It is clear that “piecemeal” reform of the legal system often does not yield the desired result. When an entire legal system has broken down, it is not enough to reform only a limited area of the law, such as banking laws, for example, without confronting the weaknesses in law enforcement in general. Modern banking laws are of little use when the lawyers, courts, and other legal institutions responsible for implementing them lack the capacity to do so effectively. What is required is a broader strategy of reform which addresses the legal system as a whole.


57. See, e.g., Thompson Ayodele, Right is Might or Might is Right, IPPA NIGERIA NEWSLETTER (Inst. of Pub. Policy Analysis, Lagos, Nig.), Jan. 27–Feb. 10, 2004. The ultimate goal should be to meet the standards of judicial independence stated by the International Bar Association:

- Individual judges should enjoy personal independence and substantive independence.
- Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.
- Substantive independence means that in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience.

in and of themselves ultimately inadequate to ensure both personal and institutional independence of the judiciary. More needs to be done to shield and protect judges from the imperious grip of politicians and elected officials.

These necessary changes will help secure the right to a fair trial and bolster public confidence in the justice system. They will also give new hope to citizens who have become despondent and hence corrupt because of the failures of the judiciary. The appropriate reform measures may also help the judiciary to regain its prestige and ultimately build a strong foundation for the rule of law.

58. M.A. Ikhialale, The Independence of the Judiciary Under the Third Republican Constitution of Nigeria, 34 J. Afr. L. 145, 147 (1990) (“[E]ven with the tight constitutional guarantee given the judiciary the political arm of the government still occasionally manages to exercise influence . . . making it doubtful if indeed Nigeria really possesses a constitutional system that ensures the insulation and independence of the judiciary from negative manipulation . . . .”).

59. See Berry F.C. Hsu, Judicial Independence Under the Basic Law, 34 H.K. L.J. 279, 282 (2004) (arguing that the judiciary should be given power to sustain its own existence and repel interference from other branches of government).

60. The effectiveness of the judiciary depends to a large extent on the public’s confidence in the ability of judges to fairly and impartially administer justice. See Alex B. Long, “Stop Me Before I Vote For This Judge Again”: Judicial Conduct Organizations, Judicial Accountability, and the Disciplining of Elected Judges, 106 W. Va. L. Rev. 1, 8–9 (2003) (“The continued vitality of the judiciary depends in no small measure on the public’s confidence that judges are ethical and that justice is being dispensed fairly and impartially.”); Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”).

61. T. Leigh Anenson, For Whom the Bell Tolls . . . Judicial Selection by Election in Latin America, 4 Sw. J. L. & Trade Am. 261, 262 (1997) (arguing that a well-functioning and honest judiciary will not only reinforce the rule of law, but will become the very centerpiece for democracy).

62. Swithin Munyantwali, the Executive Director, International Law Institute Uganda stated:

A country may have the best roads, hospitals, a high level of environmental awareness and implementation of related policies as well as the best utilities network. If her judges are dishonest, court registries clogged with cases with no ADR mechanisms or commercial courts; if her lawyers are unethical and the Bench and the Bar are not up-to-date with the latest legal developments; if her private sector is driven by out-dated commercial laws, there will be no rule of law.

II. PROBLEMS OF THE JUDICIARY

A. Judicial Corruption

Nigeria is by all accounts a corrupt country.63 Recent surveys of nations by Transparency International, a Berlin-based nonprofit organization, rank Nigeria among the most corrupt countries in the world.64 The alarming levels of corruption in Nigerian society apparently moved the framers of the 1999 Constitution to declare that “the state shall abolish all corrupt practices and abuse of office.” 65 Unfortunately, the numerous incidents of corruption are not restricted to politicians and government officials, but extend to the judiciary as well. 66 Nigerian judges and members of its society have not been able to rise above the corrupt environ-

63. “Corruption in Nigeria has passed the alarming and entered the fatal stage and Nigeria will die if we keep pretending that she is only slightly indisposed.” CHINUA ACHEBE, THE TROUBLE WITH NIGERIA 38 (1984) (emphasis in original). For a detailed study of corruption in Nigeria, see Okechukwu Oko, Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus, 34 N.Y.U. J. INT’L L. & POL. 397 (2002); JULIUS O. IHONIBERE & TIMOTHY SHAW, ILLUSIONS OF POWER: NIGERIA IN TRANSITION 151 (1998) (“Corruption has today permeated all aspects of Nigerian society and public affairs; and private business can hardly make progress without indulging in some corrupt practices. In government, the judiciary, the universities and other educational institutions, the police and the army . . . corruption has become the main engine of activity.”).


66. Nigeria does not keep accurate data on judicial corruption. See Maduagwu, supra note 28, at 13, 18–19 (discussing the prevailing culture of corruption). See also UNODC, Field Project, Strengthening Judicial Integrity and Capacity, (Aug. 29, 2005), http://www.unodc.org/nigeria/en/judicialintegrity.html. My views, therefore, are based on reports of studies, research, and newspaper accounts of judicial corruption in Nigeria. Several studies have documented in detail corruption within the judiciary and the impact of corruption on the administration of justice. See, e.g., UNODC, supra note 57.
mement in which they live and operate.\(^67\) Though democracies all over the world deal with judicial corruption,\(^68\) slacking moral values, mounting economic hardships and ineffective detection and enforcement mechanisms have turned this aberrant conduct into a full-blown national plague.\(^69\) Judicial corruption—abuse of judicial power for private gain—is no longer an aberration or isolated conduct.\(^70\) It is disturbingly a dominant and recurrent feature of the Nigerian judicial system.\(^71\) Judicial corruption often involves a vicious dynamic in which judges trade in justice for favors and personal gains.\(^72\) Judges tend to do what most Nigerian public servants do, use their official positions to enhance their incomes and power in society.\(^73\) Every aspect of the judicial process has succumbed to the scourge of corruption despite the provisions of the Code of Conduct for Judicial Officers,\(^74\) and criminal laws which demand that judicial officers refrain from engaging in unethical and corrupt behavior.\(^75\)

Corruption seems to be the systemic disease of the Nigerian judiciary, and has generated complaints from all segments of the society, including

\(^{67}\) Judges are trapped in a culture that ranks wealth over honor and integrity. See Maduagwu, supra note 28, at 18–19. It is, therefore, not surprising that most of them seem unable to resist the urge to amass wealth even if it means engaging in corrupt and unethical practices.


\(^{69}\) U.S. Dep’t of State, supra note 31, § 1(e) (reporting that “there was a widespread perception that judges easily were bribed or ‘settled,’ and that litigants could not rely on the courts to render impartial judgments. . . . Judges frequently failed to appear for trials, often because they were pursuing other means of income.”).

\(^{70}\) Petter Langseth, Judicial Integrity and Its Capacity to Enhance the Public Interest 20 (2002), http://www.unodc.org/pdf/crime/gpacpublications/cicp8.pdf (describing judicial corruption as the use of adjudicational authority for the private benefit of court personnel in particular and/or public officials in general). Judicial corruption is not limited to giving and receiving bribes. It includes the use of official position to gain an advantage or to secure a benefit. See U.S. Dep’t of State, supra note 31, § 1(e) (discussing the scope of judicial corruption).


\(^{72}\) Tobi, supra note 29, at 82.

\(^{73}\) See Oko, supra note 63 (describing how every aspect of Nigerian society has succumbed to the Scourge of Corruption).

\(^{74}\) Concerned about the prevalence of unethical practices within the judiciary, the National Judicial Institute led by the Chief Justice of Nigeria introduced a Code of Conduct for Judicial Officers in 1998. Tobi, supra note 29.

social commentators, 76 lawyers, 77 judges, 78 and even the President. 79 A study conducted in 2002 by A.J. Owonikoko reported that since 1999, more than fifty-five cases of corrupt practices 80 have been processed by the National Judicial Council, the body charged with enforcing discipline in the judiciary. 81 Many more allegations of judicial corruption are currently working their way through the National Judicial Council. 82

76. Owonikoko, supra note 42; Okongwu, supra note 43.
79. President Obasanjo recently stated: “The process [of corruption] was accompanied . . . by the intimidation of the judiciary, the subversion of due process, the manipulation of existing laws and regulations, the suffocation of civil society, and the containment of democratic values and institutions.” Obasanjo, supra note 41, at 1.
80. Owonikoko, supra note 42.
81. The National Judicial Council is a body established under the Constitution of the Federal Republic of Nigeria to advise on the appointment and removal of judicial officers. CONSTITUTION, 3d sched., pt. 1, § 20 (1999) (Nigeria). It consists of the Chief Justice of Nigeria who serves as the Chairman; the next most senior Justice of the Supreme Court who is the Deputy Chairman; the President of the Court of Appeal, five retired Justices of the Supreme Court or the Court of Appeal selected by the Chief Justice of Nigeria; the Chief Judge of the Federal High Court; five Chief Judges appointed by the Chief Justice from among the Chief Judges of the States and of the High Court of the Federal Capital Territory Abuja serving for terms of two years; one Grand Kadi appointed by the Chief Justice of Nigeria from among the Grand Kadis of the Sharia Courts of Appeal for terms of two years; one President of the Customary Court of Appeal appointed by the Chief Justice of Nigeria from among the Presidents of the Customary Courts of Appeal for terms of two years; five members of the Nigerian Bar Association who have practiced for at least fifteen years, with at least one being a Senior Advocate of Nigeria, appointed by the Chief Justice of Nigeria on the recommendation of the National Executive Committee of the Nigerian Bar Association for terms of two years and subject to reappointment; and two non-lawyers, who in the opinion of the Chief Justice are of unquestionable integrity. Id. The National Judicial Council exercises disciplinary control over both federal and state judicial officers. CONSTITUTION, 3d sched., pt. 1, § 21(b), (d) (1999) (Nigeria). The individual states’ Judicial Service Committees exercise disciplinary control of the magistrates and other officials of inferior courts of record. See, e.g., CONSTITUTION, 3d sched., pt. 2, § 6(c), (d) (1999) (Nigeria). For a detailed analysis of the structure and functions of the National Judicial Council, see generally Nnaemeka-Agu, supra note 25.
Recently, the president of Nigeria, acting on the recommendations of the National Judicial Council, confirmed the compulsory retirement and dismissal of two judges of the Federal High Court, Justices Samuel Wilson Egbo-Egbo\(^83\) and C.P.N. Senlong.\(^84\) Justice Egbo-Egbo of the Federal High Court, Abuja, issued a string of *ex parte* orders under questionable circumstances and clearly without jurisdiction.\(^85\) Each manifestly illegal order made without jurisdiction reinforced the public’s already abrasive contempt for the judiciary.\(^86\) Disturbingly, Justice Senlong, one of the most senior judges of the Federal High Court, was implicated in a bribery scandal that involved the unlawful influencing of other judges carrying out judicial functions.\(^87\) Judge Senlong was quickly suspended and ultimately dismissed from the bench for what the National Judicial Council described as “the despicable role he played in attempting to influence the decision of an election tribunal.”\(^88\) Judge M.M. Adamu, chairman of the tribunal and a judge of the Plateau State High Court, was also dismissed for receiving a bribe.\(^89\)


\(^{85}\) Judge Egbo-Egbo issued an *ex parte* order restraining the governor of Anambra State from exercising his official duties. Okenwa, *supra* note 83. Judge Egbo-Egbo had earlier issued an order compelling the Independent Electoral Commission to declare the election result in favor of the petitioner. The judge issued the order fully aware of section 285(1) of the Constitution which vests jurisdiction in election related matters in the Election Tribunal. *Id.* Also, the judge issued an order barring the Senate President Anyim Pius Anyim and the Speaker of the House of Representatives Ghali Umar Na’Abba from considering a bill currently before the National Assembly. *Id.*

\(^{86}\) See Otteh, *supra* note 77 (describing the lack of public trust in the judiciary).

\(^{87}\) Ughegbe, et al., *supra* note 84.


\(^{89}\) *Id.*
At the state high courts where most of the cases are adjudicated, judicial corruption is often far worse.\(^90\) Judicial corruption has devalued and debased society’s most fundamental mechanism for conflict resolution.\(^91\) That so many judges are willing to ignore their oath of office and distort the legal process for personal and monetary gain remains one of the most pernicious impediments to a fair trial in Nigeria.\(^92\) Far too often, the outcome of a case depends not on the merits and strength of the case but on

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\(^91\) A United Nations study found that “corruption in the judiciary may turn out to be more harmful [than in other branches of government] because it could undermine the credibility, efficiency, productivity, trust and confidence of the public in the judiciary as the epitome of integrity.” UNODC, supra note 57, at 57.

\(^92\) The adverse impact of a compromised judge on the search for justice is well documented by legal scholars all over the world. See, e.g., Zou Keyuan, Judicial Reform in China: Recent Developments and Future Prospects, 36 INT’L LAW. 1039, 1057 (2002) (“Judicial corruption could turn the rule of law to a rule of individuals pursuing their private interests. It undermines public confidence in judicial organs’ ability to implement laws and regulations, weakens the viability and effectiveness of the legal system and finally destabilizes the social order.”). Kyle W. Davis states:

A judge who has been bribed, is under undue influence by government officials, or is acting in his or her own interests will not issue decisions grounded in law. The result of such decisions is that those with lawful rights and interests, rather than finding protection in the courts, see their rights being violated and their interests given to other people in an officially sanctioned proceeding.

the whims and caprices of the presiding judge. Justice Akanbi, retired President of the Court of Appeal, provided an insightful and useful analysis of judicial corruption and its effect on judges. He stated:

First is the problem of the corrupt judge. He is an afflicted person—just like the carrier of the AIDS virus or kleptomania. He suffers from a deadly disease. To him, justice is not his primary concern. No. What matters to him is the corrupt money that is turned over to him by his partners in crime. His conscience is warped. His judicial Oath means nothing, and so he hardly realises that he is an obstacle to justice according to law. In any case, by his nature, he is a stranger to justice, and if he is not caught in the act, he remains a perpetual obstacle in the way of justice until perhaps Nemesis catches up with him. Otherwise, he is unable to appreciate, let alone administer justice according to law.

Second is the dangerous and mischievous Judge who knows the law but prefers not to follow the law. He acts on whims and caprices. He assumes jurisdiction where there is none. He declines jurisdiction where there is. To him, judicial precedence means nothing. His motive is dangerous. His wig and gown are mere symbols of his ego. Again to this class of Judges, the judicial Oath is a mere cosmetic. Such a Judge is not only an obstacle to justice according to law, he is a danger to the entire Judiciary as an institution.

It is important to note that jury trials do not exist in Nigeria. Judges therefore play far larger roles and exercise significant discretion over questions of law and fact. For example, they make credibility assess-

93. See Malachy Uzend, Casualties of Election Tribunals, DAILY CHAMPION (Nig.), Mar. 5, 2004, 2004 WLNR 6915262. The Daily Champion reported:

[T]he NJC [National Judicial Council] . . . slammed its hammers on 104 judges for various offences, including misappropriation of court funds/maladministration; polarisation and politicisation of the judiciary; unproductive/ineptitude/low court work; abuse of office/misuse of ex parte orders; general and persistent reputation for corruption and unethical behavior embarrassing to the judiciary.

Id.


95. Though Nigeria inherited the British legal system, it did not inherit the jury trials. For a discussion of the legacy of English Law in Nigeria see JOHN OHIREIME ASEIN, INTRODUCTION TO NIGERIAN LEGAL SYSTEM 92–99 (1998).

96. See Nnaemeka-Agu, supra note 47, at 230–36 (“In a case involving protection of rights, [the judge] is the ultimate protector of rights; and in a case which raises issues of
ments of witnesses and determine the relevance or weight to be attached to the testimony of witnesses. 97 Given the enormity of powers enjoyed by judges, it is very easy for Nigerian judges to influence the outcome of cases.

Judicial corruption has forced citizens to view with caution the role of the courts as impartial dispensers of justice. Nigerians are increasingly moving away from the notion of courts as impartial dispensers of justice, to the model of “cash and carry” justice where judges ignore precedents and even the law to subvert justice. 98 Anyone who pays money or has the power to advance a judge’s career can dictate the judgment and sway court rulings and orders in his favor. 99 Citizens are instinctively suspicious of judges, and perhaps for good reasons. 100 Despite mounting public criticisms, the judiciary repeatedly demonstrates a tendency, espe-

97. These are normally powers exercised by jurors. See, e.g., Edward J. Devitt et al., Fed. Jury Practice and Instructions: Civil and Criminal § 15.01 (4th ed. 1992) (“You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight that their testimony deserves.”).

98. Okongwu, supra note 43 (describing justice in Nigeria as a “cash and carry” affair). See Owonikoko, supra note 42.

99. See U.S. Dep’t of State, supra note 31, § 1(e). Motivations for deviating from judicial standards vary from judge to judge, but may generally involve any one or more of the following: “prospects of quick but unmerited career advancement; political appointment of a nominee of the judge; immediate financial gains; fear of job insecurity; or even membership of the same secret society with one of the parties to the dispute.” Deson Abali, Opinion, Nigeria: Corruption in the Judiciary, This Day (Nig.), June 23, 2003, http://support.casals.com/aaaflash1/new_busca.asp?ID_AAControl=9579.

100. Retired Supreme Court Justice Chukwudifu Oputa eloquently states what the judiciary must do to regain public confidence:

To inspire public confidence in the judicial process, judges should not only be transparently impartial but also should be seen to be accentuated only by the principles of justice and fair play. The judge should therefore scrupulously eschew bias in any shape or form. It is not merely of some importance, but is of fundamental importance, that justice should not only be done but should manifestly and undoubtedly be seen to be done. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking—“the judge was biased.”

cially in high profile and election cases, to lend its process to the service of the powerful, well-connected and wealthy citizens.101

The public perception of judicial corruption is so deeply embedded that citizens ascribe corrupt motives to honest judges who render decisions they find objectionable. In an atmosphere rendered already paranoid by stories of corruption, citizens believe every allegation of judicial corruption, however baseless or unfounded.102 Court decisions are often viewed by many as motivated by corrupt motives. When, for example, the Supreme Court ruled that the son of the former dictator Abacha was not a party to the murder of the late Alhaja Kudirat Abiola, rumor mills all over the country were agog that corrupt motives dictated the outcome of the case.103 Similarly, the assertion that the acquittal of those accused of killing the late justice minister Bola Ige was motivated by corruption continues to gain currency despite the absence of credible evidence to substantiate allegations of judicial corruption.104

Public suspicion about the impartiality of the judiciary is reinforced by judges who render ostensibly bizarre and incoherent, if not illegal, ex parte orders.105 Former Chief Justice of Nigeria, Justice Bello, took judges to task for indiscriminately granting ex parte injunctions. He stated:

I had the occasion to point out early this year that it was only in Nigeria that a court of law would restrain a university by order on an ex parte injunction from holding a convocation to award degrees to over a thousand students who had passed their examinations. A court of law de-

101. Ordinary citizens whose rights and interests have been affected by either the government or other citizens are disinclined to go to court because they feel that it is futile. Conversely, the powerful and well-connected citizens rush to court secure in the knowledge that the court can be used to validate their positions. See U.S. DEP’T OF STATE, supra note 31, § 1(e).
102. Obasanjo, supra note 41, at 7.
104. Fred Agbaje, Omisore’s Acquittal & Police Investigation, THIS DAY (Nig.), Nov. 16, 2004 (discussing the negative public reactions to the acquittal of those accused of killing the former Attorney General Bola Ige).
105. SONIA AKINBIYI, ETHICS OF THE LEGAL PROFESSION IN NIGERIA 225 (2003) (arguing that “[t]hese detestable abuse [sic] of preservative injunctive orders via exparte [sic] application denigrate the legal profession and it is interpreted by the citizenry as a strong tool of corruption.”).
nied the deserving students who had passed their examination their degrees, because two students, who had failed the examinations had applied to the court for a declaration that they too were entitled to be awarded degrees. The National Electric Power Authority was restrained by an ex parte injunction from commissioning a power house to supply electricity to a town because there was a dispute between two contractors as to whom the Authority should pay the cost of a minor work done in the construction of the power house. A court of law denied electricity to the town simply because of the dispute between two contractors. Indeed, there is an urgent need among some of us, the judges, to appreciate that ex parte injunction which was devised as a vehicle for the carriage of instant justice in proper cases should not be converted into a bulldozer for the demolition of substantial justice.106

A particularly egregious illustration is the relatively recent ruling by an Enugu State High Court judge ordering the governor of a neighboring state to vacate his office.107 This is analogous to a judge in the state of Louisiana ordering the governor of Mississippi to vacate his office. Even more troubling, the trial judge made such a sweeping ex parte order in clear violation of both the law governing ex parte orders108 and the Code

106. Id. at 221–22 (quoting Mohammed Bello, C.J., address to the 1995 All Nigeria Judges’ Conference).

107. This ruling generated considerable public furor. The National Judicial Council promptly suspended the judge pending the outcome of a detailed investigation. After a detailed investigation and a formal hearing in which the judge was afforded the opportunity to explain his conduct, the National Judicial Council recommended the dismissal of the judge. The recommendation has since been implemented by the Governor of Enugu State. See Tony Edike, Enugu Government Sacks Justice Nnaji, VANGUARD (Nig.), Sept. 24, 2004.

108. The rule governing ex parte orders has been adumbrated by the courts in a number of cases. The tenor of the cases is that ex parte orders should only be made in cases of real urgency where such an order is necessary to preserve the rights of the parties pending the hearing of the case. See Tobi, supra note 29, at 40–42, discussing Chief Ojukwu v. Military Governor of Lagos State, (1986) 3 N.W.L.R. (Pt. 26) 39; Eguamwense v. Amaghizemiren, (1986) 5 N.W.L.R. (Pt. 41) 282; Okechukwu v. Okechukwu, (1989) 3 N.W.L.R. (Pt. 108) 234. In Kotonye v. Central Bank of Nigeria, (1989) 1 N.W.L.R. (Pt. 98) 419, the Supreme Court dealt with an interim injunction, ex parte, and held that the main features of an interim injunction are:

(a) It is made to preserve the status quo until a named date or until further order or until an application on notice for an interlocutory injunction is heard.

(b) It is for a situation of real urgency to preserve and protect the rights of the parties before it from destruction by either of the parties.
of Conduct for Judicial Officers. Even if the public was inclined to believe that these questionable decisions are the product of an honest misreading of the law, some of the judgments and court orders involve a level of naïveté that calls into question the fitness of the judge to occupy a high judicial office. The Chief Justice of Nigeria, Mohammed Uwais, expressed the view widely held by Nigerians regarding the motive behind such abuse of powers, stating, “The only inference to be drawn from such behaviors is that the judicial officers so involved cannot feign ignorance but are acting or acted deliberately in bad faith for improper motives.”

B. Intimidation of Judges

Available evidence indicates that rich and powerful Nigerians are instinctively resistant to attempts to mediate conflicts and disputes through the judicial process. Their preferred mode of operation is to blunt demands for justice by engaging in a dual strategy of intimidation and manipulation. The prevailing mindset is to bribe those who can be bribed

(c) It can be made to avoid such an irretrievable mischief of damage when due to the pressure of business of the court or through no fault of the applicant to hear and determine the application on notice for interlocutory injunction.

(d) What the court does in making an order of interim injunction is not to hear the application for interim injunction, ex parte, behind the back of the respondent, but to make an order which has the effect of preserving the status quo until the application for interlocutory injunction can be heard and determined.

Tobi, supra note 29, at 42-43.


110. Judges fuel speculations by making feeble and often implausible explanations about their clearly erroneous decisions. For example, when the National Judicial Council summoned the late Justice Kusherki of the High Court of the Federal Capital Territory to explain why he issued an ex parte order barring one of the registered political parties from holding its annual convention, the judge claimed that he was sick when he signed the order and did not realize what he did. The Council was unimpressed by his explanation and recommended his removal from the bench. See Okenwa, supra note 83. Similarly, Judge Egbo-Egbo offered an equally laughable explanation for issuing an ex parte order. He claimed that he did not read the order drawn up by his registrar before appending his signature. Id.


112. See infra Part II.C.
and intimidate those who refuse to be bribed.\textsuperscript{113} Bribery usually involves money, but may also include promises of elevation to the higher bench, typically to the Court of Appeal.\textsuperscript{114} Intimidation of judicial officers extends to all branches of the judiciary from trial courts up to the Supreme Court.\textsuperscript{115} Nigerian newspapers are replete with reports of harassment and intimidation of judicial officers.\textsuperscript{116} The murder trial of those accused of killing the late Attorney General of the Federation, Bola Age, was delayed for a long time because three judges separately refused to continue hearing the case, citing pressure from unnamed highly placed persons.\textsuperscript{117} Judge Moshod Abaas recused himself, citing pressures from unusual quarters.\textsuperscript{118} This situation accurately portrays the unfortunate and uncomfortable situation in which judges find themselves once they assume jurisdiction in high profile cases.\textsuperscript{119}

The intimidation of judges assumed a disturbing dimension at a recent Court of Appeal hearing in Enugu.\textsuperscript{120} The presiding judge of the Court of Appeal, Justice Okechukwu Opene, publicly declared that he received threats from persons interested in the case.\textsuperscript{121} He stated, “Before I go on, I want to say my mind and that is my personal opinion. I am under pres-

\textsuperscript{113} See U.S. DEP’T OF STATE, supra note 31, § e.
\textsuperscript{114} See Ahiante, supra note 54.
\textsuperscript{115} An example is a letter addressed to the Chief Justice of Nigeria by a group, the Derivation Front, uncomfortable with the way the case against the Governor of Delta State was being handled. See Chioma Anyagafu, We Can’t be Intimidated Says Uwais, VANGUARD (Nig.), Feb. 7, 2004, available at Westlaw: Africa News database. Incidentally, this was not the first time a Chief Justice of Nigeria publicly complained about attempts to influence the Supreme Court. In 1983, Chief Justice Fatayi Williams “accused influential people of attempting to influence the Supreme Court.” See BASSEY, supra note 71, at 39. He stated, “In the last few days all sort of persons, some eminent, others not so eminent, from a particular state in the country have tried to [sic] dictate to me as to who and who should sit on the appeals against the decisions of the election petition tribunals which are before this court.” Id. at 40.
\textsuperscript{116} The Chief Judge of Abia State was attacked by an unidentified assailant on his way to Umuahia. People familiar with the case believed that the attack was connected to a land dispute. See Joseph Ushigiale, Abia CJ Attacked, Escapes Unhurt, THIS DAY (Nig.), June 9, 2004, 2004 WLNR 7279441.
\textsuperscript{117} See Samson Ojo, Third Judge Abandons Omosore’s Case, DAILY TRUST (Nig.), July 31, 2003.
\textsuperscript{118} Id.
\textsuperscript{119} Id. See also Lohor & Efeizomor, supra note 30 (discussing the reluctance of judges to convict in high profile financial cases).
\textsuperscript{120} Ojo, supra note 117.
sure: there are calls and threats. But I have to go on with this matter.\textsuperscript{122}

Soon after one of the justices delivered his minority opinion in the case, supporters of one of the parties to the case stormed the court premises and threatened to physically harm the judges.\textsuperscript{123} According to the newspaper report, “The judges had to quickly flee through the back door midway into their judgments.”\textsuperscript{124}

The recent attempt to assault Appeals Court Justices in Enugu serves as a distressingly poignant reminder of the dangers involved in judging in a developing and corrupt environment where citizens believe that their intervention is necessary to influence the outcome of a case.\textsuperscript{125} Despite the fact that it is clearly a crime in Nigeria for anyone to interfere with the administration of justice through threats, intimidation or offering gratification,\textsuperscript{126} the fact that law enforcement authorities did not act decisively to protect the judges reveals a troubling absence of adequate protection for the judges.\textsuperscript{127} The reactions of judges who publicly complained of threats demonstrate the pervasive sense of unease engendered by the lack of adequate protection for judges. It is both curious and instructive that judges who notified the public of threats and pressures on them failed to name the culprits. Failure to name the culprits not only reflects the awe in which even judges hold powerful Nigerians, but it also displays a lack of faith in the ability of the system to protect judicial officers.\textsuperscript{128}

Threatening to physically harm judges is fast becoming a strategy of choice for citizens frustrated by the judiciary’s apparent inability to fol-

\textsuperscript{122} Id.


\textsuperscript{124} Id.

\textsuperscript{125} See \textit{BASSEY, supra} note 71, at 31–37.


\textsuperscript{127} Policemen are typically assigned to guard judges in Nigeria. An armed police orderly also accompanies the judge wherever he goes. Chief Justice Uwais has stated that judges can request extra protection if they feel threatened. Funke Aboyade, \textit{Law Personality: State Judge Has No Jurisdiction Outside His State—Uwais}, \textit{This Day} (Nig.), Jan. 13, 2004, 2004 WLNR 7052956; see also Duke Solicits Legislature, \textit{Judiciary’s Assistance to Combat Crime}, \textit{This Day} (Nig.), June 22, 2002, 2002 WLNR 3383534 (reporting that magistrate judges threatened to go on strike if they were not provided adequate police protection).

\textsuperscript{128} Judges concerned about personal safety and skeptical of the ability of the state to protect them from disgruntled litigants tend to sacrifice the ideals of justice at the altars of personal safety. See, e.g., Ojo, \textit{supra} note 117 (reporting that after receiving threats to his life, Justice Abbas could no longer hear the Omisore case because he would be unable to “administer justice without bias, fear or favour.”).
low the law. Threats are intended to and often do have a chilling effect on judges. Unchecked, threats on judges will fundamentally affect the way judges approach their functions. Feelings of insecurity engendered by threats on judicial officers seriously undermine the security, tranquility and independence judges need to fairly and impartially dispense justice.

C. Manipulation

Besides displays of brute force, Nigerians, especially the executive branch and well-connected private citizens, impede the search for a fair trial by manipulating the judiciary. Often physical intimidation of judicial officers is preceded or even accompanied by subtle but no less pernicious efforts to manipulate judges. Top government officials have little or no respect for the concept of separation of powers and unabashedly use their enormous powers to manipulate the judiciary. Interference with the judicial process is so deeply ingrained in the Nigerian culture that politicians continue to influence court proceedings despite reassurances from the President. Governments, especially state governments,

129. The typical reaction of judges who receive threats has been to withdraw from the case. Id. No judge has had the courage to name the culprits or report them to the authorities for appropriate disciplinary actions. Id. An environment in which judges publicly acknowledge attempts to influence them without disclosing the names of those who threatened them can hardly lead to an enhanced public confidence in the judicial process. 130. Karlan, supra note 39, at 537.

131. A U.S. Department of State study found that the Nigerian judiciary is “subject to considerable influence from the executive branch” and rated its independence lower than Ghana, Zambia and Namibia. UNODC, supra note 57, pt. II.A.

132. See, e.g., Ojo, supra note 117; Ushigiale, supra note 116.

133. See A. Akintunde & G. Akinsanmi, Only True Federalism Can Save Nigeria, THIS DAY (Nig.), Aug. 15, 2005, available at Westlaw: Africa News database. Top government officials view the court, not as independent institutions set up to resolve conflicts by impartially applying the law, but as extensions of the government. This mindset encourages them to engage in maneuvers aimed at making the courts more compliant to their wishes. Professor B.O. Nwabueze’s assessment of the attitude of politicians towards the judiciary still retains currency in contemporary Nigeria. He stated that “[b]ecause success in an election carries such high stakes, politicians in this country are strongly inclined and prepared to use pressure of various kinds to try to influence in their favour the judge’s decision—from lobbying to intimidation to outright bribery.” B.O. Nwabueze, Nigeria’s Presidential Constitution 1979–83: The Second Experiment in Constitutional Democracy 443 (1985).

134. President Obasanjo, in an address to the 1999 All Nigeria Judges’ Conference, reiterated his administration’s commitment to allow the judiciary to function without interference from the executive: “It is necessary to assure you that you will not come
use various techniques to manipulate the judiciary including the extreme case of offering gratification to judges.135

The relationship between the government and the judiciary makes it much easier for government officials to manipulate judges. Though judges are appointed by the executive on the recommendations of the National Judicial Council,136 judges depend on the good relations with the government for many of their benefits like housing and transportation.137 Judges live with the anxiety that government officials, unhappy with their decisions, could make life difficult by denying them decent housing and transportation.138 Former High Court Judge P.O.E. Bassey, who experienced, firsthand, efforts by the government to diminish the authority and independence of judges stated:

One of the whips used by civil servants to force Judges to “behave” is in the allocation of residential quarters . . . the mere fact of making Judges rely on the bureaucratic civil servants as to where to put their heads, with their families, is bad enough. And to hope that judges sub-

under the influence of the Executive and that your judgements and orders shall be obeyed.” Obasanjo, supra note 41, at xxxviii.
135. N WABUEZE, supra note 133, at 443–45.
137. Professor Musa Yakubu stated:

It has been argued in recent years that the reason why the judiciary is not independent as expected is that it is not completely independent of government control and influences. The judiciary has to look towards the government for staff accommodation, salary allowance, transport, stationery and other needs. It is further argued that if the judiciary is made self-accounting, it will be completely independent from the government and can perform freely without fear or favor.

Aduba, supra note 34, at 406.

When the Executive controls what the Judiciary requires for discharging its constitutional functions, when the maintenance of the health and comfort of members of the Judiciary lies at the whims of the Executive; when the facilities for interaction with other judicial colleagues all the world over is controlled by the Executive, the only value left is that of impartiality which is maintained by the human spirit, and the sacred resolve to uphold the judicial oath. To what extent the vagaries of the executive oppression affects impartiality depends upon the pain threshold of the individual Judges and resistance of the injustice inflicted by the executive misdemeanours.

Id. at 149.
jected to such pressures could still be generally independent of their officialdom is an illusion.\textsuperscript{139}

Pressures exerted on judges by the executive profoundly inhibit their ability to approach their duties with the level of objectivity and independence necessary to secure a fair trial.\textsuperscript{140} It is therefore not surprising that some judges go out of their way to demonstrate their fealty to the executive.\textsuperscript{141} Similarly, due to the pervasive influence of local politicians in the judicial selection and promotion process, judges who contemplate a higher judicial office often show restraint in cases that involve party stalwarts.\textsuperscript{142}

The dual strategy of intimidation and manipulation has throttled the judicial process and made it difficult for citizens to obtain a fair trial.\textsuperscript{143} Judges, fearful of reprisals from government functionaries, seem eager to do whatever is necessary to remain in the government’s good graces, sacrificing in the process the citizens’ fair trial rights.\textsuperscript{144} Watching the ease with which the executive manipulates the judiciary and observing the advantages gained by judges who pander to the wishes of the executive, most judges submit to the cultural orthodoxy of judicial subservi-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{139} Bassey, supra note 71, at 20.
\item \textsuperscript{140} See Susan Webber Wright, In Defense of Judicial Independence, 25 Okla. City U. L. Rev. 633, 635 (2000) (“A judge who is concerned that his or her rulings might affect his or her career is a judge who might lose focus on the most important of judicial duties: to maintain the rule of law.”).
\item \textsuperscript{141} Some judges have the courage to stand up to overbearing public officials, but accounts of those who do are rarely reported. See Nwabueze, supra note 133, at 444 (“Exposed to such pressures, especially when they come from highly placed politicians, friends and relations, some judges may have found themselves unable to resist them. Lobbying is indeed a powerful instrument of persuasion and perhaps of coercion too.”).
\item \textsuperscript{142} Elevation to the higher bench often does not depend on competence and integrity of the judge as evidenced by their judicial track record. Rather, a judge’s contacts with the powerful have become major determinants of career advancement in the judiciary. See Abali, supra note 99.
\item \textsuperscript{144} According to Murray Gleeson, the Chief Justice of Australia: “The right of citizens to be assured that disputes, including disputes to which governments are parties, will be decided independently and impartially, demands that judges go about their duties un-influenced by the threat of reprisals or the possibility of rewards.” Gleeson, supra note 55.
\end{enumerate}
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ence to the political elites. That judges depend on the executive to provide them with amenities like housing and transportation seems to be at odds with the dictates of judicial independence. The sad reality remains that judges who function under precarious circumstances tend to succumb to pressures and compromise ethical standards to appease the powers that be. Trials conducted by intimidated judges lead to miscarriages of justice and make a mockery of the constitutional requirement of a fair trial.

D. Institutional Problems

1. Delay

The right to a fair trial in Nigeria is guaranteed by the Constitution, which provides in Section 36(1), “In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law.” Unfortunately, trials in Nigeria are never speedy or heard within a reasonable time. Studies conducted by human rights organizations and scholars identify delay as one of the major obstacles to the search for justice through the courts. For example, Hurilaw, a Nigerian non-governmental organization found that, “[e]xtreme delay in litigation in the courts is routine. On the average, hearing in a case at first instance in a Nigerian superior court can take as long as 5–6 years with another 3–4 years consumed in appellate proceedings.” A study conducted by Hu-
man Rights Watch found that “[d]elays plague the course of litigation against oil companies.” 152 A survey of the problems of access to courts in Nigeria, conducted by Dr. Jedrzel George Frynas, a Professor at Coventry University, lists delay as one of the impediments frustrating access to the courts. He stated:

Delay in the disposal of cases is perceived as the fourth most important problem of access to courts in Nigeria. This appears to be due primarily to the congestion in the courts, which manifests itself through the high number of pending cases. Cases in Nigerian courts including appeals may take over 10 years before reaching a final verdict. Sometimes the original litigants will have died by the time the judgment is made.153

The survey conducted by Dr. Frynas, which consisted of field study, interviews and analytical examinations of cases and legal documents, empirically confirmed the prevailing views in Nigeria about the slow pace of litigation.154 In fact, there is hardly any case which is heard with any real degree of urgency or desire to comply with the provisions of the Constitution.155 Even the election petition of Mohammadu Buhari against the election of Nigeria’s current president, Olusegun Obasanjo, who was declared the winner of a general election in May 2003, was pathetically

154. Late Justice Aguda’s assessment of the inadequacy of the Nigerian judiciary in 1986 is still relevant, perhaps more so in contemporary Nigeria. He stated:

The present incredibly slow process of judicial administration is frightening and oppressive . . . . A judicial system which can permit a simple case, for example, of wrongful termination of employment, to remain in the courts for over five years cannot be said to be running smoothly. Whatever happens at the end of such an aberration of court trial can hardly be said to be justice . . . . Our present system of judicial administration is a bankrupt system, and it is very sad indeed that no government from independence in 1960 to this moment has ever made any conscious effort to re-organise or modernise this bankrupt system. It is an inexplicable irony that whilst some of our other smaller sister-countries in the so-called Third World are taking giant steps in the technological age of the 21st century, we are satisfied to continue to wallow in the stinking stenches of the 19th.

155. See generally Frynas, supra note 153.
If such a case cannot be heard within a reasonable time (which should have been before inauguration), then one wonders what case can. In fact, eight months after Nigeria’s last elections, several petitions filed in various states were yet undetermined, and some had not been heard at all. To curb the delays in court proceedings, the 1999 Constitution imposed a time limit for judgments to be delivered after hearing and addresses of counsel. Judges are now required to deliver judgment not later than ninety days after the conclusion of evidence and final address by counsel. Even this laudable provision seems to have been drained of relevance by the Supreme Court in *Egbo v. Agbara*. The Supreme Court ruled that failure to deliver a judgment within the ninety-day period specified by the Constitution is not fatal where the case is entirely documentary or rests mainly on interpretation of some document where the credibility or demeanor of witnesses is not involved.

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158. CONSTITUTION, art. 294(1) (1999) (Nigeria) (“Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.”).

159. Id.


161. Justice Iguh, delivering the lead judgment stated:

In a case for instance, which is entirely documentary or rests mainly on the interpretation of some documents without the demeanour or credibility of witnesses coming into play, delay cannot be any matter of great moment. So, too, where credibility of witnesses is not involved, delay may not be material. It therefore seems to me that delay, *per se* is not sufficient reason for the interference with the judgment of a trial court. For the complaint to succeed, it has to be further established that the delay occasioned a miscarriage of justice in that the trial judge did not take a proper advantage of having seen or heard the witnesses testify or that he had lost his impressions of the trial due to such inordinate delay.
2. Inadequate Infrastructure

Infrastructural deficiencies such as aging, deteriorating and ill-equipped physical facilities severely undermine the fair and speedy administration of justice.\textsuperscript{162} Justice can hardly be speedy when judges lack adequate facilities to enable them to function effectively and efficiently.\textsuperscript{163} A study conducted by Human Rights Watch found:

Court facilities are hopelessly overcrowded, badly equipped, and underfunded. Interpreters may be nonexistent or badly trained. Court libraries are inadequate. There are no computers, photocopiers, or other modern equipment; and judges may even have to supply their own paper and pen to record their judgment in longhand. If litigants need a transcript of a judgment for the purposes of an appeal, they have to pay for the transcript themselves.\textsuperscript{164}

Infrastructural deficiencies in Nigeria undermine the search for a fair trial in several ways. First, poor infrastructure permits, if not encourages, corruption.\textsuperscript{165} Records of court proceedings and judgments are stored in

\textit{Id. at 316.}

162. See Akanbi, \textit{supra} note 94, at 46 (“The old and archaic equipment used in most courts have the effect of slowing the work of the court; they contribute in no small way to the congestion of cases in courts; they cause delay and incidentally delay leads to a denial of justice.”).

163. President Olusegun Obasanjo accurately captured the deplorable state of the judiciary in his address to the 1999 All Nigeria Judges’ Conference:

We are in sympathy with the judiciary. The conditions under which you have had to work over the years are appalling, deplorable and intolerable. Courtrooms are old and dilapidated. There are no good libraries, and court proceedings, including judgements and rulings are taken in long hand. Basic facilities like stationery, file jackets are not available. Litigants are compelled to purchase files for their cases. In most cases, your residential accommodations are poor and poorly furnished. Some of you have no serviceable vehicles. Some are obliged to commute to and from your offices by public transport. You are frustrated by these unsavory conditions under which you perform your duties.

Obasanjo, \textit{supra} note 41, at xxxvii.

164. See \textit{Price of Oil, supra} note 152, at 156.

165. Chief Gani Fawehinmi, one of Nigeria’s leading lawyers and foremost human rights activist, during his investiture with the rank of Senior Advocate of Nigeria, pointed out the problems of inadequate facilities in the judiciary:

As a result of long-hand notes, there is little or no access to record of proceedings to court users, which in turn promotes corruption and other forms of manipulations. The judicial officers control their records and can therefore control outcomes to larger extents . . . . Mechanising judicial record taking and record
less than satisfactory conditions, thus making them susceptible to damage or intentional destruction by unscrupulous citizens.\textsuperscript{166} Absence of modern facilities provides an enabling environment for corrupt and unethical court officials to tamper with evidence and even court records.\textsuperscript{167} Allegations of tampering with court records forced the Court of Appeal to order that a “handwritten judgment it delivered on the matter” must be tendered for scrutiny.\textsuperscript{168}

Second, a far more debilitating effect of inadequate infrastructure, parties are limited in the kinds of technological and visual aids available throughout litigation. The courtrooms are not equipped to handle audio, slide and other visual presentations that assist fact-finders in understanding the case and reaching a just decision.\textsuperscript{169} Lamenting the infrastructural deficiencies in Nigerian courts, Osita Okoro, a lawyer, stated:

The hardware and software of the court system is moribund . . . . Record keeping and document management facilities and procedures are rudimentary. Court libraries are outdated, compelling judges to borrow books from lawyers appearing before them. Time saving court procedures such as discovery and interrogatories are largely regarded by the Bench and the Bar alike as novelties. Modern information technology and office equipment are virtually unknown. Verbatim recording of tri-

\begin{footnotesize}
\begin{enumerate}
\item[166.] Id.
\item[167.] See Obiagwu, supra note 165.
\item[168.] Charles Onyekamuo, Anambra: Appeal Court Requests Handwritten Judgment, This Day (Nig.), Feb. 11, 2004, 2004 WLNR 7006828.
\item[169.] See PRICE OF OIL, supra note 152, at 156.
\end{enumerate}
\end{footnotesize}
als is not available; judges are compelled to manually record proceedings in long hand.\textsuperscript{170}

Unable to mount technical evidence because of inadequate infrastructure, the plaintiff who bears the burden of proof is significantly disadvantaged and must suffer his or her fate without any other avenue for redress or meaningful assistance from the system.

Furthermore, judges in Nigeria decide all issues of fact as well as law.\textsuperscript{171} The task is painfully cumbersome due to the lack of stenographers. Judges struggle with recording all the evidence in long hand, while trying to get impressions on the demeanor of the witnesses and fielding legal arguments, objections and interjections from lively Nigerian lawyers.\textsuperscript{172} It is little wonder that most cases take years to hear.\textsuperscript{173} The absence of stenographers in Nigerian courts has two undesirable effects. It leads to inordinate delays since a judge can only write so fast, and it often leads to corruption as handwritten judgments can be easily altered by judges who are so inclined.\textsuperscript{174}

Lastly, inadequate facilities, especially erratic power supply, contribute to delays as court proceedings are often interrupted or adjourned due to power outages.\textsuperscript{175} Discussing the effect of power outages on Nigeria,

\begin{itemize}
\item \textsuperscript{170} Osita Okoro, \textit{The Judiciary and the New Development Agenda}, \textit{This Day} (Nig.), Dec. 22, 2003.
\item \textsuperscript{171} See supra note 95.
\item \textsuperscript{173} Ebun-Olu Adegboruwa, a lawyer and social commentator, observed that “[t]he very idea of judicial officers taking evidence and submissions in long hand 43 years after independence is abhorring if not shameful . . . . This is one of the major causes of delay in the administration of justice in Nigeria.” Adegboruwa, supra note 52.
\item \textsuperscript{174} Chino Obiagwu, a lawyer and national coordinator of the Legal Defense and Assistance Project, a non-governmental organization, stated that “as a result of long hand notes, there is little or no access to record of proceedings to court users, which in turn promotes corruption and other forms of manipulations.” Chino Obiagwu, \textit{Anniversary Special: Judiciary Score Card 1999–2003}, \textit{Vanguard} (Nig.), May 30, 2003.
\item \textsuperscript{175} Ebun-Olu Adegboruwa, \textit{The Judiciary Must Guard Against Corruption}, \textit{Guardian} (Nig.), June 3, 2003, at 8 (“sittings are adjourned for lack of electricity. . . . Judicial officers cannot dream of generators at home or even a functional telephone line, either for domestic or official use. These appalling conditions only serve to discourage judges . . . more so [sic] when it seems to be a deliberate policy of the executive to starve the judiciary of funds.”).
\end{itemize}
Professor Olukoju stated that “[i]ndividual[s] and corporate citizens of Nigeria have suffered enormous economic and social losses and inconveniences from the inefficiency and corruption of [the National Electric Power Authority]. Constant outages have damaged electrical and electronic equipment and disrupted and bankrupted fledgling or otherwise thriving commercial and industrial enterprises.”

III. DEALING WITH THE PROBLEMS OF THE JUDICIARY

I have attempted to show in Part I of this Article how corruption, manipulation and intimidation of judges and the lack of adequate facilities undermine the courts’ ability to adjudicate disputes fairly and efficiently. The problems discussed above, especially corruption, executive manipulation and intimidation of the judiciary, are not unique to Nigeria. Mature democracies, notably the United States of America and Britain, dealt with these problems by introducing reform measures that significantly minimized, if not contained the problems discussed above. In Nigeria, however, the problems of the judiciary have been exacerbated and rendered more intractable because of the nature of the society and the inability, or perhaps unwillingness, of elected officials and the judiciary to tackle the problems and initiate measures that will enable the judiciary to function more effectively. Unchecked, these problems cripple the judiciary and may ultimately lead to a reversal of democratic gains. This portion of the paper

177. Judiciaries all over the world have faced, and continue to deal with similar problems. See generally MARY L. VOLCANSEK ET AL., JUDICIAL MISCONDUCT: A CROSS NATIONAL COMPARISON (1996) (reviewing how judicial misconduct is addressed in France, Italy, England and the United States).
178. Id.
179. See supra Part II.C.
180. See supra Part II.
181. Nigeria returned to democratically elected civilian government after fifteen years of military rule. Supreme Court Justice Uwaifo recently described the negative impact of corruption on the democratic process:

Some recent events seem to sound an alarm bell . . . what omen does this trend of falling standards portend for the country? First, a culture of compromise will take root in the dispensation of justice. Second, public confidence will be badly and broadly eroded. Third, democracy will suffer or even collapse.
will examine how Nigeria can contain and possibly eliminate the problems that disable the judiciary from responding to the needs and challenges of a democratizing and developing Nigerian society. My aim, here, is to offer suggestions that will help make the judiciary fairer, transparent and more efficient.

The Nigerian judicial structure is still in disarray, crippled by a constellation of institutional and personal problems. Judicial corruption is just the capstone of a decaying and dilapidated infrastructure. Judicial officers lack the necessary resources, independence and integrity needed to judge fairly and impartially. As a result of these problems, government officials, party stalwarts and private citizens with enough resources to either bribe or intimidate judicial officers continue to influence judicial proceedings. It is therefore not surprising that a widespread perception exists among the citizens that the judiciary is unable to constrain abuse of power and administer justice fairly and impartially.

Okenwa, supra note 78.

182. The desecration of the judiciary that became more pronounced during the military interregnum remains with us. J.A. Ajakaiye, The Constitutional Role of the National Judicial Council with Regard to Collection and Disbursement of Funds to the Judiciaries: Problems and Prospects, in 2001 ALL NIGERIA JUDGES’ CONFERENCE 127, 132–33 (2003). One had hoped that the end of military rule would also mark the end of the woes of the judiciary. Chief Judge J.A. Ajakaiye, of Ekiti State, described the tactics adopted by the military to emasculate the judiciary:

It paid the military regimes not to grant financial autonomy to the judiciary. This indirectly helped in crippling the judiciary. There were numerous instances of victimization. Police orderlies were withdrawn at the pleasure of the commissioners of police. Subvention to a state judiciary was reduced and the chief judge was denied the opportunity to attend an international conference like his counterparts because he gave judgment, which was distasteful to the state government. Judges were forced out of their [official] quarters or had the light and water and telephone cut off for giving judgments against the government. Orders of court against the government were treated with disrespect and disdain.

Id.

183. See Price of Oil, supra note 152, at 156 (“Judges, magistrates and other court officers . . . are very poorly paid. Court facilities are hopelessly overcrowded, badly equipped, and underfunded . . . . Court libraries are inadequate. There are no computers, photocopiers, or other modern equipment; and judges may even supply their own paper and pens to record their judgment in longhand . . . . This financial crisis encourages the acceptance of bribes . . . .”).

184. See supra Part II.B.

185. See Otteh, supra note 77.
The problems of the judiciary, especially corruption and manipulation, exact substantial and enduring costs on the citizens, the legal profession, the judiciary and the Nation. Calls for reform come from different sources. The international community, concerned about the survival of the rule of law and consolidating the country’s fledgling democracy,\(^{186}\) the Nigerian public, outraged by improper exercise of judicial powers, a government battling to regain the confidence of foreign investors and a profession eager to recapture its dignity, all seem to agree that something must be done to remodel the judicial architecture disassembled by years of rapacious military rule.\(^{187}\) An honest, competent and efficient judiciary will benefit all.\(^{188}\) More importantly, an honest judiciary will help Nigeria consolidate and deepen its fragile democracy and check the tyrannical instincts of elected officials.\(^{189}\) This part of the paper examines four ways

\(^{186}\) The Chief Justice of Nigeria, M.L. Uwais, in his welcome address to the 2001 All Nigeria Judges’ Conference acknowledged the support of international agencies in “helping the [Nigerian] Judiciary to strengthen its integrity and capacity, fight corruption and improve access for litigants to justice.” See Uwais, supra note 3, at xxxv–xxxvi. The international agencies mentioned by the Chief Justice include the United States Agency for International Development (USAID), the British Department for International Development (DFID), the World Bank, the United Nations Development Program (UNDP) and the United Nations Office for Drug Control and Crime Prevention (UNODC). Id. For an account of efforts by the United Nations to strengthen the capacity and integrity of the judiciary in Nigeria, see Nicholas A. Goodling, Nigerian’s Crisis of Corruption—Can the U.N. Global Program Hope to Resolve This Dilemma?, 36 VAND. J. TRANSNAT’L L. 997 (2003).

\(^{187}\) For the state of the judiciary under the military regime, see D.A. Ijalaye, Professor Emeritus, Obafemi Awolowo University, The Bench, the Bar and the Rule of Law Under the Military Regime in Nigeria, lecture at the Law Week of the Nigerian Bar Association, Ilorin Branch (Feb. 6, 1991) (on file with the Brooklyn Journal of International Law).

\(^{188}\) A group of Chief Justices and high level judges invited by the United Nations Center for International Crime Prevention and Transparency International to help formulate a program to strengthen judicial integrity identified a set of preconditions necessary to curb judicial corruption. Langseth, supra note 70, at 9. The group identified the following conditions: fair remuneration, transparent procedures for judicial appointment, adopting and monitoring of the judicial code of conduct, declaration of assets and computerization of court files. Id. at 11–13.

\(^{189}\) According to Retired Supreme Court Justice Chukwudifu Oputa:

The judiciary is the mighty fortress against tyrannous and oppressive laws. It is the judiciary that has to ensure that the State is subject to law, that the government respects the right of the individual under the law. The courts adjudicate between the citizens inter se and also between the citizens and the State. The courts therefore have to ensure that the administration conforms with the law; they have to adjudicate upon the legality of the exercise of executive power.

of improving the quality and integrity of the judiciary: appointing the right caliber of judges, punishing corrupt judges, providing continuing judicial education and bolstering judicial independence.

A. Background of the Judges

Securing fair trial rights is inextricably tied to the quality of judges who adjudicate disputes.190 One of the most effective ways to deal with judicial corruption is to ensure that only competent and honest judges get to the bench.191 It is unrealistic, perhaps preposterous, to simultaneously push for reforms that preserve fair trial rights while at the same time staffing the judiciary with incompetent and corrupt judges. Nowhere is the need for high caliber judges more pressing than in a transitional society like Nigeria where prolonged military dictatorship has taken its toll on the judiciary.192 Military rule set in motion a process of appointing judges without due regard to the integrity and competence necessary to ensure a fair trial.193 The same pattern of appointing ill-qualified judges

190. Professor Osipitan has stated, “The quality of justice depends more on the quality of men who administer the law than on the content of the law they administer. Unless those appointed to the bench are competent and upright and free to judge without fear or favour, a judicial system however sound its structure may be on paper is bound to function poorly in practice.” Taiwo Osipitan, Professor, Faculty of Law, Univ. of Lagos, Thoughts on the Independence and Integrity of the Judiciary in Nigeria, Paper delivered at Judicial Independence Workshop (Dec. 2002), available at http://nigerianewsnow.com/News/December02/530103_lawlecture.htm. See also Maria Dakolias, A Strategy for Judicial Reform: The Experience in Latin America, 36 VA. J. INT’L L. 167, 172 (1995) ("[T]he quality and integrity of a judicial system can be measured best by the quality and integrity of its judges.").


193. Dr. Olu Onagoruwa, former Attorney General of the Federation stated:

Under the military, a great deal of arbitrariness in judicial appointments have been made in utter disregard for the institutional mechanisms set up for that purpose. In some cases judges have been appointed in utter contempt for public opinion. This military interference in judicial appointment has led to the appointment of mediocrities to the bench. The situation is pathetic in the new states and in the federally controlled judiciaries where civil servants, mostly, are appointed. In many cases these new judges neither have the practicing ex-
threatens to undermine the integrity and competence of the judiciary under the current democratic administration.\textsuperscript{194}

Under the 1999 Constitution, judges are appointed by the President\textsuperscript{195} or Governor\textsuperscript{196} on the recommendation of the National Judicial Council.\textsuperscript{197} The appointment process, especially the screening of judges by the National Judicial Council, was designed to ensure the appointment of judges with the requisite competence and integrity.\textsuperscript{198} The goal of screening out unsuitable judicial nominees will only be achieved if the National Judicial Council approaches its functions with a genuine sense of detachment and objectivity and confines itself to issues relating to integrity, character and competence as evidenced by the nominee’s professional track record and academic achievements.\textsuperscript{199} Regrettably, the appointing authorities have allowed personal prejudice and ethnic and political con-

\begin{itemize}
  \item Retired Nigerian Supreme Court Justice Anthony Aniagolu’s scathing indictment of the appointment procedure for judges deserves the attention of everyone involved in the appointment of judges in Nigeria:
    
    Nowadays, the appointment of bad judges, in different parts of the country, is now taking centre stage among the constraints of the Judiciary. No more special scrutiny is exercised in the appointment of some Judges. In earlier days people frowned at the appointment of candidates regarded as not sufficiently knowledgeable in Law, or weak, generally in their commitment to the Law. Nowadays candidates who are known to be openly corrupt manage to secure appointments as Judges.

  \item Federal judges are appointed by the President. The appointment process is somewhat different for the Chief Justice of Nigeria and the Justices of the Supreme Court. Their appointments require further confirmation by the Senate. \textit{See Constitution}, arts. 230–39 (1999) (Nigeria).
  \item State judges are appointed by the Governor on the recommendation of the National Judicial Council. \textit{Id.} art. 271.
  \item \textit{See Constitution}, ch. 7 (1999) (Nigeria).
  \item See Nnaemeka-Agu, \textit{supra} note 25, at 10.
  \item President Obasanjo urged the appointing authority for judges “to ensure through rigorous screening and painstaking appointment procedures, that the best materials, in terms of learning and character get appointed to the bench.” \textit{Obasanjo, Uwais Cautioned Judges of Ex Parte Injunction, Daily Trust}, Dec. 10, 2003.
\end{itemize}
Considerations to preponderate over competence. The appointment procedure lends itself to abuse and often produces results that are inconsistent with the goals of an honest and competent judiciary. Ethnic loyalties, corruption and political favoritism have so infused the selection process that some people who are demonstrably ill-qualified to serve as judges have been appointed. Chief Richard Akinjide, a Senior Advocate of Nigeria and former Attorney General of Nigeria, implicitly acknowledged the problems with the appointment of judges in Nigeria. Responding to a question dealing with corruption within the judiciary, he stated:

First of all, the process of appointing judges into the judiciary is very bad and why should you base appointment into the judiciary on the area where somebody comes from. Supposing that area does not have the right quality, you turn appointment to the judiciary as if it is political appointment or board appointment. They do that at the federal level, they do that at the state level. I mean in some local governments, they will say they have no judge and you must appoint a judge from that local government, so they bring a fourth grade lawyer to be a judge. Whereas in other local governments, there are first class and better materials. So that is affecting the quality at all levels, which is very unfortunate, it should not happen . . . . This ethnic mentality has been carried

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200. Professor Taiwo Osipitan expressed dissatisfaction with the procedure for the appointment of judges. He stated:

The procedure and criteria for the appointment and promotion of judicial officers are not transparent . . . . [E]xcept for the requirement of post-call experience, the factors which influence the members of the commission in their decision whether to nominate or not to nominate a person for appointment or promotion are known to members alone. This has resulted in intensive lobbying by those who aspire to become judges. In some cases, appointments and promotions are not based on merit but the strength or the connection of the appointee. A judicial officer whose appointment or promotion is the product of lobbying is unlikely to be independent, in cases involving his benefactors.

Osipitan, supra note 190.

201. See id.

202. Supreme Court Justice, Niki Tobi observed:

Although the Constitution makes clear provisions on the appointment of judicial officers, the application of the provisions at times bring [sic] some problems. There are known instances where recommendations are made not on the merits but on grounds of favouritism and nepotism . . . . The position is fairly ugly these days. Some candidates go about campaigning for appointment as Judges and they do so shamelessly.

Otteh, supra note 77.
so far and it has affected the quality of the appointment we are making.203

Nigeria has degenerated to a position where ethnic origin, social background and connections have become far more important than competence and integrity.204 Judicial appointment based on patronage increases the likelihood of appointing judges who pander to the wishes of their benefactors.205 Problems resulting from the appointment of ill-qualified judges will be less severe or perhaps completely eliminated if the appointing authorities screen out incompetent and unqualified candidates.206 Appointment should be limited to lawyers who have sufficiently demonstrated their integrity, both personally and professionally.207 Pro-


204. Otteh faults the present mode of appointing judges:

[T]he recommendation of the candidates have been sourced from among a very exclusive, privileged but tiny group whose predilections will spring from a broad mix of peculiar affinities: thus while one person might prefer a candidate because his or her state of origin is Lagos State, another might make a recommendation because a candidate is the son of a political benefactor; yet, another judge would recommend a candidate because that candidate was particularly obsequious while he or she acted as Chief Registrar. Who loses the chance to get recommended? Mr. Eligible, who did not, or will not plug into the circuit of that privileged class.

Otteh, supra note 77.

205. KAYODE ESO, FURTHER THOUGHTS ON LAW AND JURISPRUDENCE 264 (2003) (“A judge, whose appointment has been so influenced by the Governor, might consider himself, or, at the least, be so considered, by the public, to whom he should appear independent, (and this is worse) to be answerable to his benefactor, the Governor.”).

206. The United Nations’ Office on Drugs and Crime recommended:

[T]here is a need to institute more transparent procedures for judicial appointments to combat the actuality or perception of corruption in judicial appointments (including nepotism and politicization) and in order to expose candidates for appointment, in an appropriate way, to examination concerning allegations or suspicion of past involvement in corruption.

UNODC, supra note 57, at 50.

207. The Attorney-General of the Federation and Minister of Justice, Chief Akinlolu Olujimmi, recently called for the appointment of judges with the right training and background. He stated: “Aware that the administration of justice is bound to suffer delay if judges are not adequately trained or equipped, we will discourage the appointing of ill qualified persons to the bench on account of political patronage and other extra legal considerations.” Akinlolu Olujimmi, Agenda for Justice Sector Reform, This Day (Nig.), Nov. 16, 2004, http://www.thisdayonline.com/archive/2003/08/26/20030826law07.html.
fessor Musa Yakubu urges that judges “should be men of unimpeachable antecedent, men of high probity. Men of unassailable intellect, men who could not balk under pressure.”208 Limiting judicial appointments to lawyers of proven competence and integrity will numb public fears that judges are beholden to the appointing authorities and will also enhance the independence of the judiciary.209 As the Chief Justice of South Africa stated in an address to the International Commission of Jurists, “The culture of judicial independence must be sustained by procedures for appointment to the bench which are fair, transparent, and reasonable and in which the judicial input is substantial and manifest.”210 Judges appointed on the basis of competence and integrity can easily approach their duties without fear or favor and inspire confidence both from the public and the profession.211

A major problem, however, with recruiting high quality judges is that few good and successful lawyers are interested in taking up judicial appointments.212 For a long time, appointment to the higher bench was

208. Aduba, supra note 34, at 406–07.
209. The former Chief Justice, Hon. Justice Mohammed Bello, once stated that “in order to ensure the perfection of the independence of the judiciary, the criteria for and mode of appointment of Judges should be based on no other consideration than the suitability, competence, integrity, learning and incorruptibility of the appointees.” Niki Tobi, The Legal Profession and the Quest for Genuine National Integration and Development, in THE LEGAL PROFESSION AND THE NIGERIAN NATION: ESSAYS IN HONOR OF CHIEF AFE BABALOLA 27, 41 (Yemi Akinseye-George ed., 2000).
210. CEELI, supra note 34, § II.B.
211. Marvin E. Aspen, The Search for Renewed Civility in Litigation, 28 VAL. U. L. REV. 513, 519 (1994) (“Judges cannot ask lawyers to accept a standard of professional conduct to which they do not abide.”). The quality and integrity of the judiciary will be significantly enhanced if the appointing authorities adopt the standards formulated by Nigeria’s preeminent jurist, retired Supreme Court Justice Oputa:

The qualities of courage, honesty and integrity required of judges are meant to ensure that they do not either under pressure or of their own volition yield their moral authority and that they do not in the process of decision making allow themselves to be swayed from the path of truth and justice. The qualities of firmness and impartiality will allow the judge to turn the wheels of justice objectively and not subjectively . . . . [I]n the halls of justice the battle is for the truth and against expediency. It is a battle for protection from power or its abuse . . . . It needs a man of commensurate moral fibre and moral courage to stand up to this assault from power, to maintain his balance and deliver justice.

AKINBIYI, supra note 105, at 110 (quoting Oputa, J., from a lecture at Obafemi Awolowo University).
212. A study conducted by the Constitutional Rights Project, a Nigerian non-governmental organization, found that “[t]he low wages attributed to judicial officers has
viewed as the hallmark of a successful legal career. Judges enjoyed such preeminent positions both within and without the legal profession that a career in the judiciary proved attractive to most lawyers. All of that has changed. Lawyers prefer, instead, to become Senior Advocates of Nigeria. Consequently, lawyers seeking judicial appointments and some who eventually get appointed may not be the finest legal minds. Some of them may even lack the right moral fiber to serve as judges.

Reluctance to accept judicial appointments results from a constellation of factors including inadequate pay, poor working conditions and more importantly, the diminished status of judges in Nigerian society. To discouraged independent-minded lawyers in private legal practice from taking up positions in the bench, as such lawyers are reluctant to give up relatively lucrative private practices for poor judicial positions.”

213. See generally Akinbiyi, supra note 105.

214. ESO, supra note 205, at 282 (“It must be recognized . . . that an appointment to the Bench carries . . . with it, enormous prestige and honour . . . . [S]ome of those who are now on the Bench and also those who have retired from it, joined the system mainly on account of this honour and prestige . . . .”).

215. Nigeria has a special class of lawyers analogous to the Queens Counsel in England, known as Senior Advocates of Nigeria. ASEIN, supra note 95, at 237. The title of Senior Advocate of Nigeria (SAN) is conferred on lawyers who distinguish themselves in the field of advocacy. See Legal Practitioners Act, (1990) Cap. 207, § 5 (Nigeria). For a discussion of the criteria for conferring the title of Senior Advocate of Nigeria on lawyers, see ASEIN, supra note 95, at 237–44.

216. See A.A.M. Ekundayo, The Legal Profession and the Nigerian Nation in the 21st Century, in THE LEGAL PROFESSION AND THE NIGERIAN NATION: ESSAYS IN HONOUR OF CHIEF AFE BABALOLA 117, 125 (Yemi Akinseye-George ed., 2000) (“The 20th century Nigerian nation has seen many erudite, courageous, honest and brilliant judges. Unfortunately, the close of the century is also witnessing the arrival of an increasing number who are by no means as erudite, courageous, honest and brilliant.”).

217. See Muhammed Mustapha Akanbi, Retired President of the Court of Appeal, The Need for Proper Funding of the Judiciary, Speech given at the Special Sitting of the Court of Appeal, Kaduna Division (July 4, 1994), in THE JUDICIARY AND THE CHALLENGES OF JUSTICE, supra note 94, at 95, 99 (1996). Akanbi succinctly captured the depressing plight of the judiciary in Nigeria:

Some of the problems facing the Judiciary are only known to insiders. It is common knowledge for those who care to know, that the salary is poor, the conditions of service unattractive and the glories of the past no more. And it is a truism to say that the Judiciary is the worst hit by the pervading atmosphere of political instability and insensitivity. It has not been possible for the Judiciary to develop or fulfill itself because more often than not it is financially hamstrung.

Id.
encourage lawyers to take up appointment, Nigeria must find ways to burnish the image of the judiciary. The judiciary must be reestablished as an honorable and respectable branch of the legal profession. Salary and working conditions must be reviewed to provide better conditions of service. Improved working conditions, especially enhanced salary structure, will enable the judiciary to recruit and retain high quality judges with the requisite integrity, competence and judicial temperament. Increasing remuneration of judges may also reduce the temptation for them to engage in corrupt activities to augment their meager salaries.

B. Sanctions

Despite Nigeria’s transition to democracy, judges who have been appointed more for their contacts than competence and who have internalized the corruption developed during years of military interregnum have not shaken off those values. The most dramatic way to promote probity in the judiciary is to punish erring judges. Nothing undermines the

218. ESO, supra note 205, at 282 (“There must be honour attached to the post, for the honour of being on the Bench is not altogether, nor always, a matter of CASH. It is more a matter of honour.”).

219. Retired Supreme Court Justice Kayode Eso stated:

The judiciary must be so reformed and the conditions of service made so attractive as to attract the best brains from all sectors of the law. The reformation could not be complete until the institution is able to attract seasoned legal practitioners, of the Senior Advocate [of Nigeria] class, to its fold. Indeed, what should be aimed at is that appointees, other than such advocates should also be top lawyers and well-established advocates in their spheres of life, that the Senior Advocates, who have been invited for appointment, would be made proud of the peers that would be appointed with them.

220. Some scholars find a nexus between poor salary structure and judicial corruption. See, e.g., CEELI, supra note 34, § IV.G (“A more sensitive issue is whether the failure to fairly compensate judges inadvertently promotes corruption. Otherwise honest and dependable individuals may be more likely to succumb to offers of gifts and bribes by unscrupulous attorneys or wealthy litigants when they need to supplement their meager incomes.”); Langseth, supra note 70, at 6 (reporting that studies list low remuneration among the causes of judicial corruption).

221. See Onagoruwa, supra note 193.

222. As described in In re Schenck:

[J]udges are disciplined primarily to preserve public confidence in the integrity and impartiality of the judiciary. Thus, disciplining judges serves to educate and inform the judiciary and the public that certain types of conduct are improper and will not be tolerated. Discipline of a judge also serves to deter the
integrity and public confidence in the justice system more than wellfounded allegations of impropriety by judges.\textsuperscript{223} Swift and fair disposition of allegations of misconduct not only restores public confidence but also induces attitudinal and behavioral changes among judicial officers.\textsuperscript{224} For a society yearning for accountability, a nation eager to see judicial corruption rooted out, punishing corrupt judges is key.\textsuperscript{325} A contrary measure, one that glosses over corruption, will destroy public confidence and encourage citizens to resort to corrupt practices in an attempt to level the playing field.\textsuperscript{226}

Punishment, or threat of it, will pressure judges to respond or adapt to acceptable judicial behavior. It forces judges to reevaluate the choices they make. Sanctions convey to judges in a very powerful way that abuse attracts unpleasant consequences. Sanctions also have the potential to influence the conduct of other judges and may assuage the injured feelings of the public, who feel justifiably outraged by judicial misconduct.\textsuperscript{227}

The National Judicial Council administers the disciplinary regime for judges in Nigeria.\textsuperscript{228} In addition to screening and recommending judicial nominees, it also investigates allegations of judicial misconduct and recommends punishment to the appropriate authorities.\textsuperscript{229} It has played a more aggressive role in articulating and enforcing standards of judicial conduct.\textsuperscript{230} Following complaints that raise sufficiently serious or appar-
ently well-founded allegations of impropriety, the National Judicial Council typically suspends the erring judge pending the outcome of a detailed investigation and a full-blown hearing in which the complainants and the judge have the opportunity to state their positions and explain their conduct. Sanctions that the National Judicial Council could recommend against judges found guilty of impropriety include admonitions, suspension, retirement and in some cases outright dismissal.

Judicial impropriety falls into two broad categories: violations of the Code of Conduct for Judicial Officers and criminal conduct. In cases of non-criminal conduct that violate the Code, the National Judicial Council should be the final authority to investigate and recommend punishment. If, however, the misconduct amounts to a crime, the National Judicial Council should, in addition to recommending sanctions, refer the matter to the appropriate authorities for further investigation and possible

231. Akinwale Akintude, NJC Commended For Suspending Erring Judges, THIS DAY (Nig.), Feb. 3, 2004 (reporting that NJC recently suspended four judges for allegedly receiving bribes, and another judge, Justice Senlong, was suspended for allegedly influencing the judgment of a tribunal).

232. In choosing the appropriate sanction, the National Judicial Council should always take into account the purposes of disciplining judges so eloquently stated by the Oregon Supreme Court in *In re Schenck*, 870 P.2d 190, 207 (Or. 1994).

233. Minor ethical violations are normally addressed by admonishing the offending judicial officer. As suggested by the Oregon Supreme Court, “Censure may be appropriate in a particular case for extra-judicial conduct that violates the Code, but which is not directly related to a judge’s performance in office.” *In re Schenck*, 870 P.2d at 209. This reasoning apparently motivated the National Judicial Council to recommend reprimanding the Chief Judge of Abia State for paying monies belonging to the state judiciary into a private fixed account. See Leonard Dibia, *Nigeria; Abia State Judicial Crisis*, DAILY CHAMPION (Nig.), Dec. 7, 2004.


235. Okenwa, supra note 83 (reporting that the Federal Government retired Justice Egbo-Egbo following the recommendations of the National Judicial Council).

236. Justices Senlong and Adamu, accused of receiving bribes, were dismissed outright from the bench. See *Nigerian Government Dismisses Three Judges*, supra note 88.


238. CONSTITUTION, 3d sched., § 21(b) (1999) (Nigeria).
criminal prosecution.\footnote{The Independent Corrupt Practices Commission can prosecute judges accused of corruption without waiting for a referral from the National Judicial Council. \textit{See} Corrupt Practices and Other Related Offenses Act, (2000) § 6 (Nigeria) (stating that it is the duty of the Commission to, among other things, prosecute persons suspected of violating the Act or other laws prohibiting corruption and that “[e]very prosecution for an offence under [the] Act or any other law prohibiting bribery, corruption and other related offences shall be deemed to be done with the consent of the Attorney General.”). For example, the Commission is currently prosecuting the Chief Judge of Akwa Ibom, Justice Effiong David Idiong for allegedly receiving a bribe. The National Judicial Council had earlier investigated Justice Idiong and cleared him of the charges that form the basis of the indictment by the Independent Corrupt Practices Commission. \textit{See} Lillian Okenwa, \textit{ICPC can Prosecute Akwa Ibom CJ}, \textit{THIS DAY} (Nig.), Jan. 26, 2005, 2005 WLNR 1100034.} For example, bribery is both a violation of the Code\footnote{The Code of Conduct for Judicial Officers provides, “A Judicial Officer and members of his family shall neither ask for nor accept any gift, bequest, favour, or loan on account of anything done or omitted to be done by him in the discharge of his duties.” \textit{CODE OF CONDUCT FOR JUDICIAL OFFICERS R. 3F(1) (1998) (Nigeria)}.} and a crime.\footnote{See generally \textit{MICHAEL TONRY, HANDBOOK OF CRIME AND PUNISHMENT} 345–66 (1998) (discussing the theories and purposes of punishment).} Therefore, a judge accused of bribery may be sanctioned by the National Judicial Council and prosecuted for the same offense.

Disciplinary proceedings initiated by the National Judicial Council should not preempt or preclude further criminal prosecution of the offending judge, if the facts so demand. Criminal prosecutions and disciplinary proceedings serve entirely different purposes. Disciplinary proceedings initiated by the National Judicial Council essentially serve to ensure compliance with the ethical standards of the judiciary\footnote{In \textit{re} Schenck, 870 P.2d 185, 210 (Or. 1994) (“[Discipline] is necessary to maintain public confidence in the integrity and impartiality of the judiciary that demands adherence to standards of conduct it has set for itself and for the fair administration of justice.”).} while criminal sanctions serve to reaffirm society’s disdain for conduct designated as a crime.\footnote{Automatic disbarment should follow convictions for designated crimes. Criminal conviction is a valid ground for imposing disciplinary sanctions on lawyers. \textit{See} Legal Practitioners Act, (1990) Cap. 207, § 11(1)(b) (Nigeria) (defining unprofessional conduct}

Depending on the nature of the crime and the outcome of the criminal prosecution, the Nigerian Bar Association should also look further into the matter to see if it merits disbarment.\footnote{For example, the Commission is currently prosecuting the Chief Judge of Akwa Ibom, Justice Effiong David Idiong for allegedly receiving a bribe. The National Judicial Council had earlier investigated Justice Idiong and cleared him of the charges that form the basis of the indictment by the Independent Corrupt Practices Commission. \textit{See} Lillian Okenwa, \textit{ICPC can Prosecute Akwa Ibom CJ}, \textit{THIS DAY} (Nig.), Jan. 26, 2005, 2005 WLNR 1100034.} Judges, after all, are lawyers
and as such are still subject to the disciplinary control of the bar association. A lawyer convicted of a crime is typically disciplined by the bar. It would be anomalous, indeed preposterous, if a judge guilty of a crime were merely dismissed from the bench and allowed to retain the privilege to practice law.245

The legal profession should clearly articulate the kinds of judicial impropriety that warrant taking further disciplinary action against a judge who has been sanctioned by the National Judicial Council. Serious crimes such as fraud, theft and accepting or receiving bribes are sufficiently injurious to the integrity of the legal profession to justify further actions by the bar.246 Instances where the judge has not been criminally prosecuted or has engaged in minor impropriety are far more problematic. In such cases, the bar should have the discretion to decide whether the sanction recommended by the National Judicial Council is enough both to convey to the judge the futility of violating the law and to reassure the public, or whether further action is needed to preserve the honor of the legal profession.247

The National Judicial Council has been greeted with great public enthusiasm because of its well-publicized efforts to promote accountability to include conviction for a criminal offense which is incompatible with the status of a legal practitioner).

245. Some jurisdictions allow the lawyers’ disciplinary mechanism to sanction a lawyer for acts committed while acting in a judicial capacity. See, for example, In re McGarry, 44 N.E.2d 7, 12 (Ill. 1942), where the Illinois Supreme Court stated, “An attorney at law while holding the office of judge may be disciplined for acts of immorality, dishonesty, fraud or crime and his licence taken away, and the fact of his holding a judicial office at the time does not render him immune from punishment.” See also State ex rel. Okla. Bar Ass’n v. Sullivan, 596 P.2d 864, 869 (Okla. 1979) (finding that a lawyer can be disciplined for acts committed in his official capacity only if “such acts involve moral turpitude, of a fraudulent, criminal or dishonest character”).

246. In re Abuah, [1962] 1 ALL N.L.R. 279, 283 (Nigeria). The Nigerian Supreme Court held that conviction for a criminal offense prima facie makes a person unfit to continue to practice law. Id. See also In re Seaman, 627 A.2d 106, 121 (N.J. 1993) (citations omitted) (describing the role of sanctions in maintaining judicial independence).

247. The standard articulated by the Nigerian Supreme Court in In re Abuah may provide some guidance in such cases: “We think it is plain and it is commonsense that the Court is not bound to strike a man off the rolls unless it is satisfied that the criminal offence of which he has been convicted is of such a nature as to make him unfit to practice without loss of self-respect, or whether one can still consider him a fit and proper person to be entrusted with the grave responsibilities which are demanded of a member of the profession.” In re Abuah, [1962] 1 ALL N.L.R. 279, 283 (Nigeria).
within the judiciary. In recent times, the National Judicial Council has aggressively investigated instances of judicial impropriety and has not hesitated to recommend sanctions against erring judges in appropriate cases. Sanctioning judges is commendable in light of the social acceptance of corruption in Nigeria and the frequency of allegations of judicial corruption. The National Judicial Council’s insistence on probity and accountability has made a lasting impression on judges who now operate with a heightened awareness of their limitations.

Even for a society eager and perhaps desperate to tackle judicial corruption, sanctions should be handled with the utmost care. Sanctioning judges, even a mere reprimand generally considered to be the mildest sanction, significantly undermines the integrity and the moral standing of the affected judges. Citizens, lawyers and judges agree that judicial corruption should be aggressively tackled. At the same time, however,

248. A non-governmental organization, Igbo Integrity Foundation, commending the efforts of the National Judicial Council stated:

[T]hese sanctions meted by [the National Judicial Council] to judges who are bent on dragging the name of the judiciary to the mud, has demonstrated once again that, after all there is somebody out there who can still stand and defend the battered image of the judiciary in this country.

Chimaobi Nwaiwu, Group Lauds National Judicial Council’s Decision on Erring Judges, VANGUARD (Nig.), Apr. 7, 2004, available at Westlaw: Africa News database. Similarly, the Lawyers League for Human Rights commended the National Judicial Council for taking disciplinary actions against corrupt judges. In a press release, the group stated:

[T]he National Judicial Council’s decision was a step in the right direction which demonstrated that the judiciary has the capacity to deal with cases of allegations of misconduct against judicial officers with dispatch and that the judiciary is alive to its duty of self discipline to wield inherent powers to show the public that it is on top of any situation.

Akintude, supra note 231.

249. See Ughegbe, et al., supra note 84, at 1 (“Between 1999, when the National Judicial Council (NIC) came into being, and now, it has considered hundreds of petitions from litigants across the federation against judicial officers bordering on professional misconduct. The Council, to date, has disposed off [sic] at least 105 of the cases, recommending punishment where necessary.”).

250. See supra Part II.B.

251. See Nnaemeka-Agu, supra note 25.

252. See Ruffo v. Conseil de la Magistrature, [1995] S.C.R. 267, 341 (Can.) (Sopinka, J., dissenting) (“A reprimand is an extremely serious punishment for a judge. A reprimanded judge is a weakened judge: such a judge will find it difficult to perform judicial duties and will be faced with a loss of confidence on the part of the public and litigants.”).
they wish and expect that investigations of alleged judicial impropriety be conducted in a fair and respectful manner and take account of the need to maintain the independence of the judiciary.\textsuperscript{253}

A tension will always exist in the judiciary between accountability and independence.\textsuperscript{254} The challenge for Nigeria and indeed all constitutional democracies is “how to detect judicial corruption accurately, to investigate it fairly, and to eradicate it effectively without eroding an independent judiciary.”\textsuperscript{255} The National Judicial Council must proceed with consummate care to maintain the delicate balance between independence and accountability. The concept of judicial independence will be drained of meaning and relevance if judges are corrupt.\textsuperscript{256} On no account should judicial independence operate to bar the National Judicial Council from investigating genuine and credible allegations of impropriety.\textsuperscript{257} Aggressive enforcement of judicial standards is necessary not only to ensure probity, but also to promote public confidence in the judicial process.\textsuperscript{258} On the other hand, the need for accountability should not be allowed to denigrate judicial independence and the capacity of judges to discharge their functions without fear or favor. The National Judicial Council must maintain a delicate balance between enforcing disciplinary standards so

\begin{thebibliography}{99}
\bibitem{253} Long, \textit{supra} note 60, at 5 (“Judicial independence and judicial accountability are the twin goals of the judiciary.”).
\bibitem{255} Wallace, \textit{supra} note 254, at 344.
\bibitem{256} See id. at 345 (noting that independence will be weak if corrupt behavior is prevalent); see also Jon Mills, \textit{Principles for Constitutions and Institutions in Promoting the Rule of Law}, 16 \textit{Fla. Int’l L.} 115, 127 (2003) (“[C]orruption is a threat to judicial independence because it creates a suspect relationship between the litigant’s court and the litigant, which results in final decisions based on considerations other than proper application of legal principles.”).
\bibitem{258} \textit{See In re} Schenck, 870 P.2d 185, 207 (Or. 1994).
\end{thebibliography}
that judges do not violate their judicial oath and allowing judges sufficient autonomy and independence.

Walking the tight rope between accountability and independence demands that the National Judicial Council refrain from second-guessing judges and reading unnecessary meaning into wrong decisions. There exists, however, the fear in some quarters that the National Judicial Council, in its enthusiasm to respond to public demands for judicial probity, may act in ways that compromise judicial independence and stifle creativity. Some judges worry that the Council may mistake misunderstanding of the law for corruption. The National Judicial Council must be careful not to equate misreading of the law with corruption. The nature of the adjudication process is that judges sometimes reach wrong conclusions or misinterpret the law. Erroneous or incorrect decisions are not necessarily the result of corruption and should not form the basis for sanctions by the Council. Judges should always be free to state their good faith understanding of the law without fear of sanctions or reper-

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259. As part of the research for this project, I interviewed some judges across Nigeria who for understandable reasons did not want their identities to be revealed.

260. According to one of the judges I interviewed “that is why we have appeal courts. The National Judicial Council should not involve itself in matters that are best left to the appeal courts to resolve. The fact that a judge made a decision other judges would have made differently should not be prima facie evidence of corruption or abuse of office.” Some of the judges I interviewed cite the case of Justice Solomon Hun Ponu who was dragged before the National Judicial Council for prematurely signing a warrant of possession before the expiration of the three day statutory period. No allegation of impropriety was leveled against the judge but the complainants preferred to report the judge to the National Judicial Council. The judge ultimately resigned from the bench after a protracted investigation by the National Judicial Council, apparently to save himself from further embarrassment.

261. Cynthia Gray, The Line Between Legal Errors and Judicial Misconduct: Balancing Judicial Independence and Accountability, 32 Hofstra L. Rev. 1245, 1246–47 (2004) (“[I]t is not unethical to be imperfect, and it would be unfair to sanction a judge for not being infallible while making hundreds of decisions often under pressure.”).

262. I do not argue that errors of judgment should never be the basis for sanctions against judges. Persistent errors and errors motivated by bad faith may very well be a violation of the Code of Conduct, which enjoins judicial officers to “respect and comply with the laws of the land . . . .” See Code of Conduct for Judicial Officers R. 1 (1998) (Nigeria), http://www.nigeria-law.org/CodeOfConductForJudicialOfficers.htm. See also In Re Quirk, 705 So. 2d 172, 180–81 (La. 1997) (“[A] judge may be found to have violated the Code of Judicial Conduct by a legal ruling or action made contrary to clear and determined law about which there is no confusion or question as to its interpretation and where this legal error was egregious, made in bad faith, or made as part of a pattern or practice of legal error.”). For an examination of cases where decisional errors were held to constitute judicial misconduct, see generally Gray, supra note 261.
cussions. The prospect of dragging judges before the National Judicial Council for decisional errors will undermine judicial independence and drive judges to become timid and less creative in their reasoning. Er-
roneous or incorrect decisions are typically corrected by appeals. Disciplinary mechanisms should be limited to violations of the Code of Conduct for Judicial Officers and criminal offenses. The “judicial disci-
plinary process should not be used as a substitute for appeal.” The National Judicial Council must be careful not to allow unsatisfied litigants and mischievous lawyers to use the judicial disciplinary process to harass and intimidate judges. Judges may be loathe to engage in creative judging for fear of being accused of corruption and hence susceptible to career ending sanctions and the accompanying public disgrace and hu-
miliation.

263. Lubet, supra note 257, at 59 (arguing that “judicial independence is most gravely threatened when judges face sanctions . . . based on the merits of a ruling”).
264. KATE MALLESON, THE NEW JUDICIARY: THE EFFECTS OF EXPANSION AND ACTIVISM 39 (1999) (“The appeal process is an internal mechanism by which judges review the decisions of other judges. Its purpose is to maintain consistency and accuracy in the law, both substantive and procedural. It does not incorporate any element of external accountability which could link the judiciary to the electoral process and applies only to errors which are determined by the courts themselves to be appealable.”).
265. See Nnaemeka-Agu, supra note 25 (discussing the disciplinary activities of the Judicial Council).
266. JEFFREY M. SHARMAN, INTER-AMERICAN DEVELOPMENT BANK, SUSTAINABLE DEVELOPMENT DEPARTMENT STATE, GOVERNANCE AND CIVIL SOCIETY DIVISION JUDICIAL REFORM ROUNDTABLE II, JUDICIAL ETHICS: INDEPENDENCE, IMPARTIALITY, AND INTEGRITY 8–9 (May 19–22, 1996), http://www.idlo.int/texts/IDLO/mis6379.pdf (“The preservation of judicial independence requires that a judge not be subject to disciplinary action under the Code merely because the judge may have made an incorrect ruling. An independent judge is one who is able to rule according to his or her conscience without fear of jeopardy or sanction. So long as judicial rulings are made in good faith and in an effort to follow the law, as the judge understands it, the usual safeguard against legal error is appellate review.”). See also Randy J. Holland & Cynthia Gray, Judicial Discipline: Independence with Accountability, 5 WIDENER L. SYMP. J. 117, 129 (2000) (“an erroneous legal ruling that is made in good faith is not unethical judicial conduct; correcting legal errors is the role of the appellate court, not the state judicial conduct organizations.”). The admonition of the United States Supreme Court in Pierson v. Ray, should find support in Nigeria: “[A judge’s] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision making, but to intimidation.” Pierson v. Ray, 386 U.S. 547, 554 (1967).
267. See Lubet, supra note 257 (arguing that judicial independence may be compromised by fear of decisional sanctions).
The best way to shield judges from baseless allegations and the attendant obloquy and social stigma is for the National Judicial Council to conduct initial investigations into allegations of impropriety without publicly disclosing either the target of the investigation or the allegations. The need for confidentiality during the investigatory stages is especially important to protect all the participants including judges and complainants, as well as the judicial system as a whole, from unnecessary obloquy should the allegations turn out to be without merit. The publicity that typically accompanies accusations of judicial impropriety makes it difficult for a judge who goes through the disciplinary process to regain his integrity and respect in society.

Discussions with some judges and senior members of the bar reveal that some of the allegations against judges are baseless, filed in most

268. Disciplinary proceedings against judicial officers in most states in the United States remain confidential during the initial stages, especially during the screening and investigatory stages. See Keith, supra note 45, at 1401 ("[M]ost states recognize that some level of confidentiality in the process of investigating judicial misconduct protects not only the participants—complainants and judges alike—but the judicial system as well.").

269. Bryan E. Keyt, Reconciling the Need for Confidentiality in Judicial Disciplinary Proceeding with the First Amendment: A Justification Based Analysis, 7 Geo. J. Legal Ethics 959, 966 (1994) ("[T]he primary argument asserted in support of confidentiality protection, at least through stage one of the proceedings, is the desire to protect the judiciary from frivolous and unfounded complaints that may damage the reputation and independence of the judicial branch."); Brian R. Pitney, Note, Unlocking the Chamber Door: Limiting Confidentiality in Proceedings Before the Virginia Judicial Inquiry and Review Commission, U. Rich. L. Rev. 367, 373 (1992) (suggesting that confidentiality is necessary "to prevent self-serving complaints from harassing judges with unfounded or vexatious complaints"). The rationale for maintaining confidentiality in judicial disciplinary proceedings articulated by the United States Supreme Court will find support in Nigeria:

The substantial uniformity of the existing state plans suggests that confidentiality is perceived as tending to insure the ultimate effectiveness of the judicial review commissions. First, confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination. Second, at least until the time when the meritorious can be separated from the frivolous complaints, the confidentiality of the proceedings protects judges from the injury which might result from publication of unexamined and unwarranted complaints. And finally, it is argued, confidence in the judiciary as an institution is maintained by avoiding premature announcement of groundless claims of judicial misconduct or disability since it can be assumed that some frivolous complaints will be made against judicial officers who rarely can satisfy all contending litigants.
cases to harass, discredit and intimidate judicial officers.\textsuperscript{270} The National Judicial Council must make conscious efforts to screen out baseless allegations and spare judges the anxiety and humiliation of defending themselves against unfounded allegations. Maintaining privacy and confidentiality at the initial stages will ensure that judges are not smeared by baseless and false allegations. If the National Judicial Council finds a complaint against a judicial officer to be baseless and decides to dismiss the case, it should only communicate its findings to the interested parties, i.e., the complainants and the target of the investigation. The complaint, including all the allegations and the correspondence between the Council and the parties, should remain confidential and must not be disclosed to the public. Allegations and the identity of the target of investigation should only be made public if the National Judicial Council finds that a \textit{prima facie} case exists to warrant launching a full-scale inquiry.\textsuperscript{271}

\section*{C. Continuing Judicial Education}

For a fairly long time, continuing judicial education was not considered a priority for judges in Nigeria.\textsuperscript{272} New judges did not have orientation or training programs and older judges embarked on educational activities without any meaningful assistance from the state.\textsuperscript{273} It was assumed that their background either as practicing lawyers or magistrates adequately prepared them to serve as judges.\textsuperscript{274} This assumption over the years has

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\textsuperscript{270} This was disclosed to me during a private interview with a retired Justice of the Court of Appeal and a retired Justice of the Supreme Court who also served as a member of the National Judicial Council.

\textsuperscript{271} In most states in America, judicial proceedings are made public after the filing of a formal charge. See Cynthia Gray, \textit{Handbook for Members of State Judicial Conduct Commission} 71 (1999).

\textsuperscript{272} For a discussion of the events that culminated in the establishment of the National Judicial Institute, see Nat’l Jud. Inst., \textit{From Continuing Education to a National Judicial Institute} (1993).

\textsuperscript{273} Justice Mohammed Bello, then Chief Justice of Nigeria, stated:

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While in the past, members of the Judiciary, particularly judicial officers have pursued their self-development unaided by government, it is time, in our view, in the interest of the Judiciary . . . [to] provide proper forum for the intellectual development necessary for the proper administration of justice in this country.
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\textsuperscript{274} See Malleson, \textit{supra} note 264, at 180 n.3 (quoting Professor Zander: “[T]he assumption is that by the time a person is appointed as a judge he has knocked around the
proven unrealistic, and even fallacious. New and even experienced judges often find themselves resolving issues and matters that are completely new and foreign to their areas of expertise.\textsuperscript{275} The complexity of legal controversies and the passage of new laws present challenges that judges may not be well equipped to handle without the benefit of education programs.\textsuperscript{276} Moreover, judges recruited from the legal academy without significant experience in legal practice need continuing judicial education to familiarize themselves with the practice and procedure of the judiciary.\textsuperscript{277}

\textsuperscript{275} Making a case for the need for continuing judicial education, Jeffery Sharman stated:

\begin{quote}
It is necessary for both new and experienced judges to study substantive legal topics . . . First, it is important to keep abreast of recent developments in the law, and secondly, it is needed to master areas of the law in which they have little or no experience. The judge who has spent most of his or her previous career as a lawyer may have little or virtually no knowledge of many legal matters which will have to be faced as a judge . . . . Thus, there is a need—and a continuing one at that—on the part of judges to learn about substantive legal topics . . . . While judges can be expected to have studied the rules of evidence, civil procedure and criminal procedure as students in law school, they may have had little practical experience with those matters in their years as attorneys. And the vast majority of persons appointed or elected to be judges have not previously studied judicial administration or judicial ethics. So, there is a strong need to teach these subjects as part of judicial education programs.
\end{quote}


\textsuperscript{276} Retired Supreme Court Justice Oputa stated:

\begin{quote}
[T]he judge has an obligation to improve his competence in the performance of his duties by improving his intellectual ability and widening his knowledge, ability and experience of people and of the law. He should know the principles of the law which he applies and should know the Rules of Procedure in criminal and civil causes and matters. A virile and learned Bar has nothing but concealed contempt for an incompetent judge, so also the public at large. Our judges should, therefore, keep themselves up to date by continuous reading and be kept up to date by a well scheduled program of Continuing Legal Education.
\end{quote}

\cite{Oputa:2001:100}, at 203.

\textsuperscript{277} Judges in Nigeria are recruited mostly from the practicing bar and the magistracy. \textit{See} All Nigeria Judges' Conference 2001, \textit{supra} note 3, at xlii. Justice M.A. Ope Agbe, the then Administrator of the National Judicial Institute explained the rationale behind continuing education program for judges: "[T]hese judicial officers are usually appointed from private legal practitioners, lawyers in the ministries of justice, academi-
It is widely accepted by scholars and jurists that continuing judicial education is vital to the development of a professional, honest and independent judiciary. In 1991, Nigeria joined the ranks of countries that provide formal continuing legal education tailored specifically to address the educational needs of the judiciary by establishing the National Judicial Institute. The National Judicial Institute consists of members drawn mainly from retired judges, mostly of the Supreme Court and the Court of Appeal. The functions and objectives of the National Judicial Institute are to:

[C]onduct courses for all categories of judicial officers and their supporting staff with a view to expanding and improving their overall knowledge and performance in their different sections of service;

[P]rovide continuing education for all categories of judicial officers by undertaking, organizing, conducting and facilitating study courses, lectures, seminars, workshops, conferences, and other programs related to judicial education.

The National Judicial Institute organizes orientation programs for newly appointed judges and provides periodic seminars, workshops and conferences throughout the country. The educational programs cover a wide range of issues considered important for judges. The proceed-

278. J. Clifford Wallace, Globalization of Judicial Education, 28 Yale J. Int’l L. 355, 356 (2003) (“Judicial education and training programs are of vital importance in making the judiciaries effective and in providing the structures for achieving the rule of law.”). In some states in the United States of America, continuing education for judges is mandatory. For example, in Colorado, state judges must complete a required number of continuing legal education hours within a three year period. Colo. R. Civ. P. 260.2(1) (requiring all state judges to complete 45 units of CLE during each three year period).


280. Id. § 2(3).

281. Id. § 3(2)(a), (b).


283. For example, topics presented at orientation courses for newly appointed judges include constitutional and administrative law, civil and criminal procedure, approach to and style of judgment writing, evidence, judicial ethics and concepts of justice. Nat’l Jud. Inst., supra note 272, at 32.
ings, including papers and lectures, are published and widely circulated in Nigeria.284

Thus, the National Judicial Institute has significantly and positively affected the overall performance of the judiciary.285 By organizing seminars, conferences, and workshops, judges have been provided with an enhanced understanding and greater appreciation of the ethical and intellectual underpinnings of their positions.286 Scholarships and lectures produced under the aegis of the National Judicial Institute help judges to ponder and reflect on their position and the best way to approach their role as adjudicators.287

Another major focus of continuing legal education is judicial ethics.288 Prior to 1993, there was no formal code of ethics for judges.289 Judicial officers relied on their friends or their intuitive sense of right and wrong to resolve ethical dilemmas. Reliance on one’s intuitive sense of right and wrong can prove unsatisfactory. As lawyers assume new roles as judges, “it is even more important that the judge be guided by express standards of ethical conduct rather than rely upon his or her innate common sense.”290 The demand for express standards of ethical conduct for judges culminated in the adoption of a formal Code of Conduct for Judicial Officers in 1998.291 The Code emphatically states, “Violation of any of the rules contained in this Code shall constitute judicial misconduct or

284. See, e.g., ALL NIGERIA JUDGES’ CONFERENCE 2001, supra note 3; 1999 ALL NIGERIA JUDGES’ CONFERENCE, supra note 2.
285. For the achievements of the National Judicial Institute, see Tobi, supra note 209, at 33–34.
287. C.O. Okonkwo, A Historical Overview of Legal Education in Nigeria, in LEGAL EDUCATION FOR TWENTY-FIRST CENTURY NIGERIA 26 (I.A. Ayua & D.A. Guobadia eds., 2000) (“Already members of the Bench, especially newly appointed judges, seem to be deriving immense benefit from the activities of the Institute.”).
288. For a discussion on judicial ethics in Nigeria, see Oputa, supra note 276, at 193.
289. See AKBINBIYI, supra note 105, at 202.
misbehavior and may entail disciplinary action."\textsuperscript{292} The Code serves as a useful source of information and guidance on the scope and limits of permissible judicial behavior.\textsuperscript{293} It provides definite instructions on what constitutes judicial impropriety.\textsuperscript{294} A judge’s conduct, whether in or outside the courtroom, affects the integrity of the judicial process as well as public confidence in the system of justice. The Code, therefore, admonishes a judicial officer to “avoid impropriety and the appearance of impropriety in all his activities.”\textsuperscript{295} It further states that a judicial officer “should respect and comply with the laws of the land and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the Judiciary.”\textsuperscript{296} The Code covers off-the-bench as well as on-the-bench conduct of judicial officers. It offers guidance and suggestions to judicial officers on how to handle their adjudicative duties,\textsuperscript{297} administrative duties,\textsuperscript{298} avocational activities,\textsuperscript{299} civil and charitable activities\textsuperscript{300} and business and financial activities.\textsuperscript{301}

The moral fervor of the Code of judicial ethics can be reinforced by continuing judicial education programs.\textsuperscript{302} Through lectures, seminars

\begin{footnotes}
\footnote{292}{Id. Explanations (iii).}
\footnote{293}{Recent Developments: Developing Judicial Code of Ethics, 46 J. AFR. L. 103, 111 (2002). Extolling the adoption of judicial codes of ethics, the journal stated, “To help retain the sensitive balance between independence and accountability, it is becoming increasingly common for states to develop a code of judicial ethics. Such a document is extremely desirable as a means of establishing the parameters for public expectations and criticisms of judicial conduct.” Id.}
\footnote{294}{Mackay, supra note 290, at 10 (“[A] code of judicial ethics can provide a base for judges to assess their behavior. It can provide a map (be it ever so general) in a largely uncharted sea.”).}
\footnote{296}{Id. R. 1(1).}
\footnote{297}{Id. R. 2.}
\footnote{298}{Id. R. 2(b).}
\footnote{299}{Id. R. 3(a).}
\footnote{300}{Id. R. 3(b).}
\footnote{301}{Id. R. 3(e).}
\footnote{302}{The benefits of continuing judicial education were stated by Professor Markey, former Chief Judge of the Court of Appeals, Federal Circuit, and former Chair of the Advisory Committee of Code of Conduct of the Judicial Conference of the United States as follows:}

[S]eminars in judicial ethics would benefit judges in two ways. First, seminars would educate judges in the rules of judicial ethics and their application. Second, seminars would allow judges to exchange their thoughts on and experience with ethical issues. Education in the rules and their application would arm the
and publications, the National Judicial Institute seeks to educate, motivate and challenge judges to observe the ethical standards contained in the Code of Conduct for Judicial Officers. Without educational programs that continually stress judicial ethics, even the most aggressive disciplinary regime will not be enough to address judicial improprieties. For newly appointed judges, the rigors of adjusting to their new roles as judges will be significantly reduced by educational programs that sensitize judges to the ethical standards of the judiciary. Judges often need guidance to overcome the challenges posed by judging in a corrupt environment. The guidance needed to overcome the temptations faced by judges can come from training and education.

The activities of the National Judicial Institute, especially programs and seminars on judicial ethics, reflect a commendable appreciation of the need to focus on preventive and prophylactic measures that reduce incidents of judicial impropriety as opposed to the after-the-fact reactive responses that underlie the efforts of the National Judicial Council. Only by supplementing sanctions with educational programs that address the underlying causes of corruption will Nigeria achieve the desired goal of eliminating judicial corruption. It is therefore very important that the National Judicial Institute, acting in conjunction with the National Judicial Council, continue to provide guidance to judges on the scope and limits of acceptable judicial behavior and offer suggestions that will judges with knowledge of the rules and would make colleagues available as resources for judges who are faced with ethical issues.


303. Id.

304. Sanctions are often inadequate to deal with the underlying factors that lead to corruption. See Michael Kirby, Justice of the High Court of Australia, The St. James Ethics Centre, Living Ethics, Tackling Judicial Corruption—Globally, http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_stjames.htm (“[I]nternational treaties, supported by local laws, increasingly impose sanctions on those who set out to corrupt the vulnerable. [Transparency International] teaches that putting corrupt officials behind bars is not enough. The solutions must be systemic. The basic causes must be addressed.”).


306. The National Judicial Council only steps in after a judicial officer allegedly engages in judicial misconduct. See Nnaemeka-Agu, supra note 25.

307. See Gray & Zemans, supra note 305.
help judges resolve ethical dilemmas involved in presiding over trials in a developing society with slacking moral values.\textsuperscript{308} Besides instruction in ethics, the National Judicial Institute will help in equipping judges with the tools and education they need to effectively cope with judging in a rapidly developing and politically unstable country.\textsuperscript{309} New laws are frequently passed to assist in the transformation of the country. It will be very helpful if the judges who interpret these laws are exposed to continuing judicial education that will better equip them to handle the task.\textsuperscript{310} In addition, as litigation becomes increasingly complex and lawyers attain greater proficiency and sophistication as a result of technological advancements in society, it is essential that judges be trained to cope with or match the expertise of lawyers.\textsuperscript{311}

D. Independence of the Judiciary

The Nigerian judiciary continues to face problems due in large measure to the legacy of military rule. The military’s disdain for due process led to attempts to manipulate the judiciary and turn judges into pliable agents of state power.\textsuperscript{312} Years of manipulation of the judiciary culminated in a compromised judiciary that is unable to engage in dispassionate and impartial adjudication of disputes.\textsuperscript{313} Despite democratic transition, the damnable legacy of military rule still thwarts efforts to create a virile and independent judiciary. Though flagrant and brazen control of the judiciary reminiscent of the military era seems unlikely, the Nigerian

\begin{itemize}
\item \textsuperscript{308} See Markey, \textit{supra} note 302 (discussing the benefits of continuing judicial education to judges).
\item \textsuperscript{309} For a discussion of the role of judges in developing societies, see Oko, \textit{supra} note 192, at 625–29.
\item \textsuperscript{310} Sharmar, \textit{supra} note 266, § III.E.
\item \textsuperscript{311} Thomas M. Nickel, \textit{Judges Deserve Access to Educational Opportunities}, 49 FED. LIT. Nov.–Dec. 2002, at 56 (arguing that seminars that expose judges to cutting edge issues make for a robust and healthy judiciary).
\item \textsuperscript{312} Agbede, \textit{supra} note 146, at 144.
\item \textsuperscript{313} Agbede describes the effect the military regime has had on the judiciary:
\begin{quote}
Of all the excesses of the military regime the most intolerable is the undeclared control they exercise over the judiciary . . . . The sheer intimidating posture of the military regime (with unrestrained power) towards the judges who have to depend on the same regime for the enforcement of their judgment is itself disarming. Their behind-the-scene overtures can hardly be resisted by the average judge let alone their overt acts of intimidation.
\end{quote}
\end{itemize}
judiciary continues to confront government functionaries who are inveterately uneasy about the notion of an independent judiciary.  

A legal framework exists for the independence of the judiciary in Nigeria. Judges enjoy security of tenure and once appointed serve until they attain the retirement age. They are appointed through a process that is relatively immune from politics. The executive cannot initiate removal or disciplinary proceedings against judges. Also, the Constitution pro-

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314. Government officials view the judiciary as vital to their power base and therefore engage in all kinds of machinations to turn the judiciary into malleable instruments of state power. The dominant government attitude towards the judiciary was eloquently stated by Petter Langseth, a crime prevention officer with the United Nations Center for International Crime Prevention, “One has to understand the political resistance to judicial independence as the result of the unwillingness of the executive and legislature to let go of a court system frequently used as a tool to settle political scores or to consolidate political bases.” Petter Langseth, Empowering the Victims of Corruption Through Social Control Mechanisms 21, paper presented at IACC’s Meeting in Prague (Oct. 9, 2001), http://www.unodec.org/pdf/crime/gpacpublications/cicp17.pdf.


316. Justices of the Supreme Court and the Court of Appeal may retire at the age of sixty-five and shall cease to hold office when they attain the age of seventy. CONSTITUTION, art. 291(1) (1999) (Nigeria). Other judges may retire at sixty but must cease to hold office at sixty-five. Id. art. 291(2).

317. The Chief Justice of Nigeria and the Justices of the Supreme Court are appointed by the President on the recommendation of the National Judicial Council subject to confirmation by the Senate. Id. art. 231(1), (2). The President of the Court of Appeal is appointed by the President on the recommendation of the National Judicial Council subject to confirmation by the Senate. Id. art. 238(1). Other justices of the Court of Appeal are appointed by the President on the recommendation of the National Judicial Council. Id. art. 238(2). The Chief Judge of the Federal High Court is appointed by the President on the recommendation of the National Judicial Council subject to confirmation by the Senate. Id. art. 250(1). At the state level, the Chief Judge is appointed by the Governor on the recommendation of the National Judicial Council subject to confirmation by the House of Assembly of the State. Id. art. 271(1). Other state high court judges are appointed by the state governors on the recommendation of the National Judicial Council. Id. art. 271(2).

318. Under the Constitution of Nigeria:
vides that remuneration and salaries payable to judges and their conditions of service shall not be altered to their disadvantage.319

In practice, however, judicial independence remains extremely fragile, implacably assaulted by politicians and corrupt judges. Though the Nigerian Constitution maintains a clear separation of powers between the executive and the judiciary, it is illusory to assume that politicians will refrain from interfering with the judiciary simply because of the Constitution. The experience in Nigeria reveals that intolerance, contempt for the judiciary and the desire to control and manipulate the judiciary continually swirl within the executive.320 Elected officials and politicians often push or prod judges to forfeit their impartiality and independence.321 The judiciary, on its part, has some judges who either lack or fail to demon-

A judicial officer shall not be removed from his office or appointment before his age of retirement except in the following circumstances—

(a) in the case of—

(i) Chief Justice of Nigeria, President of the Court of Appeal, Chief Judge of the Federal High Court, Chief Judge of the High Court of the Federal Capital Territory, Abuja, Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and President, Customary Court of Appeal of the Federal Capital Territory, Abuja, by the President acting on an address supported by two-thirds majority of the Senate.

(ii) Chief Judge of a State, Grand Kadi of a Sharia Court of Appeal or President of a Customary Court of Appeal of a State, by the Governor acting on an address supported by two-thirds majority of the House of Assembly of the State, [sic] praying that he be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct;

(b) in any case, other than those to which paragraph (a) of this subsection applies, by the President or, as the case may be, the Governor acting on the recommendation of the National Judicial Council that the judicial officer be so removed for his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct.

Id. art. 292(1).

319. Constitution, art. 84(3)–(4) (1999) (Nigeria). In addition, judges are guaranteed a pension upon retirement. Id. art. 291(3)(c).

320. Government officials exploit the appointive powers and control over the funds allocated to the judiciary to prod judges to bow to their wishes. See NWABUEZE, supra note 133.

321. Id.
strate the integrity needed to resist pressures and overtures on them to deviate from acceptable judicial behavior.322 Nigerians have come to realize that it is the attitude of the executive and its willingness to respect the integrity of the judicial process and refrain from interfering with the judiciary that nurtures the independence of the judiciary rather than constitutional provisions and self-serving declarations by politicians.323 In a system where judges are fearful of the executive, it is futile to expect them to exercise the level of independence needed for them to engage in impartial and dispassionate resolution of conflicts.324 The climate of intimidation, manipulation and control of the judiciary by the executive often forces judges to engage in a cost-benefit analysis with potentially disastrous consequences for the integrity and independence of the judiciary.325 Judges have to choose between commitment to justice and risking the ire of the executive or demonstrating their fealty to the executive. Most judges have succumbed to the notion


The universal principle of separation of powers between the three arms of government, namely: the executive, legislature and the judiciary, appears not to be in operation in Nigeria at the federal and state levels, particularly with reference to the judiciary. The judiciary in Nigeria is tied to the apron string of the executive, both at the federal and state levels and this erodes the independence of the judiciary. In other words, the judiciary in Nigeria is so dependent on the executive that it is regarded as an extension of the executive.


323. Independence of the judiciary thrives in established democracies principally because of the democratic culture and temperament of elected officials who encourage the judiciary to function as intended without interference or manipulation. See Hsu, supra note 59, at 282.


325. Geoffrey P. Miller, Bad Judges, 83 TEX. L. REV. 431, 457 (2004) (“If judges are not independent, they will be subject to influence that could distort the outcome of cases, skew the development of substantive law, and detract from public confidence in the judicial system.”).
that career development depends on how they rule, especially in high profile cases involving the government. Judges cast in this mold prefer to demonstrate their loyalty to the executive, sacrificing the dictates of justice in an attempt to appease the executive, and thus, maintain their viability in the system. This explains the lack of independence despite the constitutional provisions designed to secure the independence of the judiciary.

Until Nigeria produces an independent, competent and honest judiciary, securing fair trial rights will remain largely unattainable, perhaps illusory. The imperatives of judicial independence dictate that judges be “protected in their decision-making from interference by the state and all other influences that may affect their impartiality.” Judicial independence does not exist solely for the protection of judges; it is necessary for the good of the public and the system of government.

326. This was disclosed to me during an interview with a retired Justice of the Court of Appeal.
327. See Agbede, supra note 146, at 143.
328. In 1989, Justice Mohammed Uwais, then Chief Justice of Nigeria, in a paper entitled The Structure and Position of the Judiciary, admonished judges to assert their independence and refrain from kowtowing to the executive. He stated:

...the heads of the Judiciary and the Judges themselves are too timid to exercise their new found independence. They sheepishly follow whatever the Executive decide for the Civil Service as if the Judiciary is still part of the Civil Service. There is no doubt that the time has come when the Judiciary should be seen to exert its administrative independence... The burden is on the shoulders of the Executive heads of the Judiciary and indeed the Judges collectively.

329. See Jerome J. Shestack, Commentary, The Risks to Judicial Independence, 84 A.B.A. J. 8 (1998) (“An independent judiciary is the measure of an effective separation of powers in our democracy. It stands as the ultimate protector of our constitutional rights and liberties against the power of the executive or the will of the legislature. It is the foundation that underlies a rule of law.”); Michael G. Collins, Judicial Independence and Scope of Article III—A View From the Federalist, 38 U. RICH. L. REV. 675, 687 (2004) (“The dual functions of judicial independence as an aid in securing enforcement of the Constitution on the one hand, and the impartial enforcement of ordinary rights on the other, is a frequent theme of The Federalist No. 78.”).
331. There exists a broad consensus among jurists and scholars that judicial independence is vital to the efficiency and effectiveness of the judiciary. Janet Stidman Eveleth has written:

Judicial independence is the cornerstone of our rule of law and it is also significant for citizens. It means that when any citizen appears before a court of law,
will never have confidence in a judiciary that is either manipulated by or afraid of the executive.  

Judicial independence insulates judges from external pressures and allows “a judicial officer in exercising the authority vested in him . . . to act upon his own convictions, without apprehension of personal consequences to himself.” For judicial independence to deepen, more efforts should be expended in helping elected officials and the general public to understand that judicial independence is not just for the benefit of individual judges. The judiciary will never be truly independent if elected

his or her case will be decided on its merits. Impartial judges, governed only by our rule of law, apply the law fairly to all citizens and shield them from politicians, government, businesses and each other. They protect the individual rights of all Americans and ensure they are treated equally and fairly. An independent judiciary enables citizens to enjoy liberties and freedoms guaranteed under the Constitution.


Judicial independence is valued because it serves important societal goals—it is a means to secure those goals. One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.


332. Gleeson, *supra* note 55. Stressing the need for an independent judiciary, U.S. Supreme Court Justice Stephen Breyer stated:

The good that proper adjudication can do for the justice and stability of a country is only attainable, however, if judges actually decide according to law, and are perceived by everyone around them to be deciding according to law, rather than according to their own whim or caprice or in compliance with the will of powerful political actors. Judicial independence provides the organizing concept within which we think about and develop those institutional assurances that allow judges to fulfill this important social role.


334. In the final analysis, judicial independence inures to the benefit of the society, especially those who lack the resources to protect their rights. See W.F. Rylaarsdam,
officials do not check the impulse to manipulate and intimidate judges.\textsuperscript{335} Elected officials’ commitment to the independence of the judiciary must go beyond mere symbolism. Political elites cannot continue to masquerade as defenders of judicial independence while striving fervently to interfere with, intimidate and manipulate the judiciary. Lawyers must convince the often antagonistic executives that hopes of deepening democracy cannot be realized without a strong and independent judiciary. Once elected officials are persuaded to appreciate the role and place of the judiciary and how the judiciary can bring about stability, they will be more likely to allow the judiciary to function without interference. Also, the public will join the struggle for judicial independence once they are reassured that the prospects of securing fair trial rights lies in the quality of the judiciary.\textsuperscript{336}

\textbf{E. Funding}

Prospects of establishing an independent judiciary will be further endangered if judges depend on the goodwill of the executive branch for their funding.\textsuperscript{337} It is a continuing source of frustration to judges that money allocated to the judiciary is controlled by the executive.\textsuperscript{338} Ex-

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\textit{Judicial Independence—A Value Worth Protecting,} 66 S. CAL. L. REV. 1653, 1655 (1993) ("Judicial independence is hardly needed to protect the interest of the powerful, the politically well-connected, or the interests of the majority. Like free speech, its only value lies in protecting the unpopular, the disliked, and the others outside the mainstream.").
\end{flushleft}

\textsuperscript{335} No one could seriously argue with the Chief Justice of Nigeria who stated that "[t]he independence of the judiciary can only be sustained and guaranteed when there is no interference by the other arms of the government or their agencies in the discharge of its duties." Uwais, \textit{supra} note 3, at xxxi.

\textsuperscript{336} Shirley S. Abrahamson, \textit{Courtroom With a View: Building Judicial Independence With Public Participation}, 8 WILLAMETTE J. INT’L L. & DISP. RESOL. 13, 24 (2000) ("The public’s willingness to support and fight for judicial independence depends on the public’s understanding of, and trust and confidence in, the judicial system. A public that does not trust its judges to exercise even-handed judgment will look upon judicial independence as a problem to be eradicated.").

\textsuperscript{337} See Aduba, \textit{supra} note 34, at 404 (noting that funding has been one of the most difficult problems for the judiciary).

\textsuperscript{338} Chief Justice Uwais, in an address to the All Nigeria Judges’ Conference, emphasized the need to grant financial autonomy to the judiciary. He stated:

The funding of the judiciary is crucial and is a most important index for assessing the independence of the judiciary. Although the 1999 Constitution of the Federal Republic of Nigeria has made special provisions towards funding the Nigerian judiciary, those provisions are not free from ambiguity; consequently, the application of those provisions by various State Executives is reportedly half-hearted.
pressing the frustration widely shared by most judges in Nigeria, retired
President of the Court of Appeal, Justice Akanbi stated, “It is certainly
no use speaking of the judiciary as the third arm of government if that
arm has wittingly or unwittingly been consigned to the role of beggar,
living at the mercy of the other two powerful arms.” Premised on the
need to liberate the judiciary from the clutches of the executive, the calls
for granting the judiciary control over its statutorily allocated funds have
become louder and more persistent over the years.

The Constitution conferred on the judiciary the task of acting as a
check upon abuse of power and protecting citizens’ rights against gov-
ernmental encroachment. It is nonsensical for judges to depend on the
goodwill of the executive for the funds needed to effectively discharge
their functions. A funding procedure that leaves the judiciary at the
mercy of the executive hinders the judiciary’s effectiveness and capacity
to resist executive pressures. Potential for interference is great whenever
the executive controls the funds statutorily allocated to the judici-
ary. Both the appearance and reality of independence demand that the
judiciary should have complete control over its funds.

The Constitution Drafting Committee that produced the 1979 Constitu-
tion included a provision in the draft constitution that lessened the judici-
ary’s dependence on the executive for its funding. Section 74(4) of the
draft constitution provided that:

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Uwais, supra note 3, at xxxi.
339. Aduba, supra note 34, at 405.
1988) 55 (1998) (“Many factors contribute to or detract from the achievement of judicial
independence. Very frequently, various State Chief Judges appeal to the Executive to
make sufficient funds available in order to make the judiciary a viable arm of Govern-
ment. Connected with this is the call that the funding of the judiciary should be separately
provided for in the Constitution, in order to enhance their independence. In other words,
Executive control of judicial purse strings inhibits the independence of the latter.”).
341. CONSTITUTION, art. 6 (1999) (Nigeria).
342. CEELI, supra note 34, § 4, pt. F (“Constitutional or legislative provisions that the
judiciary is independent become suspect when the control of the resources essential to
operation of the judiciary are vested in the executive arm of the government.”).
343. SAGAY, supra note 340, at 55.
344. See Aduba, supra note 34, at 404.
345. Chief Justice Uwais, in an address to the All Nigeria Judges of the Lower Court
Conference stated that “[j]udicial independence entails not only lack of external interfer-
ence with the judicial function, but also financial autonomy.” Okon Bassey, Judicial
Independence, Key to Good Governance, Says Uwais, THIS DAY (Nig.), Nov. 22, 2004.
No money shall be withdrawn from the Consolidated Revenue Fund or any other public fund of the Federation except in the manner prescribed by the National Assembly.

Provided that moneys in respect of the Capital and Recurrent Expenditure of the Judicial Service of the Federation charged upon the Consolidated Revenue Fund of the Federation shall be withdrawn from the Fund and paid into a special account of the Federation under the control of the judiciary of the Federation.346

This provision was, however, deleted by the then Supreme Military Council before signing the Constitution into law.347 Deleting this provision served and still serves as a further indication of the attitude of the executive and elected politicians toward the judiciary.348 It may well be time for Nigeria to consider a constitutional amendment to incorporate the recommendations of the Constitution Drafting Committee. Several scholars and commentators have called for granting the judiciary control over its funds.349 History and logic support a constitutional amendment that will liberate the judiciary from executives who in the past have shown deliberate indifference to or lack of concern for the plight of the judiciary.350 It is both appropriate and desirable to allow the judiciary to


347. Id.


349. Agbede, supra note 146, at 143 (“In order to be able to perform its role as an unbiased umpire in cases involving the interest of the government, the judiciary should in no way be subordinate to any of the other two organs. It is therefore necessary that the judiciary should be made financially independent of the executive.”); SAGAY, supra note 340, at 55; Ajakaiye, supra note 182, at 136.

350. See Constance A.R. Momoh, Commentary, in ALL NIGERIA JUDGES’ CONFERENCE 2001, supra note 3, at 84. Justice Constance A.R. Momoh, Chief Judge of Edo State, aptly described the effect of judiciary’s dependence on the other arms of government for its funding:

Over the years it has become evidently clear that the power of control of the nation’s purse jointly exercised by the other two arms of government has continued to be used to the detriment of the judiciary.

The poor funding of the judiciary, both in respect of capital and recurrent expenditure year in year out, bears eloquent testimony to this. The result is that unlike what generally operates in the other two arms of government, the work
control its funds. Judges will be in a better position to resist attempts by the executive to influence them if they control their own funds.

The dictates of judicial independence and the need to protect judges from executive pressures demand that the judiciary have control over its funds. Granting the judiciary control over its funds will have enormous implications both for the independence and the operational efficiency of the judiciary. Proper funding will enable the judiciary to address structural and institutional problems that cause delay. Infrastructural problems, including the absence of stenographers and modern tools like computers can all be addressed with adequate funding. Control over funds will make it possible for the judiciary to channel funds where they are most needed, especially in the areas of salaries and working conditions. Funding is especially needed to improve the salaries of judges to avoid the urge to augment their incomes through corrupt means.

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environment of judicial personnel, especially the judges, their living environments and remunerations remain very poor.

Id. at 88.

351. It may well be time for the policy makers in Nigeria to give sincere attention to the recommendations of the Constitutional Conference empanelled in 1994 by the late Dictator Abacha. On the funding of the judiciary, the Conference stated:

If the Judiciary is to be truly independent, it must have absolute control of its finances. Funding of the court system must be made independent of the Executive. The Judiciary should prepare its own annual budget and defend same. The approved budgetary allocation of the judiciary should be disbursed directly to the Judiciary as in the case of Local Governments. The Judiciary should have its own accounting administration with the Director-General as the Chief Accounting Officer who should be responsible directly to the Chief Justice or Head of Superior Courts of Record as the case may be.


352. Justice M.A. Ope Agbe, then Administrator of the National Judicial Institute, highlighted the deplorable state of the judiciary and the need to adequately fund the judiciary. Welcome Address by the Honourable Administrator, National Judicial Institute, in ALL NIGERIA JUDGES’ CONFERENCE 2001, supra note 3, at xli, xlii–xliii (“In the course of our going around organizing workshops, we came across a total lack of the tools to enable judicial officers do their work . . . . [i]t must however be stated loud and clear that without adequate funding, this arm of government would be handicapped in the quest to attain good government in the country.”).

353. See supra Part II.D for a discussion of the institutional problems that prevent the judiciary from efficiently adjudicating disputes.

354. See id.

355. Wallace, supra note 254, at 350 (remarking that the likelihood of corruption is increased when judges are not adequately compensated by the state).
ries make it difficult for judges to function efficiently. Some judges, become susceptible to corruption as they seek other means to augment their meager incomes.356 Upright judges are often preoccupied with balancing financial needs, thus compromising the clarity of mind necessary to make for effective legal reasoning.357

IV. CONCLUSION

Judicial corruption is a damnable blight on Nigeria’s justice system. A judiciary that cannot fairly, efficiently and transparently administer justice and that allows money and influence to determine the outcome of a judicial proceeding is atrocious and offensive to Nigeria’s values and democratic order. More importantly, judicial corruption has the obvious consequence of alienating the public from, and reducing their confidence in, the justice system, and indeed, the democratic process. I have shown in this paper that the judiciary must purge itself of corruption and reform its practices so that it can better discharge the eminently important task of administering justice. I have also shown that the right mix of education and sanctions is necessary to recapture the judiciary’s institutional commitment to justice, integrity and professionalism. I suggested the transformation of existing programs and institutions to enable Nigeria to meet the demands and challenges of fair trial.358

To preserve the right to a fair trial, Nigeria must respond progressively and creatively to the problems of the judiciary, especially corruption and

356. See Olowofoyeku, supra note 322, at 63 (“It is of utmost importance for judicial independence that judges should be free from financial anxieties. This is because a judge who is subjected to financial anxieties through inadequate or insecure pay might be reduced into a state of servility to the authority responsible for his financial fortunes, or might succumb to pressures because of financial worries.”).
357. See Akanbi, supra note 94, at 46 (“The mind that administers justice must be free from financial embarrassment. He must be able to think straight, talk straight, walk straight to be able to deliver good judgment. All things being equal, a good judgment flows from a mind that is not bogged by the thought of where do I get my next meal or where do I get the money to pay my son’s school fees. Poor condition of service disturbs the mind. It is an obstacle to clear and positive thinking and consequently, an obstacle to justice according to law.”).
358. Fair trial rights will truly mean something if the judiciary recaptures its standing as fair and impartial umpires. Everyone who goes to court should, according to U.S. Supreme Court Justice Sandra Day O’Connor, “leave secure in the knowledge that justice is open, illuminated, and makes room for everyone, and that in this place facts are determined correctly, legal issues resolved fairly and wisely, and equal justice under law is rendered to all.” Sandra Day O’Connor, Courthouse Dedication: Justice O’Connor Reflects on Arizona’s Judiciary, 43 ARIZ. L. REV. 1, 7 (2001).
inadequate funding. The National Judicial Council is trying, with some success, to sanitize the judiciary and discipline erring judges.\textsuperscript{359} Because judicial corruption is deep-seated and pervasive, it cannot be eradicated immediately and easily. Too many Nigerians are immersed in the culture of corruption to allow quick and easy solutions. Combating judicial corruption requires the sustained efforts of all. Nigerians must find the resolve to confront an entrenched culture that encourages corruption and interference with the judicial process. Citizens, the ultimate victims of judicial corruption, who complain incessantly about judicial corruption, have a large stake in reforming the judiciary. Citizens can significantly aid the fight against judicial corruption if they refuse to participate in corrupt activities and report corrupt judges to the appropriate authorities.\textsuperscript{360} Efforts to reform the judiciary will not succeed unless the public and lawyers with relevant information report it.\textsuperscript{361} The National Judicial Council must redouble its efforts to educate the public on the scope and limits of acceptable judicial behavior. Promoting awareness of judicial conduct issues “will result in an increased level of integrity among the judiciary as well as an enhanced public appreciation of that integrity.”\textsuperscript{362} Lawyers should also explain to the public, and especially their clients, the rules and procedure for filing complaints against judicial officers.\textsuperscript{363} The legal profession’s role in combating judicial corruption will be significantly enhanced if the legal profession sanctions its members who engage in judicial corruption.\textsuperscript{364}

\textsuperscript{359} The National Judicial Council has conducted credible and transparent investigation in cases where the facts warrant an inquiry into the conduct of a judicial officer. Nnaemeka-Agu, \textit{supra} note 25, at 18.


\textsuperscript{361} The National Judicial Council only acts upon credible evidence of wrongdoing against a judge. See Nnaemeka-Agu, \textit{supra} note 25, at 18 (“The National Judicial Council does not go about fishing for offending Judicial officers. It must first receive a report of wrongdoing.”).

\textsuperscript{362} Keith, \textit{supra} note 45, at 1405.

\textsuperscript{363} Similar recommendations were made by the group of Chief Justices and other high ranking judges convened by the United Nations Center for International Crime Prevention and Transparency International. See Langseth, \textit{supra} note 70, at 13.

\textsuperscript{364} This is very important because lawyers are often accused of enabling judicial corruption. Justice Oyeyipo stated:

\begin{quote}
It is sad to observe that lawyers are invariably involved in cases of Judicial Corruption. Judicial corruption can hardly take place without the active partici-
Another problem highlighted in this paper is judicial independence and how best to preserve it. Regrettably, politicians exert considerable influence over the judiciary and often use their powers to prod judges to consent to their wishes. Honest judges find themselves hobbled by pressures from elected officials and party stalwarts and are thus prevented from engaging in dispassionate and impartial adjudication. Until judges are allowed to function without interference, the judicial process will remain an eminently unfair forum for conflict resolution. Politicians and elected officials must be encouraged, and if need be, challenged to repress the instinct to interfere with the judicial process. Here, I suggested the crafting of new policies and regulations that will grant financial autonomy to the judiciary and deprive the executive of the strong leverage it uses to manipulate judges.

Fair trial rights and indeed justice will be secured in the country if Nigeria aggressively attacks judicial corruption, appoints only competent and upright judges, refrains from interfering with the judiciary and provides the funds necessary to enable the judiciary to function effectively and efficiently. The reform proposals suggested in this paper, if honestly and properly implemented, will enable the Nigerian judiciary to recapture its integrity, professionalism and independence. Only then will Nigeria have a judiciary that can help citizens realize the true meaning and promises of fair trial rights guaranteed by the Constitution.365

pant [sic] of a lawyer in one way or the other. A bad lawyer is always too ready to serve as a conduit pipe through which money gets to a corrupt judge.

Oyeyipo, supra note 8, at 17–18.

365. Nigerians share President Obasanjo’s characterization of a dream judiciary in his speech to the 1999 All Nigeria Judges’ Conference: “The judiciary of our dream [sic] is that which is independent and free from all political, legislative, ethnic or religious pressures and manipulation.” Obasanjo, supra note 2, at xxxvii.
“ODIOUS DEBTS” VS. DEBT TRAP: A REALISTIC HELP?

Christoph G. Paulus*

I. INTRODUCTION

It seems there are not too many lawyers who have an understanding of or about the technical meaning of “odious debts.” Nevertheless, this highly dubious doctrine—if it is one, but for reasons of simplification it will be called a doctrine in what follows—has the potential of almost explosive power for many lender states in this world. Just a glance at the internet under this catchword makes clear where this power comes from. Literally dozens of NGOs claim that states like Iraq are debt-free—not because the lender states should display grace after liberation from Saddam Hussein, but because of legal consequence! “Odious debts” are understood as a legal institution which, by force of law, make certain debts automatically null and void.1

The doctrine of “odious debts” dates back little more than one hundred years. Because it has been topical only sporadically over this period, it is unclear whether or not it already has the precision or “marginal sharpness” that would be necessary if it were to be used as a legal instrument. This uncertainty, in turn, makes the term “odious debts” appear very versatile in the ways it can be used and instrumentalised. In particular, the value statement already inherent in the terminology tends to mislead one into exploiting this doctrine to attempt to render morally repugnant facts legally null and void. In view of these facts, it is the (thankless) task of the legal scholar to call for an exercise of caution in drawing conclusions of this sort (however understandable they may be in human terms), and to point out the distinction between law and morality,2 which is a hard-

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1. Thus, debt forgiveness is seen as an improper act of voluntary grace. If there is instead a legal automatism, there is no room for grace and reciprocal gratitude. For the “traditional” treatment of state debts and the possibility of their restructuring, see, for example, Fabio Marcelli, IL DEBITO ESTERO DEI PAESI IN VIA DI SVILUPPO NEL DIRITTO INTERNAZIONALE (2004); see also August Reinisch & Gerhard Hafner, STAATENSUKZESSION UND SCHULDENÜBERNAHME BEIM “ZERFALL” DER SOWJETUNION (1995).

won victory in legal history and which requires recognition by the legal community.

This exhortation naturally does not negate the option of developing legally practicable contours with the help of which certain debts can be termed “odious” and can accordingly be dealt with on a legal level. It is only an attempt to clarify the fact that moral indignation, however justified, cannot automatically produce the desired legal consequences by using a purportedly legal concept. For this, the term must be defined more precisely in legal terms. This paper will look at the extent to which this appears feasible at the present time.

II. HISTORY OF THE “ODIOUS DEBTS” CONCEPT

The phenomenon of efforts being made to seek a way of ending debt repayment at the state level looks back on a long history.3 The first recorded use of the concept of “odious debt” in this respect dates back to 1898 where it was cited by the United States of America.4 In the wake of the Spanish-American War, from which the United States emerged victorious, “odious debt” was taken as a justification for not repaying Cuba’s debts to Spain, which the United States, as the de facto ruling power over Cuba, should normally have honoured.5 The United States claimed that these debts were “odious” because the money lent to Cuba by Spain, which then had to be repaid, would have served to consolidate and perpetuate the oppression of the Cuban people.6

The term resurfaced about a quarter century later in Costa Rica, triggered by an act of Parliament and the subsequent arbitration proceedings.7 In 1919, Costa Rica managed to end the dictatorship of Frederico Tinoco and passed a law (the Law of Nullities) repudiating the debts granted by the Royal Bank of Canada to the dictator in the name of Costa Rica.


5. See generally Sovereignty: Its Acquisition and Loss, The Cuban Debt, 1 MOORE DIGEST § 97, at 351–85 (summarizing the peace negotiations between the United States and Spain); ERNST H. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION 329 (1931).

6. MOORE, supra note 5, at 367.

Rica, on the ground that they were "odious." The subsequent arbitration proceedings ended in 1923 when the arbitrator, Chief Justice Taft of the United States Supreme Court, upheld the right of Costa Rica to act in this way.

A few years later, the legal scholar Alexander Nahum Sack produced an in-depth study in which he examined attempts to define the doctrine of "odious debts" precisely in legal terms, such that it could be operationalised. According to Sack, a successor state is only bound to repay the debts of its predecessor if the funds thus obtained were used to meet the needs of the state and were obtained in the best interests of the state. If, however, (1) the funds were not used to meet the needs of the state and were not obtained in the best interests of the state, and (2) the creditors were aware of this fact, then the granting of the loan represents a hostile act against the people of the debtor state, which renders the debt "odious" and thus invalid.

Sack is often held to be the academic who has dealt most in-depth with the issue of what happens to national debts after a regime change. He is still in some respects considered the "crowned prince" of advocates of this legal principle. Recently, however, his proposal has been taken one step further in a Canadian study. The authors of the Canadian study propose that the "odiousness" of a national debt should be determined not only on the basis of the two criteria advanced by Sack (i.e., use of the funds to the benefit of and in the best interests of the state, and the knowledge on the part of the lender that this is not the case). They argue that a third, objective criterion should be added—that the debts must have been taken out with the consent of the population.

In the early 1980's, the International Law Commission had already tried to find a definition in the context of developing the Vienna Conven-

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8. Id. at 376.
9. Id. at 399.
10. See generally ALEXANDER NAHUM SACK, LES EFFETS DES TRANSFORMATIONS DES ÉTATS SUR LEURS DETTES PUBLICIQUES ET AUTRES OBLIGATIONS FINANCIÈRES: TRAITÉ JURIDIQUE ET FINANCIER (1927) [hereinafter SACK, LES EFFETS DES TRANSFORMATIONS]; ALEXANDER NAHUM SACK, LA SUCCESSION AUX DETTES PUBLICIQUES D’ÉTAT 70 (1929).
11. SACK, LES EFFETS DES TRANSFORMATIONS, supra note 10, at 157.
12. Id.
13. FEILCHENFELD, supra note 5, at 16.
15. Id. at 42.
16. Id.
tion on Succession of States in Respect of State Property, Archives and Debts from April 4, 1983.17 The proposal was as follows:

Article C. Definition of odious debts

For the purposes of the present articles, “odious debts” means:
(a) all debts contracted by the predecessor State with a view to attaining objectives contrary to the major interests of the successor State or of the transferred territory;
(b) all debts contracted by the predecessor State with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.18

However, not only was this article not inserted into the Convention, the Convention itself has not yet come into force at all.19

To conclude this brief historical outline, it can be said that these lines of thought and argumentation leave too great a vacuum in theory and in practice for us to accept the principle of “odious debts” as a legal institution recognised under customary law.20 For this to happen, the principle would have to have been applied over a longer period and would have to be recognised as a legal obligation.21

III. PURPOSE OF “ODIOUS DEBTS”

Before we go on to look at the question of whether and how the doctrine of “odious debts” can or could be used legally in the future, at least in the proposed manner, it would be helpful to clarify the purpose of this new legal principle.

A. The Original Purpose

The two historical examples given above in Part II were retrospective. Therefore, the outcome could not have been foreseen by the two parties to the loan agreement when the loan was originally granted. Thus, (from

17. Id. at 33.
a European legal stance) an essential prerequisite of law is not met—the tenet that the law should act as an instrument to steer the behaviour of actors.22

It is true that this deficiency alone is not enough to call into question the legal validity of the measures, particularly for customary law. Thus, a generally accepted source of law is characterised precisely by the fact that somewhere, at some point in time, a new legal understanding emerges which, in the course of time, becomes so convincing that it eventually becomes an integral part of the general notion of justice.23 We have not yet reached this point with respect to the doctrine of “odious debts.” Even if one hundred percent agreement is not needed to achieve this level of acceptance, neither is it enough for a few small groups to be convinced of the legal validity of a concept for it to become accepted as customary law.

B. Today’s Purpose

The direct purpose of the doctrine of “odious debts,” as laid out in the terms of reference for this study, is to create the sort of impact which would steer the behaviour of relevant actors. Like a signal, it should remind the parties involved in future loan agreements to respect the limits of private autonomy (Privatautonomie) set by the new legal principle.

This doctrine would thus take its place among a number of existing legal regulations—in particular those under private and constitutional law—which act as protective mechanisms against any overly-hasty and thus irresponsible commitment on the part of a state.24 Usually, both constitutional and civil law clearly state what formalities a country must comply with before entering into a commitment of this sort. If these formalities are ignored, which according to reports appears to be the case more often than not, the commitments regularly have no legally binding impact, even under private law.25 A doctrine of “odious debts” could not

24. The question as to whether or not a legal regulation of this sort is an instrument of international, public or civil law is of more technical interest, and the issue will not be analyzed in any more depth here. See generally August Reinisch, State Responsibility for Debts: International Law Aspects of External Debt and Debt Restructuring (1995).
25. There are of course de facto problems in obtaining legally binding confirmation that contracts of this sort are null and void, and even greater difficulties involved in stipulating the legal consequences of a decision of this sort.
add any additional, more serious, or further-reaching form of invalidity—with the exception perhaps of a demonstratively expressed stronger moralistic condemnation.

Any legally recognised doctrine of “odious debts” would thus only come into play over and above the (long-standing) legal instruments already in use. Since the doctrine would be used to enforce certain moral values, an attempt would have to be made to reach a global agreement on these moral values because the simple fact of the matter is that here, as in many other instances, the values praised by one appear to be unacceptable to another. Considerations pertaining to a clarification (or even discussion) of this sort have no place in a legal study. However, we will simply state that the goals of having the “odious debts” doctrine accepted as a legal principle must surely be to leave a dictatorial regime high and dry in material terms, and thus to foster democratic forms of government. For, in line with the variations of the doctrine of “odious debts” proposed thus far, the potential lender can only be sure at the planning stage that the sum borrowed will be repaid in the latter case.

IV. PROS AND CONS OF “ODIOUS DEBTS”

Whatever the finer details of these objectives, we must examine in legal terms the pros and cons of introducing (or establishing) the doctrine of “odious debts.”

A. Cons

The most crucial and obvious argument against establishing the doctrine of “odious debts” is the basic legal principle of *pacta sunt servanda* (pacts must be respected). 26 This ancient principle is not based on inflexible and stubborn legal thinking, but on the recognition of the value of having a firm basis for planning, not only for the economy but also for interpersonal dealings in general. Even if the “invention” of the contract *per se* is not necessarily the result of a need for future security of this sort or in some other form, the binding nature of a contract, once entered into, is a matter of personal and economic interest. We should not lose sight of the fact that any incursions into this security will trigger a response on the part of the affected party, which ought to be taken into account before any pertinent new legal principle is introduced.

In the case at hand, the response might well be that the willingness of potential lenders to grant loans decreases dramatically. We can, of course, counter that this is precisely the desired effect (see Part III.B) of the doctrine—that certain states or certain governments are unable to borrow money. However plausible this argument might appear at first sight, if we disregard for the moment the fate of the population (i.e., each individual citizen) affected, the consequences are far-reaching. However, as morally repugnant as it might seem to lend money to a generally abhorred dictator, what about the loans accorded to his in-no-way-disreputable predecessor27 which are due for repayment under the regime of the current dictator? Who is to set the yardstick for what is to be deemed “generally abhorred”? What will happen if a head of government with a hitherto unblemished reputation suddenly turns bad during his period in office? Should a sort of blacklist be drawn up of endangered countries?28

The list of questions of this nature could easily continue. However, the examples already given indicate the trend that a doctrine of “odious debts” would imply a politicisation and moralisation of legal considerations, 29 which would undoubtedly make it more difficult to borrow money in many cases and would entirely preclude it in others. This cannot be the overall desired effect because the populations of the countries affected would then bear the brunt of the changes. If the aim is not to introduce any across-the-board bans on lending, but to deem legally untenable those loans or parts of loans that fall into the category of “odious” on an individual basis, this will at the very least involve considerably higher costs on the part of lenders since they will have to monitor the actions of their borrowers more closely. Lenders will not be able to cir-

27. It is more than just a historical footnote that the term “dictator” stems from the ancient Roman republic where this office was seen as a salvation in a desperate situation. See Wolfgang Kunkel & Martin Schermaier, Römische Rechtsgeschichte 22 (13th ed. 2001).


cumvent their responsibility to refuse to be part of “odious debts” by incor-
porting simple provisions in their lending agreements to the effect
that the funds lent are to be used for generally accepted purposes. Conse-
quently, if the costs of monitoring borrowers rise, the costs of borrowing
will increase, in turn making borrowing prohibitively expensive for some
countries, while severely restricting the borrowing capacities of others.

B. Pros

On the other hand, we must realise that there is a current worldwide
trend to erode the principle of pacta sunt servanda which has been held
in such esteem for thousands of years. In the field of civil law, we can
point to consumer protection law, which has been developing over the
last forty or so years.30 One of its main achievements has been to make it
significantly easier to rescind a contract, thus making serious inroads into
the binding nature of contracts.31

While it is true that this comparison is not entirely apt—given that con-
sumers play no part in the borrowing sector involved here and that con-
sumer protection law regularly excludes “non-consumers” from its field
of application—it should still be mentioned since calls for the recogni-
tion of the doctrine of “odious debts” practically all appear to be based
on a de facto power gap between the lender and the borrower (or at least
the population of the borrowing state). Given the fact that globalisation is
shrinking our world to the “global village” in which international law is
increasingly moving into areas that were hitherto the prerogative of civil
law,32 the parallel drawn between consumer protection under civil law
and international law no longer appears quite so unthinkable.

Equally, the “erosion” of the basic principle of pacta sunt servanda is
slowly being seen in international law. It is no coincidence that here too
(although still in very few isolated cases) the principle of democracy,
which is enshrined in international public law, is being taken as a ground
to justify the cancellation of long-standing contracts, although no reason

25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guar-
antees, art. 3, para. 5, 1999 O.J. (L 171) 12, 15.
31. Id.
32. It is enough to mention the discussion on the introduction of a state insolvency law. See Christoph G. Paulus, A Statutory Procedure for Restructuring Debts of Sover-
eign States, in RECHT DER INTERNATIONALEN WIRTSCHAFT No. 49, at 401–06 (Thomas
Wegerich et al. eds., 2003); see also Detlev F. Vagts, Sovereign Bankruptcy: In re Ger-
exists to terminate the contract under either its agreed upon terms or other valid legal provisions.33

In view of these findings, we must conclude that the introduction of a legally binding doctrine of “odious debts” is not automatically condemned to failure on the ground that contracts, once concluded, must be honoured. Another qualification of this basic principle by no means implies a fundamental rejection of the traditional principle—particularly in view of the erosion of the binding nature of this principle that can be observed in many areas of law worldwide. On the other hand, it must be said that the introduction of any doctrine of this sort will make it more difficult to borrow money in the future, thus potentially worsening the living conditions of entire populations.

V. APPROACHES TO RESOLVING THE PROBLEM

If we sum up the findings so far, we can state the following: the doctrine of “odious debts” has not yet achieved the status of customary law. The desired introduction serves the goal (inter alia) of undermining the material basis of dictatorships and fostering democratisation worldwide. The introduction of the doctrine would doubtless make it more difficult to borrow money but would not entail any fundamental break with existing law.

If these are the starting conditions for any doctrine of “odious debts” in whatever form, we must then look at the finer points. What form should the doctrine take or how should it be formulated in legal terms in order to achieve the intended objectives? The answer to this entails two steps. First, we must look at the approaches proposed to date, and second, we must devise our own proposal.

A. Response (ad hoc)

The cases to date in which the doctrine of “odious debts” has been invoked (Cuba and Costa Rica) are, from a legal point of view, particularly unfortunate cases of the application of “law.”34 By deciding retrospectively on the legal nullity of the debts, they preclude the steering impact of law already discussed in Part III.A. If it is uncertain ex ante whether or not the sword of Damocles of legal unenforceability is merely hanging

34. See supra Part II.
over the sum lent, or whether it might actually fall, the foundation for
determining the cost of loans begins to wobble. If the sword falls, the
lender must bear the risk that the borrower might not conform to the
norms of acceptable and accepted behaviour. At best, this appears to be
perhaps a morally justified preferential treatment for the population thus
freed from the yoke of debts, but in legal terms it is difficult to reconcile
with a basic sense of justice.

At this juncture we should, however, add a qualification. The idea of
the law as a steering instrument can be put into practice in various ways.
In Germany, for instance, it takes a different form from that adopted in
the United States. In Germany, the legislator is held to be responsible for
ensuring security in planning, which means that the feasible path to be
taken must be laid down ex ante in great detail,\textsuperscript{35} whereas in the United
States, the prevalent philosophy is that individuals are free to wheel and
deal as they please, but that in so doing they accept the risk that some
court might at some point in time brand this past wheeling and dealing
illegal.\textsuperscript{36} So what would appear untenable in Germany is the expression
of a fundamental understanding of liberty in the United States.

\textit{B. Prevention (ex ante)}

Having looked at these premises, it would thus appear preferable, from
a German point of view, to develop preventive criteria for a doctrine of
“odious debts” that is to be applied in the future.

1. The New Proposal

\begin{itemize}
\item[a)] This approach is in line with the Canadian proposal mentioned
above.\textsuperscript{37} It extends Sack’s criteria, stating three conditions—lack of con-
sent on the part of the people, the loan not being in the interests of the
people, and the lender’s knowledge of the other two facts. If all three
conditions are met, this would render the debt null and void, thus effec-
tively freeing the borrower from the obligation to repay the debt.
\item[b)] Two positive aspects of this proposal should be mentioned. First, by
pinpointing “creditor awareness,” it stands out from many other propos-

\textsuperscript{35} See Eckart Klein & Thomas Giegerich, \textit{The Parliamentary Democracy, in The
Constitution of the Federal Republic of Germany} \textsc{150–51} (Ulrich Karpen ed.,
1988).

\textsuperscript{36} See, e.g., Paul Carrington, \textit{The American Tradition of Private Law Enforcement, 5
German L.J.} \textsc{1413} (2004), \textit{available at} http://www.germanlawjournal.com/pdf/Vol05No
12/PDF_Vol_05_No_12_1413-1429_SI_Carrington.pdf (arguing that business conduct in
the United States is regulated \textit{ex post} by private plaintiffs “in the form of civil money
judgments rather than \textit{ex ante} in the form of official approval or disapproval.”).

\textsuperscript{37} See supra Part II.
als and ideas advanced by various NGOs, which simply ignore (intentionally or unintentionally) this condition. It is quite clear that this cannot be, and one would assume that there is no need to belabor the point. However, in order to make things as clear as possible, we should stress the fact that it would be extremely unjust, in line with all precepts of justice that exist in the civilised world, to foist on a lender, merely because he is a lender, the risk that the funds lent by him might be used for some improper purpose. This risk can only be attributed to the lender if he can subjectively be held responsible for the “odious” use to which the borrowed sum is put.

The second positive aspect is that the proposal does not concentrate on a change of government or regime, which was the case in both Cuba and Costa Rica, and which was more or less explicitly taken as a major contributory ground or appeared to play a major role in Sack’s proposals. A result of this sort might de facto play an important part in honouring existing commitments. For instance, what dictator, however rough, would plead that his debts were null and void on the basis of the doctrine of “odious debts,” when in the future he would be dependent on borrowing more funds at regular intervals. However, in legal terms, we must always see the “odiousness,” however we choose to define it, independent of and separate from any such government or regime change. The fact that such regime change takes place does not make the funds previously lent and used in any way more odious. The change per se is nothing that could increase the burden of guilt of an odious dictator. We can thus conclude that a legally binding doctrine of “odious debts” is independent of any such change in government or regime. The debt per se is odious; it does not merely become odious because of any change in the actors involved.

c) At the same time, however, the criteria contained in the Canadian proposal must be criticised because they are too vague and therefore in-calculable.

If the consent of the population is needed, the application of the doctrine must (surely) be excluded where a democratically elected government is in power. Whether this or the opposite case genuinely limits the desired target group sufficiently, appears questionable. Firstly, we must ask how we should proceed in the case of a mock democracy, in which the government claims to be legitimated by the votes of the people, as is the case in “true” democracies. Secondly, monocracies automatically fail to meet this requirement. Monarchs or spiritual heads of a religious state

38. Surprisingly, the same is true for the abovementioned definition of the International Law Commission. See supra note 18.
are thus, by virtue of the structure of the state, branded “odious,” which will automatically make it more difficult for them to borrow money and will thus make borrowing more expensive for them.

This leads us to the underlying and truly fundamental question—namely, who should define who is a dictator under the terms of the doctrine of “odious debts?” This is an extremely delicate question which cannot be answered using the yardstick of existing law, or indeed, existing philosophy. The answer that “any government that is not legitimated by the people” is a dictatorship can in no way be accepted as being sufficiently precise.

The other objective criterion of the Canadian proposal—absence of benefit—suffers from the same shortcomings. Who is to provide the yardstick against which “benefit” is to be measured? This is an important inquiry in both factual and temporal terms: in factual terms because it must be possible to define \textit{ex ante} what serves the interests of the population and what does not. However, there are no blanket answers to this question. Weapons purchases, for instance (to take a particularly controversial example), are only discreditable because of the individual circumstances that accompany them—i.e., if they are to be used for an unjustified war of aggression or for other criminal purposes, but not if they are to be used for the country’s own defence. Or, to take another example, funds might be used to install a system of repression in the form of prisons, but what number of prisons can be said to be in the interests of the population and what number can be considered excessive and hence no longer in their interests? Nobody would seriously suggest that a country should not be allowed to build prisons at all.

Still, doubts are justified in the other direction as well. The construction of schools and hospitals is generally considered to be in the interests of the population. However, what is to happen if these schools and hospitals remain the sole prerogative of the rich or of the family of the ruler? The question is, to put it succinctly, who are the “people” and who should represent them?

This brings us to the temporal aspect. At which point should we ask about the “benefit”—at the time of lending or the time at which a decision is made as to whether or not the debt is odious? From a legal stance, it can only make sense to look to the time of lending. Otherwise, lenders would be expected to perform monitoring functions, which they would either be unable to perform, or which would make the loan prohibitively expensive.

Finally, we must also criticise the subjective criterion of “creditor awareness.” While creditor awareness, as already mentioned, is essential, the focus cannot exclusively be on the positive knowledge on the part of
the lender. This would make it all too easy to circumvent the doctrine. If it is to be applicable in practice to any real degree, the subjective yardstick must be worded more precisely, for instance, such that positive knowledge is considered equal to ignorance resulting from gross negligence.

2. Lex Mercatoria

While we must concede that the criticism above appears to imply that it is possible to achieve greater precision, it must be said that at least at present this will be difficult since we have not advanced beyond considering the structure of a statutory definition. Having said this, though, we can attempt to come closer to an appropriate solution—and do so without departing too far from what we have dealt with so far. It is particularly helpful to base our work on existing models the legal character of which is unquestionable.

This stance allows us to look at a complex set of regulations which can best claim to be accepted worldwide, or at least to be the lex mercatoria to complied with—the UNIDROIT Principles of International Commercial Contracts. Courts in many countries increasingly rely on these principles when they are called on to judge international contracts where it is not entirely clear which legal system should apply. Since the lending agreements we are dealing with here are generally of a commercial nature, it is natural that we should take the UNIDROIT Principles as our guidelines. Article 3.1(b) restricts the field of application of the UNIDROIT Principles in that they do not deal with invalidity arising from immorality. Thus, the lex mercatoria makes no express statement on this generally accepted legal principle, which comes closest to the doctrine of “odious debts.” This is a reflection firstly of the unwillingness to incorporate moral aspects into the legal sphere, and secondly of

42. UNIDROIT Principles, supra note 40, ch. 3, art. 3.1(b).
the realization that standards of morality vary so widely the world over that it would be impossible to find a common denominator.

Nevertheless, Article 3.10 does provide for basic rules when there is an “excessive advantage” between the duties of the parties, as a result of which the pertinent contract can be contested.\textsuperscript{43} This right exists “if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage.”\textsuperscript{44} The text goes on to list the factors that should be taken into consideration: “the fact that the other party has taken unfair advantage of the first party’s dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill,”\textsuperscript{45} as well as “the nature and purpose of the contract.”\textsuperscript{46}

It is not entirely certain, however, whether or not this approach can be developed to produce an operational doctrine of “odious debts.” Even if there is indeed a gross disparity between the lender’s duty and the duty of the people of the borrowing state, in the kinds of cases of interest here, it is unlikely that there is a great disparity between the lender and the representative of the borrowing state (which is, in legal terms, the only relevant party here).

3. Case Groups

Nevertheless, the above \textit{lex mercatoria} approach can be used in other ways. We can apply the methods of combining various elements prescribed in Article 3.10 to the question of “odious debts.” This is not unusual in terms of legislation and is often encountered in the national standardisation of open offences such as the immorality of legal transactions. At first glance, this procedure might seem even less precise than the three conditions laid down in the Canadian proposal, but the advantage of the method proposed here compared with the criticised lack of precision in the attempts hitherto to concretise the doctrine of “odious debts” is as follows.

The odiousness of a debt is not automatic, provided the said factual elements are met. Instead, a number of diverse facts must be seen in context before a decision is made in each individual case. This procedure, which will initially have to commence by force of circumstances, can be defined with increased precision as more experience is gained by establishing so-called case groups. Once established, these case groups will

\begin{itemize}
\item \textsuperscript{43} \textit{Id.} ch. 3, art. 3.10(1).
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} \textit{Id.} ch. 3, art. 3.10(1)(a).
\item \textsuperscript{46} \textit{Id.} ch. 3, art. 3.10(1)(b).
\end{itemize}
represent the experience gained in several cases such that when this level of experience is gained, an individual case can be accorded to an already recognised case group of “odious debts” and the legal consequences will then become axiomatic. Thus, while the rulings in the beginning will have the flair of some kind of decisionism—since they are made without any pre-existing experience and without directly comparable material—they will gain predictability and certainty in the long term and will eventually line up to create a coherent chain of decisions.

The advantage of this procedure is that the large number of possible case constellations is not forced from the outset into a straight-jacket of predefined characteristics. Instead, it ensures the necessary openness that allows us to take into account the wide range of possible options. With every case dealt with, however, the acquired experience will grow with the result that the initial openness can gradually be replaced with increasingly precise formulations, culminating in the establishment of case groups.

In terms of the foreseeability and calculability for potential lenders, which we have considered at several junctures to be extremely important, national experience with standards of this sort (in Germany we need only quote section 138 of the German Civil Code or BGB (Immorality of Legal Transactions)) indicates that this form of standard-setting is acceptable. Also, if the criteria for the assessment of each individual case are sufficiently clear, lenders can more easily anticipate the outcome than would be the case with the definitions of factual elements, which in many ways are too narrow and/or too broad.

Apart from the above mentioned considerations, we always need to be able to impute “odiousness” to both sides with no exceptions. In addition to subjective prerequisites, such as knowledge of the purpose for which the funds would be used or the fact that the lender should have had such knowledge, the following paragraphs outline the main criteria.

Borrower’s Representative

For reasons of legal precision, the term “borrower’s representative” must first be explained. While we often speak of the “borrower,” in the cases relevant here, this term is inappropriate. The “borrower” is always

the country in question and not the natural person who is to be targeted by the doctrine of “odious debts,” i.e., the dictator or despotic ruler. Thus, the focus should not be on the borrower, but on the person who uses the borrower in order to take out a loan. In somewhat simplified terms, we shall use the term “borrower’s representative” to designate this person hereinafter.

It is generally accepted in the analysis of the case of Costa Rica discussed above or of Iraq at present that the odiousness of a debt can arise as a result of the person or the behaviour of this borrower’s representative. However, the question as to how a necessary degree of censure can be identified is extremely difficult to answer and can only be touched on here. It is by no means sufficient to define the circle of individuals affected in terms of their lack of democratic legitimation (see Part V.B.1), unless we wish to consider it odious per se that there is no “genuine” democracy in that country. We can define more usable criteria if we measure the legitimation of the borrower’s representative by taking generally accepted requirements as a yardstick. International law can help us here—48—for instance, fundamental principles such as *jus cogens*.49 We could, perhaps, also use the conventions on human rights to which the state in question is a signatory.

It is true, all the same, that the consequence of gearing action to these yardsticks of values is that one category of “odiousness,” which has often been advanced and which was specifically mentioned in the arbitration in the Costa Rica case, cannot be identified—namely the use of the loan for the personal purposes of the borrower’s representative. The borrowing state, rather than the lender, must demand repayment from the ruler who has thus benefited personally.

*Creditors*

Another advantage of the concrete definitions of a doctrine of “odious debts” proposed here is that it opens our eyes to the fact that the odiousness need not be caused by the state representative alone. It is only rarely noted that the very first instance where the doctrine of “odious debts” was applied, in Cuba, is a case in which the creditor (in this case Spain)
was responsible for giving the debt its negative character.\textsuperscript{50} Again, the
aim here is not to make moral issues or values the sole criteria for as-
assessment, and so in this context too, the fundamental principles of inter-
national law already cited in the above section, perhaps accompanied by
human rights conventions to which the lender’s state is a signatory, will
have to be used. If, for instance, debts arise as a result of an unjustified
war of aggression, at least one criterion of odiousness would be met.\textsuperscript{51}

\textbf{Purpose of the Loan}

Another criterion used to identify “odious debts” is the purpose of the
loan. However, great caution is called for here because the truism that
there are two sides to every story applies here as well. We have already
pointed out above that weapons purchases or the construction of prisons
are not odious \textit{per se}, just as the construction of schools and hospitals
need not necessarily be an automatic blessing for the population.\textsuperscript{52} The
purpose of a given loan will have to be assessed against the provisions of
international law in order to produce generally binding value-based yard-
sticks.

\textbf{General Circumstances}

Another criterion that will have to be defined more precisely, and will
surely be defined more precisely in the future, is the general circum-
stances under which the loan is granted. The high standards of interna-
tional law norms need not necessarily be applied exclusively here. To
fine-tune the identification of “odiousness,” other circumstances could
also play a part, such as money laundering, cooperation with internation-
ally wanted criminals (i.e., drug dealers, etc.) or comparable factors.

4. Result

In conclusion, a doctrine of “odious debts” appears to be legally practi-
cable if it is based on more precisely defined standards than has been the

\textsuperscript{50} This peculiarity is noted by Jürgen Kaiser & Antje Queck, \textit{Odious Debts—Odious
Creditors? International Claims on Iraq}, at 7 (Friedrich Ebert Stiftung, Dialogue on
Globalization, Occasional Papers Nov. 12, 2004), http://www.fes-geneva.org/publica-

\textsuperscript{51} See U.N. GAOR, Int’l L. Comm’n, \textit{Fourth Report on State Responsibility}, at 17,
tions of international law, such as genocide and wars of aggression “are such an affront to
the international community as a whole that they need to be distinguished from other
violations, [as in] the laws of war . . .”).

\textsuperscript{52} See supra Part V.B.1.c.
case to date. This can be achieved by taking a step back from the factual elements which are not detailed enough and by replacing them with an open factual element of “odious debts,” which would then be limited by an assessment of factors that are as concrete as possible, so as to establish case groups. If these are to gain general acceptance, the value-based yardsticks used must be stringent—they cannot be allowed to reflect only the ethical beliefs of one small group. If these factors are considered in relation to one another, and if a certain debt is judged “odious” on this basis, we must still demonstrate that both parties involved are accountable with the help of subjective criteria (knowledge on the part of the lender or the fact that the lender should have had this knowledge). If this is the case, the legal consequences will follow.

VI. LEGAL CONSEQUENCES

This final, apparently banal statement conceals a problem. What should the legal consequences be? If the goal of the doctrine of “odious debts” is to legally exonerate a state from its obligation to honour its debts, provided it meets the terms of this doctrine, it is not really appropriate to declare the automatic nullity of the loan agreement or to bestow upon it the right to repudiate the contract. For, if only the legal basis (i.e., the loan agreement) were declared null and void, the lender could demand the repayment of at least the sum granted as a loan on the ground of unjust enrichment. Whether or not this would apply to the agreed interest is uncertain. We should also point out once again that a large number of loan agreements are likely to be null and void anyway because they contravene inter-state formalities.

If we are to achieve the declared goal of the doctrine of “odious debts,” then we must not only have the loan agreement declared null and void, but also preclude demands for repayment on the ground of unjust enrichment. There is a parallel to this in the civil law of almost all legal systems based on Roman law (i.e., from late nineteenth century Europe) in the form of a provision corresponding to the German Civil Code (BGB) section 817.53 According to these provisions, the lender is not entitled to demand repayment on the ground of unjust enrichment if both the borrower and the lender can be accused of unethical behaviour under certain circumstances.54

53. In the United States, this legal consequence is applied in cases when a contract is illegal. See Peter Hay, U.S.-AMERIKANISCHES RECHT 56 (2000).
54. See, e.g., CODE CIVIL [C. CIV.] art. 1370 (Fr.); Código Civil Federal [C.C.F.] [FEDERAL CIVIL CODE] art. 1882 (Mex.).
VII. INSTITUTIONAL ASPECTS

One final, extremely important question pertains to the institution that is to be responsible for enforcing this new legal principle. Because of well-known reservations, this responsibility should not be accorded to the IMF/World Bank\(^{55}\) or to the International Court in The Hague.\(^ {56}\) Ad hoc arbitration, like the Iran-U.S. tribunal, is unlikely to be acceptable because the specific power relations in that case are unlikely to be replicated. However, using a different arbitration court in each instance would prejudice the establishment of case groups proposed in this study. A fairly consistent court or panel would be needed for this.

Under these circumstances, we find ourselves faced with only two options: either we use existing court institutions or we create a new adjudicative body. One option would be the Dispute Settlement Body of the WTO pursuant to Article III(3) of the Convention of 15 April 1994.\(^ {57}\) This would be the preferred solution because this body has already gathered a wealth of expertise in global legal disputes.

A second option, creating a new body, could be the responsibility of the United Nations\(^ {58}\)—perhaps to be transferred to UNCTAD because of the subject matter involved. Procedures could be based on those proposed by the IMF for a Sovereign Debt Restructuring Mechanism (SDRM) and the pertinent Dispute Resolution Forum (DRF).\(^ {59}\)

Such a panel of judges would have the exclusive power to decide the relevant cases. The rules containing the details of the procedure could be established by that very panel itself (thereby following the U.S. model). However, it should be clear from the outset that any suit brought before the panel can be initiated only by a petition. A general duty to initiate

\(^{55}\) See, e.g., Joseph Stiglitz, Odious Rulers, Odious Debts, ATLANTIC MONTHLY, Nov. 2003, at 42, available at http://www.globalpolicy.org/socecon/develop/debt/2003/11odiousdebts.htm (arguing that the IMF playing a central role in the bankruptcy process would be problematic because it is one of the international community’s major creditors).

\(^{56}\) This Court, of course, could be involved under the present conditions only if both parties to the loan agreement are States.

\(^{57}\) For a description of this panel and how it works, see Matthias Herdegen, INTERNATIONALES WIRTSCHAFTSRECHT, in JURISTISCHE KURZ-LEHRBÜCHER NO. 4, § 7, at 151 (2003); Ignaz Seidl-Hohenfelder & Gerhard Lochb., Das Recht der Internationalen Organisationen einschließlich der Superanationalen Gemeinschaften 182, para. 1312 (7th ed. 2000); John Jackson, The Jurisprudence of GATT and the WTO 133 (2000).

\(^{58}\) See Stiglitz, supra note 55, at 42.

suit would instead require a worldwide control system which is bound (according to national experiences) to be selective and thereby inefficient. The consequential question—namely who should be given the right to file a petition—is, as a matter of course, a political one.

The answer depends on what one tries to achieve with the new legal principle. If only the parties to the loan contract in question were permitted to file a petition, it would seem more likely than not that a procedure would be initiated only after a change of government or political system, since it might be assumed that hardly any party would have an interest in learning that a debt is “odious” unless it goes through such a political change. In contrast, if the circle of potential candidates for initiating such lawsuits is drawn too broadly (including, e.g., NGOs), this would foster a certain control mentality which, in turn, would result in a whole set of further problems. Thus, it is necessary to find an appropriate process which guarantees access to the panel in cases of “odious debts” without imposing an unbearable control mechanism on the parties involved.

VIII. RESULTS

The above deliberations can be summed up in the following results:

• The doctrine of “odious debts” has not yet acquired the status of a legal rule. The only conceivable source of law would be customary law, but the necessary prerequisites have not yet been met.

• The existing proposals for defining an “odious debts” doctrine make very clear the direction in which the doctrine is headed. However, the proposed definitions are still not precise enough to be acceptable as a general rule. What is needed is a higher degree of flexibility.

• A heightened degree of flexibility could be achieved by establishing open factual elements with sufficiently precise assessment factors in order to establish case groups over the course of time.

• The legal consequences of this “odious debts” doctrine would not only be the nullification of the underlying loan agreement, but also the denial of the right of the lender to demand repayment on the ground of unjust enrichment.

• The court responsible for judging whether or not a debt is “odious” could either be the Dispute Settlement Body of the WTO/GATT or a new court set up by the United Nations along the lines of the DRF.
CO-TEACHING INTERNATIONAL CRIMINAL LAW: NEW STRATEGIES TO MEET THE CHALLENGES OF A NEW COURSE*

Stacy Caplow** and Maryellen Fullerton***

I. INTRODUCTION

International Criminal Law came of age as an academic discipline in the 1990s. When nations around the globe joined to create two new international tribunals to bring high profile human rights violators to trial, the world witnessed the first concerted effort in fifty years to hold accountable individuals who committed crimes against humanity and genocide. The tribunals for Rwanda and the former Yugoslavia have, in turn, generated new codes of procedure and new substantive law decisions concerning criminal culpability. The Rome Statute, which led to the creation of the International Criminal Court in 2003, further solidified the role of international criminal law as a part of the criminal justice system. At the same time, transnational crimes like money laundering, narcotics trafficking, and terrorism were reshaping the world of domestic laws and procedures. Accelerated by legal responses post-September 11, new issues related to both national and international investigation, apprehension, prosecution, defense, and jurisdiction arise with great frequency.

International Criminal Law encompasses parts of many other courses—International Law, Criminal Law, Criminal Procedure, Comparative Law, International Human Rights—and is evolving in front of our eyes as both an area of law and a law school course.

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4. See infra Part III.E and note 22 (listing some of the post-September 11 issues we examined in our International Criminal Law course at Brooklyn Law School).
For several years, we recommended adding an International Criminal Law course to the Brooklyn Law School curriculum, and we specifically asked to teach it together. We had two principal reasons. First, the course is an amalgam of our separate areas of prior teaching experience. We thought that the combination of our international and criminal law backgrounds would allow us to understand this new field more easily. Second, although joint teaching by full-time faculty is rare, much of law practice is collaborative and we thought our joint efforts would bring a synergy to the endeavor. We also counted on the sum of our parts adding up to a larger whole as our aggregate mastery of the subject would expand our individual contributions. In addition, we saw co-teaching as an opportunity for two friends to collaborate and mutually benefit from working together.

Most educators in other fields report a variety of advantages gained by both teachers and students in team-taught courses. The consensus is that teamwork promotes self-discipline, forces teachers to clarify goals for each class, exposes teachers to new perspectives from observing others teach, improves the quality of teaching by combining teachers’ strengths, energizes and improves morale, and encourages creativity and community. At the same time, all concur that team teaching requires considerably more effort and time spent on coordination, planning, and mutual reflection, as well as administrative support and encouragement.

5. In contrast to the world of lawyers and business, “an honest assessment would show us that law schools have almost no use for teamwork. Law schools do not encourage team teaching . . . .” Beverly I. Moran, Trapped by a Paradox: Speculations on Why Female Law Professors Find It Hard to Fit into Law School Cultures, 11 S. CAL. REV. L. & WOMEN’S STUD. 283, 294 (2002). Team teaching is even “rarer” than opportunities given to students to work cooperatively. Barbara Glesner Fines, Competition and the Curve, 66 UMKC L. REV. 879, 906 (1997). In two comprehensive bibliographies covering teaching methods, Arturo López Torres, MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom, 77 NEB. L. REV. 132 (1998), and Arturo López Torres & Mary Kay Lundwall, Moving Beyond Langdell II: An Annotated Bibliography of Current Methods for Law Teaching, 35 GONZ. L. REV. 1 (2000), the authors identify only a handful of articles describing team teaching, and those appear in a limited range of offerings: legal writing, clinical, or skills courses.


7. BUCKLEY, supra note 6, at 12–15. See also GARY THOMAS, EFFECTIVE CLASSROOM TEAMWORK: SUPPORT OR INTRUSION? 28–29 (1992); MARY SUSAN FISHBAUTH, MODELS OF COLLABORATION 101–15 (1997); GORDON A. DONALDSON, JR.
After a semester of co-teaching International Criminal Law, a course new to us and to our law school, and one that is taught at relatively few schools nationwide, we are converts both to the subject matter and to collaborative teaching. As we gained a new depth of understanding of the dynamic and multilayered field, we also profited from the joint intellectual journey. We were sustained by the collaboration itself as we were able to tackle new materials while taking a more reflective look at the teaching process. As experienced teachers who have frequently taught the same course year in and year out, we know that manifold non-teaching demands on time and attention often induce us to rely on time-honored materials and methods. Team teaching, however, does not permit inertia, laziness, short cuts, or complacency since it forces articulation of choices and decisions about content and method, coordination, cooperation, compromise, and regular reflection about performance. Indeed, we found that the demands of team teaching multiplied rather than diminished our workload as we spent our semester in perpetual motion. Nonetheless, we found the rewards more abundant and the reinvigoration more robust than we had experienced in the past when we prepared new courses alone. The esprit, and occasional stress, of the collaboration also created new layers to our friendship (both personal and professional) with promising directions for the future.

II. EMBARKING ON A NEW CHALLENGE

A. Our Initial Decision to Co-teach International Criminal Law

Several years ago, we approached the administration with the proposal that the law school offer a new course in International Criminal Law, and that we co-teach it. Our reasons ranged from the desire for serious pro-

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8. Although we realize that faculty members may prepare their own materials, we attempted to do a rough survey of how many law schools offer a course in International Criminal Law by examining the adoption of the two major texts. According to information supplied by the publishers, we concluded that fewer than fifty-five law schools have offered International Criminal Law in any one academic term during the past four years. See e-mail from Diana Bell, Carolina Academic Press, to authors (July 7, 2004, 15:16 EST) (on file with authors); e-mail from Lisa A. Hughes, Sales Operations Manager, LexisNexis Law School Publishing, to Violeta Petrova, Brooklyn Journal of International Law (Aug. 29, 2005, 13:39 EST) (on file with the Brooklyn Journal of International Law). A sizeable proportion of the courses seem to be taught by adjunct or visiting law professors.

9. Since both of us have been teaching for more than twenty years, we have taught several courses repeatedly during that time.
fessional growth to just plain wanting to have fun. We thought that the students might also appreciate the variety of learning from two people and would benefit from seeing a model of teaching collaboration that is usually absent in the law school classroom outside of clinics.\textsuperscript{10} We made the case for offering the new course and persisted in our request to co-teach it.\textsuperscript{11} After two years, our administration agreed.

\textsuperscript{10} Adherents of cooperative learning praise collaborative learning experiences for students because they import a greater variety of different experiences into the creative lawyering process, foster communication skills, encourage listening to others, and reduce competitiveness. \textit{See, e.g.}, \textsc{Gerald F. Hess & Steven Friedland}, \textit{Techniques for Teaching Law} 131–36 (1999); \textsc{Susan Bryant}, \textit{Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession}, 17 \textsc{VT. L. Rev.} 459, 460 (1993); \textsc{David F. Chavkin}, \textit{Matchmaker, Matchmaker: Student Collaboration in Clinical Programs}, 1 \textsc{Clinical L. Rev.} 199 (1994) (discussing advantages and disadvantages of group work in a clinic setting); \textsc{Stephanie M. Wildman}, \textit{The Question of Silence: Techniques to Ensure Full Class Participation}, 38 \textsc{J. Legal Educ.} 147, 152–54 (1988); \textsc{Mark Tushnet}, \textit{Evaluating Students as Preparation for the Practice of Law}, 8 \textsc{Geo. J. Legal Ethics} 313 (1995) (an experiment in joint grading). But, the acknowledged advantages of student collaboration rarely seem to replicate in the traditional classroom, although at least according to one optimistic law school dean, “[s]eminars, clinical courses, team teaching, and courses in drafting legal instruments have begun to dominate the method of instruction in upper level classes.” \textsc{Frank J. Macchiarola}, \textit{Teaching in Law School: What Are We Doing and What More Has to Be Done?}, 71 \textsc{U. Det. Mercy L. Rev.} 531, 535 (1994).

\textsuperscript{11} Team teaching is a luxury both for the law school and the collaborating teachers, as the members of the teaching team offer fewer courses than when they are teaching solo. Perhaps this is why most reported team-teaching efforts have paired a doctrinal teacher with an adjunct practitioner or skills teacher. \textit{See, e.g.}, \textsc{ABA Coordinating Committee on Legal Education, Team-Teaching of Substantive Law and Practice Skills in Substantive Law Contexts} (1996); \textsc{Hon. Robert R. Mehrgie, Jr.}, \textit{Legal Education: Observations and Perceptions from the Bench}, 30 \textsc{Wake Forest L. Rev.} 369, 376 (1995) (courses team-taught by law professors and practitioners add “exciting real-life dimension to law school curriculum”). \textit{See also} \textsc{Barbara J. Busharis & Suzanne E. Rowe}, \textit{The Gordian Knot: Uniting Skills and Substance in Employment Discrimination and Federal Taxation Courses}, 33 \textsc{J. Marshall L. Rev.} 303, 344–45 (2000) (advocating for a practicum model administered by a practicum professor in close cooperation with a doctrinal professor); \textsc{Carol Chomsky & Maury Landsman}, \textit{Using Contracts to Teach Practical Skills: Introducing Negotiation and Drafting into the Contracts Classroom}, 44 \textsc{St. Louis L.J.} 1545, 1546 (2000) (pairing a Contracts and a Negotiation professor); \textsc{Robert P. Burns}, \textit{The Purposes of Legal Ethics and the Primacy of Practice}, 39 \textsc{WM. & Mary L. Rev.} 327, 353–54 (1998) (Professional Responsibility taught with practitioners and/or skills teachers). Other courses pair a legal academic with an academic from another field in an interdisciplinary course. \textit{See, e.g.}, \textsc{Symposium, Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship}, 11 \textsc{Wash. U. J. & Pol’y 1} (2003); \textsc{V. Paulani Enos & Lois H. Kanter}, \textit{Who’s Listening? Introducing Students to Client-Centered, Client Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting}, 9 \textsc{Clinical L. Rev.} 83, 99–103 (2002) (discussing a multi-disciplinary approach to advocacy on behalf of victims of domestic violence, spanning across legal
Individually, we were both extremely enthusiastic about introducing International Criminal Law, with its “ripped from the headlines” subject matter, to the curriculum. Although the scope is vast and daunting, requiring the mastery of an extensive and unwieldy body of international and national law, with legislation, judicial opinions, and treaties affecting many countries and institutions, we thought a joint effort would combine our resources and strengths and result in a more effective presentation. We each relished the prospect of learning more about the other’s field and about the burgeoning field of international criminal law.

We also wanted to work together because we like and respect each other. Although we have been colleagues and friends for more than twenty years and had spent a semester together in our immigration clinic, we knew that co-teaching a new, wide-ranging course would be an even closer collaboration. We saw this as an opportunity to advance our professional lives not only by adding another course to our repertoire but also by tackling another kind of teaching experience. Working as co-teachers would require us to dedicate more energy and reflection to exactly what we were doing in that classroom and give us each permission to engage, reflect upon, and mutually improve our teaching.


12. Brooklyn Law School occasionally allows non-clinicians to spend a semester doing clinical teaching. In Spring 1999, Maryellen taught in the Safe Harbor Project which Stacy has directed since 1997.
MEF: As I look back on my desire to co-teach this course, I’d say that I’ve really enjoyed classroom teaching for two decades: the give-and-take with the students, the feeling of success when a student’s face shows understanding, the sense of communicating important perspectives about our society. I think I’m good at demystifying, initiating thinking, and challenging students to be inquisitive and analytical.

What I haven’t liked is the sense of intellectual solitude that I often feel—in the classroom, in the halls, in my office. I have warm relations with my colleagues and with many students, but intellectually speaking, I experience teaching as something I do ALONE. The students are there, of course, and I consult colleagues about teaching materials, perspectives, and so on, but I rarely have the opportunity to share the classroom with a peer whose responses to the classroom dynamic are likely to be attuned to the same issues as mine.

SC: I’ve always enjoyed taking on new courses and challenges. Over the years, I have taught six different clinics, often learning new subjects. I’ve also taken leaves of absence to work, again often in new areas of law or unfamiliar professional contexts. I’m accustomed to the anxiety of the unknown but also have learned how valuable the benefits of stretching and changing can be.

As a clinician, I don’t experience isolation. Many of my clinic classes are co-taught, usually around a table, so that the atmosphere is more relaxed. Quite the opposite; I feel pulled in many directions all the time—by students, by clients, by the outside world. This course would open up whole new bodies of law to me, even a new language and method of seeing the world and approaching the law. It also would allow me to cross the international law border. Working with Maryellen would reduce the risks and stress of a new course. And, because she is such a talented teacher, I knew I’d learn a lot from the joint venture.

From the moment that our proposal was approved, we were joined at the hip, spending hours together in our offices, on the phone, or e-mailing. It helped that neither of us began with a definite vision of the course that had to yield to a competing view. We often wondered, both aloud...
and silently, if continuous efforts to accommodate, negotiate, and compromise would make us regret our decision.

B. Preparation

Like any teacher of a new course we went into planning mode. What are the objectives of the course? Which topics should we include? We needed to develop our syllabus, but to do even that, we had to decide how to conduct this team-teaching enterprise. Some decisions were easier than others, and it was not always predictable which issues would be harder to resolve. Many decisions were interdependent.

We agreed readily not to limit class size and to teach a three-credit survey course rather than a specialized seminar. We also established no prerequisites, although we expected to draw primarily from the fairly large pool of students at our law school interested in international law and, secondarily, from the students eager to take any course in the criminal law field.13 As a result, as we planned the overall curriculum and the individual classes, we had no idea how many students would enroll in the class or what their baseline knowledge would be. We assumed, however, that, with a few exceptions such as those students who might have selected the course because it met at a convenient time, most students would be as excited about the subject matter as we were and would be receptive to an innovative course. Indeed, throughout the semester, many students mentioned that they were glad to be part of a unique, somewhat experimental, and creative venture.

We wanted to bring as much life as possible to the course since many things that we would be studying might seem both far away and hard to imagine, and yet be contemporary and vital. We knew we would have to provide substantial background for many discussions because we have learned over the years that world events that seem recent to us are faint historical references for our students.14 To provide context and to emphasize contemporaneous developments, we planned for three guest-speaker

13. With regard to the prerequisites, we knew that all students would have taken Criminal Law in their first year. We also knew that many of the student members of the Brooklyn Journal of International Law would have taken the basic public International Law course in the previous fall semester, so we thought that at least some of the students likely to enroll would have been exposed to fundamental concepts of the international legal system.

14. During the semester, we encountered many examples of this truism. For example, most of our students did not know details of the 1972 Munich Olympics hostage-taking, the 1985 Achille Lauro hijacking, the 1988 Lockerbie airline bombing, or the desaparecidos in Pinochet’s Chile.
class sessions at intervals during the semester.\textsuperscript{15} We also agreed to show parts or all of several commercially available films in connection with particular topics,\textsuperscript{16} and we devoted a lot of energy to posting current news articles on the course web page in order to increase the students’ sense of connection to outside events that unfolded almost daily. We hoped that the students who chose to enroll would respond to this barrage of information.

Our two most important decisions were the choice of texts and how we would structure our co-teaching. Selecting our teaching materials was difficult. We did an exhaustive search of various texts available in English, spending some time looking at volumes written by non-U.S. authors, and we fleetingly considered putting together our own materials. Rather quickly, though, we both agreed on the pragmatic approach of adopting one of the current U.S. casebooks.

MEF: Stacy took the lead here and enthusiastically investigated the alternatives. I was happy to follow her instincts, because I had adopted the more prosaic (lazy?) approach: “We’ll present an interesting course no matter what materials we use.”

Neither of the two available casebooks meshed with my vision of the course. In my view, one was vastly over-inclusive and the other significantly under-inclusive. We selected the smaller text. Then we decided to choose the more expansive one. Then we flip-flopped several more times before we settled back on our original choice. Although I had initially said that I didn’t care which we adopted, I ended up arguing strongly to stick with our original choice.

\textsuperscript{15} Our first speaker, David N. Kelley, former United States Attorney for the Southern District of New York, has been one of the most experienced prosecutors of terrorism cases nationally. Our next speaker was Benjamin B. Ferencz, a well known veteran prosecutor at the Nuremberg Trials and a captivating orator, who has also been an ardent activist on behalf of the International Criminal Court. See Benjamin B. Ferencz, http://www.benferencz.org (last visited Aug. 5, 2005). Our last speakers shared a single session. They were Maxine I. Marcus, a former student who was then working in the Office of the Prosecutor of the Special Court for Sierra Leone, and Justice Gustin L. Reichbach, New York Supreme Court (Kings County), who recently spent six months as an international judge on the tribunal established by the United Nations Mission in Kosovo.

\textsuperscript{16} We showed the award-winning \textit{One Day in September} (SONY Pictures Classics 2001), and three films in the Court TV series \textit{Landmark War Crimes Trials: The Nuremberg Trial, The Trial of Adolph Eichmann, and The Bosnia War Crimes Trial} (Choices 2000).
I found this process excruciating. I didn’t want to keep revisiting the decision. It was the first strong signal to me of the extra time and emotional energy that team teaching might demand. Incidentally, I ended up thinking that we had made the wrong decision, and I felt guilty about it for much of the semester.

SC: I wanted to be pragmatic. I thought there were two viable options. I liked the approach of the casebook that selected more U.S. case law because I thought the students would be more comfortable dealing with new concepts if they were set in familiar sources. And, incidentally, so would I.

I also liked the mundane fact that one was in paperback and would cost the students less money. Plus, I thought the one we chose would not require the purchase of a documentary supplement. During the semester I regretted the choice because we needed to supplement the casebook so heavily. This was a burden on us and on our students.

Once we had decided on the casebook, we selected the topics and their sequence and began to develop a basic syllabus (a work-in-progress throughout the entire semester, by the way). We considered how to deploy ourselves and how to define our joint teaching concretely. Quickly, and without controversy, we agreed that we would divide up the classes/topics evenly. Several of our colleagues who had jointly taught seminars had advocated a point-counterpoint approach, with the two faculty members disagreeing and debating each other frequently during the class. We were reluctant to adopt that method in a large survey course because we thought that having two faculty voices contradicting each other ran a serious risk of suppressing student participation. We also worried that the students would feel more confused than we wanted in a course that might be a leap into uncharted waters for many of them. And, we felt tentative enough in this new venture that we did not want to undermine our authority. Accordingly, we agreed that when one of us was leading the class, the other would sit in the back and resist participating.


18. Although we realized that the observer might occasionally have an insight or clarification that might be helpful to the class discussion, we decided to forgo that poen-
SC: I strongly advocated that we should each take responsibility for particular classes or topics. First, there were the reasons I was willing to articulate: I thought the students might be thrown off balance unless one of us was “in charge” of the class. I suspected that, unless we carefully scripted our presentation, the point-counterpoint method would be more confusing than helpful. I was skeptical of the argument that students benefit from hearing diverse viewpoints because they learn that “there are no answers.” Two “expert opinions” might preempt student discussion. I also knew that I would learn more about teaching from Maryellen if I simply could observe her rather than be expected to join the discussion.

My less defensible reasons for wanting to divide classes completely were efficiency and insecurity. Obviously, if each of us took the lead for designated classes, a difficult enough task for me given the unfamiliarity of international law materials, the workload would be less onerous. Also, in most classes in which the teachers engage in debate, they are legitimate experts with well-defined opinions. As a newcomer to this field, I hesitated to hold myself out as such.

MEF: I saw the advantages of bifurcating teaching, but I leaned more toward designing an approach that enabled both of us to participate in the discussions and debates within a class. In large part, I wanted more collegial debate in class because I wanted to redress the intellectual isolation I find dissatisfying in solo teaching. I suspect I also felt less insecure because I was comfortable with the “foreign” elements—the international law concepts, vocabulary, and sources of law.

We thought that any misinformation could be fixed in the next class, as each of us would have done if teaching the course alone, and decided not to risk disrupting the pace of the class by having the non-leader inject amplification or correction. We violated this resolution a few times during the semester, each time with the tacit permission of the person up front, usually in the form of a plaintive glance or a raised eyebrow.
From past experience in sharing the podium during the same class period, though, I knew it difficult to relinquish control over the class and to wait my turn so I agreed that it would be wiser and more manageable if we took turns designing the classes and leading the discussion.

Once we decided to alternate primary responsibility for topics and created a rough roadmap for our syllabus, dividing the topics was simple. Some were natural fits. With regard to the rest of the topics, we were both so interested in the ideas of the course and so eager to accommodate the other that we basically volunteered for particular subjects with an eye toward giving the other a break. We wanted the students to get used to both of us as teachers from the beginning of the semester, so we alternated as much as possible, with each teaching no more than three classes in a row.

Dividing the classes this way also made our lives easier. Only one of us had to wrestle with the materials and develop a lesson plan for any particular class, although we each faithfully read all of the assignments and attended all of the classes. Alternating topics had the added benefit of providing each of us a little breathing room during the semester when the other took charge for a week or so. On occasion, the alternating structure created problems, and one of us would have to finish a unit at the beginning of a class the other was scheduled to teach. Our timing improved over the semester. We also remained flexible. Sometimes, to avoid confusion, we delegated to the other the job of wrapping up the previous class’s materials.

Selecting the classroom format for our joint teaching effort had an impact on how we came to describe our experience. Although we have variously called it “team teaching,” “joint teaching,” and “collaborative teaching,” we have come to think that the term “co-teaching” more accurately reflects our feeling about this venture. To many, team teaching implies that both teachers are active in the classroom at the same time. To some, it suggests that one teacher is the master, the other the apprentice. To others, it brings to mind a sports analogy, with images of elaborate game plans, split-second coordination, and multiple people on the field at the same time. For us, co-teaching implies a more equal sharing of authority. It also emphasizes the coordination aspect that accompanies alternating primary responsibility by course topic. Finally, it reflects the compromises and cooperation that follow a decision to share responsibility and cede a certain amount of the absolute control a law teacher typically exercises.
Co-teaching, at least as we did it, unquestionably increased the amount of time each of us spent on class preparation during the semester. We almost always consulted in detail about the materials and the best approach for each class. This was in addition to our individual preparation for the class. Also, even before we reached the stage of developing a lesson plan, we frequently found that the materials raised complicated and puzzling issues which we turned to each other to discuss. We always debriefed and reviewed class afterwards, time we rarely spent when teaching solo.¹⁹

III. ADJUSTMENTS, COMPROMISES, ADAPTATIONS, AND SOME OF THE NITTY-GRITTY DETAILS

A. The First Class

The first day of the semester found us in a large classroom with sixty students enrolled in International Criminal Law. In addition to the usual first class housekeeping details and a discussion of a hypothetical scenario that introduced the main themes of the course, topics typical for any first class, we explicitly addressed the challenges of team teaching and our hopes for its impact on the students’ learning. We advised them how we planned to organize the semester and how we planned to evaluate their performance. We wanted to let them know how we thought our different areas of expertise would enrich the course and allay any concerns that alternating the principal teaching role would be confusing. Saying all of this aloud helped convince us also that we could succeed in our experiment.

B. Cooperation

To co-teach democratically also required a substantial divestiture of the unilateral decision making that typically occurs, and is basically privileged, in law schools, and probably in most educational settings. We had to consider and reconsider every step in mutually respectful, time consuming, and conciliatory consultation. We adjusted or surrendered some of our usual habits. For example, we took attendance although that had been a ritual for only one of us. To reconcile our differences about whether to call on students by their first or last names, one of us acceded.

¹⁹. To encourage professional development growth in teaching, Brooklyn Law School has adopted a policy that each full-time tenured faculty member visits the classes of two colleagues each year in order to learn from observing. Ideally, the visitor and the teacher talk about the class afterwards. The program is, however, voluntary, and the visits tend to be sporadic and unevenly distributed.
We briefly considered sticking with our respective habits but decided that would be too confusing. With regard to student participation, one of us routinely relies on volunteers while the other moves through the class randomly calling on many students. As the semester wore on, we both seemed to move to a middle, more mixed ground. Similarly, after we decided to offer students a paper option instead of an exam, we had to negotiate our different approaches about deadlines and expectations, and then communicate this clearly to the students.

On the other hand, we actively encouraged each other to try new strategies and techniques in the classroom. For example, we devised word games to demystify some of the vocabulary, scavenger hunts to encourage the students to penetrate the complex Rome Statute defining the International Criminal Court, and, for the first time, created Power Point presentations. None of these tasks required two teachers, and some were more effective than others, but the constant presence and encouragement of another teacher dedicated to the same course created an environment that made both of us want to be more creative and invest more energy in our teaching.

Not only did we try new teaching techniques, but we each undertook classes or units on topics more natural to the other. For example, Maryellen, the jurisdiction maven, taught the class about the Nuremberg precedents while Stacy worked the students through the jurisdictional limitations of the international criminal courts in the Hague and Tanzania. Stacy, the criminal law expert, covered extradition procedures while Maryellen focused on enemy combatants and the Guantanamo detainees. These choices are another reflection of the many different ways that the presence of a co-teacher energized us to push ourselves in new directions.

C. Teaching Styles

In the classroom, we had dissimilar styles. At least that is what the students told us. Many of them had taken classes from both of us before and knew what to expect. Indeed, after the first class, one said, “We knew more than you did about how different you are in the classroom.” Other students were new to both of us. Each of us had close relations to a few students who had been our teaching assistants, clinic students, or advisees. In general, the students in the class had great enthusiasm for the course, and in many cases loyalty to us. The spirit was high throughout the semester, despite some adjustments to our different approaches in the classroom.

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20. See infra Part III.E (detailing the range of topics we covered in the course).
Having now spent twenty-eight classes together, we are mystified by the students’ anecdotal responses that our classroom methods are different. We think our teaching styles are fundamentally the same. We both teach standing up from the front of the classroom, in a modified Socratic (or question-and-answer) approach. We rarely lecture except to introduce a topic, to sum up, or to provide a quick review. We both generally open a topic by establishing the analytical framework and policy choices before moving to a closer analysis of the legal issues. We both ask questions to force the students to read statutes closely and judicial opinions narrowly, although we are not equally persistent in our questioning of individual students.

It is true that one of us tends to walk up and down the aisles, and the other tends to stick closer to the podium, but both of us spend a portion of the class behind the podium, and both of us are out in front of it in each class. We both use the blackboard to generate quick outlines and to create visual images to reinforce the topic. We both used Power Point presentations at several junctures and both were apologetic about our lack of technological savvy. One of us tends to speak in a louder voice and in a somewhat more formal manner, but we both talk with our hands and use self-deprecating humor. We have thought about the differing student perceptions a lot, and they remain a puzzle.

In contrast, our reactions to the students’ behavior in class were fundamentally the same. Independently, we thought the same student comments were insightful, whereas student questions and comments that confused one of us usually also confused the other. One of our responses to the students that was identical utterly surprised us: we each thought that a greater number of students had participated more energetically in the other’s classes! This caused us to observe student participation more carefully and, by the end of the semester, we were beginning to notice that different students seemed to respond more actively depending on who was leading the class.

D. Coordination and Pacing

We found that we had to be flexible about scheduling and timing. We, of course, needed to communicate our plans clearly to the students so they could prepare the appropriate assignment. In this respect, the web course (more about the web course later) was a substantial asset because it allowed us to respond to changes and instantaneously inform the students of the revisions. Adjusting our pacing on the spot during the class was more complicated. Spending more time than planned on exploring a topic is one of the mixed pleasures of teaching; generally, it signals that student interest has been stimulated, but it exacts costs in coverage. This
issue is not unique to team teaching, but co-teaching, especially in the alternating topic format we adopted, can exacerbate the problem. Sometimes we had not finished a topic as planned when the class ended. What to do? On occasion, in order to avoid compounding the problem, we decided to omit the materials we had not reached. Other times we decided to carry over a topic into the next class and figure out who should perform the wrap-up. It was definitely more difficult to make timing adjustments when each had to take into account the other’s lesson plans but often could not assess the impact her imperfect timing would have on the other.

Another problem that occasionally arose as a result of our division of topics was the student hand in the air wanting to go back to an earlier class taught by the person no longer at the podium. Although we each had devised strategies in our individual classes for coping with questions to which we did not have an immediate answer, we worried that they might not be transferable to this situation and that the teacher in charge of that particular class might appear weak or ignorant if she did not respond. We both felt that the dilemma was aggravated by our relative unfamiliarity with the total range of materials in this new course and by the fact that each of us had had a relatively small exposure to the subjects generally taught by the other. To a great extent, we tried to deflect student expectations of omniscience by expressly portraying ourselves as having greater command of different components of the course, international law versus criminal law and procedure, so that our individual authority in the classroom would not be undermined if the other provided answers. On the occasions when we were stumped, usually we signaled each other for help.

E. Connections Between the Classroom and the World

We managed to create an open atmosphere in the classroom by not only being available to the students for questions after class, but also by arriving in class about a half hour early to engage the students informally. Since the topics were so current, the majority of our students were eager both to master the materials presented and to relate them to the pressing events of the day. We tried to include as much news-breaking material as possible. Among other subjects, we discussed the Guantanamo Bay detentions, the designation of U.S. citizens as enemy combatants, aspects of the USA PATRIOT Act, the ongoing Milosevic

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21. Many students arrived a half hour early to get settled and probably to do some last-minute reading. One or both of us would arrive early and talk with the group of ten to fifteen students who showed up early just to chat.
prosecution, the tenth anniversary of the Rwandan genocide, the newly established international criminal tribunals in Sierra Leone and Cambodia, and the impending trial of Saddam Hussein.22

One of our explicit missions was to make strong connections between the classroom and the world so that the students would leave the course with a new or sharper sense of the relevance of international criminal law in its own right and its role in both national and transnational prosecutions. To achieve this, we exposed the students to an almost daily barrage of postings and announcements about the endless variety of relevant legal and extra-legal developments. We became so committed to highlighting the links between our course and current events that we even maintained our web course over the summer with steady reminders about cases and events.

F. Difficulties

The development of the course web page, onto which we posted the syllabus, course documents, teaching hypotheticals, and links to internet sources, as well as current events articles and news reports, was rocky. 23 We relied heavily on it to supplement the casebook. The students quickly complained that it was cumbersome. They wanted us to replace it with a photocopied course packet containing all of the supplementary readings, edited to highlight the most salient points, and presented in the order in which they should be read.24 Instead, they had to sign onto the web


24. Their request was not unreasonable, but it was not doable. At least during our first semester teaching the course, we could not plan sufficiently in advance to allow time for
course, go to the appropriate page in the syllabus, click onto the document, and either read it online or print it. Sometimes we posted an entire document, such as a treaty, but only asked them to read a part of it.

We turned to the students for assistance in making the web course more user-friendly. Based on their feedback, largely received via the discussion board feature of the web page, we streamlined the web course as much as possible so that it required a minimum number of clicks, posted excerpts as well as full documents, and made our roadmap for the course clearer. Their comments made us realize that we had been carried away by our enthusiasm for assembling information for them and had been seduced by the speed of our school internet connections and printers. We had not realized that many of the students—though technologically very capable—faced hardware-imposed problems that we did not.

Although the course web page exponentially complicated the course by requiring a lot of advance planning, editing, and posting, it definitely facilitated our organization. We used the folder and sub-folder function in posting course materials to indicate the ways in which various concepts are related to each other. We also used the syllabus function to post questions to guide their readings. As mentioned earlier, we used the ability to communicate with students instantaneously to let them know of breaking news, changes in assignments, or glitches in accessing materials that had been brought to our attention. Nevertheless, although we used the web course as a tool to impose an organization on the readings and assignments, the students never adjusted fully to its benefits. Thus, it may have been a hindrance rather than a help.

International Criminal Law was not an easy course for the students. Much of the material and vocabulary was difficult and alien. Dealing with civil law legal systems and international conventions was sometimes perplexing. International judicial opinions, in particular, were extremely long and complex, consisting of multiple opinions written without clear holdings, dicta, and other familiar structures students of com-

25. Our class met at 2:30 p.m. on Tuesdays and Thursdays. We often heard from students around 11:00 a.m. on those days that they were having trouble accessing LexisNexis, meaning, of course, that they were getting around to the reading shortly before class. We knew, since we also had been on the web page regularly, that there had not been any problems the day or the evening before!

26. How much of the student reaction to the course web page was a function of their resistance to unfamiliar and wide-ranging sources of international law or to their discomfort with assignments in a new and evolving course remains unclear. One of us has used course web pages extensively in the past, and they have not triggered negative student reaction.
mon law are trained to identify. They are frustratingly indeterminate for many U.S. law students. Although more than half of the students already had taken a course in international law, most of the students found it difficult to move between international and municipal law, to correlate treaties, statutes, and cases, to understand the political and foreign relations underpinnings of many legal developments, and to begin to express themselves in a new language.

Like our students, each of us had to master a lot of new material and vocabulary in the other's field. Both of us had to learn a substantial amount about the hybrid topic of international criminal law. To do this, we began by teaching each other the basics of our specialties where we could, and shared our growing competence in new areas. As co-teachers, we may have appeared to the students to be running on parallel tracks, dividing the subjects according to our specialties and preparing classes separately. In reality, though, our paths generally converged as we jointly unraveled difficult material in hours of conversation and assisted each other to become familiar with new concepts, theories, principles of law, and even entire legal systems. Basically, we taught each other as well as our students. This was both rewarding and sustaining. Ironically, this is the very learning strategy our students employ regularly in study groups. They have been co-learners far longer, and certainly more recently, than we have.

One aspect of the experience made us laugh. After a few weeks of classes, we realized that we had fallen into an unconscious behavior pattern. The one who had taught the class left the classroom awash in self-criticism. (“I was disorganized.” “It didn’t go according to plan.” “I omitted too much.” “I couldn’t generate student discussion.” “What went wrong?#!”) Meanwhile, during the class, the observer had watched in admiration. (“The pacing was perfect.” “So many students really were active.” “The organizational overview was so useful.” “The discussion really forced the students to develop great points.”) We had become a mutual self-deprecation/mutual admiration society. Of course, we pointed out flaws gently, and our routine yielded much helpful commentary about our teaching skills, lesson plans, and interactions in the classroom.

MEF: Having a colleague in the classroom during every single class was a substantial change and made me feel vulnerable. She would see every one of my mistakes. She would know when I handled a student question or response ineptly. She would know when I flubbed some basic principle about criminal law.
She would see when I didn’t understand a point a student was making.

But, I always had someone to talk to about the substance of the course. It was enormously enriching to have an informed and eager colleague available for discussion to explore and analyze the interrelationship between several complex bodies of law, as well as pedagogical choices. This was totally positive.

SC: I’ve never been that confident about my public presentations, so having a regular observer who would be a sensitive and friendly critic was a great asset. I also was really nervous about the exposure of my flaws and insecurities (Can I ask a provocative question? Do I know the material well enough? Has my methodology been productive?), and that never really subsided even though my critic was almost always supportive and never ever harsh. But, I learned so much from just watching Maryellen motivate the students into responsiveness with humor, tact, and gentle pressure. She is a demanding teacher, whereas I let them off the hook easily. She uses the board really effectively. And, when I was unsure about the law, she was there to pull apart a complicated case or statute.

IV. EVALUATION OF THEM, OF US, OF THE EXPERIMENT

A. Our Evaluations

To evaluate the students’ mastery of the course material, we administered a traditional essay exam. In this aspect, co-teaching was a dream come true. We met together to sketch the issues we thought should be included, to brainstorm about fact patterns, and to choose portions of the course for each of us to develop. Ultimately, we each created one question, which the other read and adjusted, that comprised fifty percent of the exam. This division of labor and support system enabled us to craft the exam even more quickly than in our other courses. More importantly, having the input of a colleague who had been an integral part of the class led us to feel more confident about the validity of the exam questions.

We then separately graded our respective question. We did not compare criteria for assessing an answer, nor did we read the answers to the other’s question except in one extreme case where the student had performed at a close to failing level so we wanted to double-check the scoring. We then worked together to fit our grades into the law school’s
mandatory curve, and then together completed the final step of raising some grades based on class participation. In this last step, we had to come to some agreement about which students deserved adjustments and why, an easily reached consensus since we concurred in almost every instance about how much and how valuable their class participation had been.

Ten students opted to write term papers, most for upper-class writing credit. We divided the supervision of the papers, for which we insisted on deadlines for topic selection, an outline, a first and a final draft. As noted earlier, we had somewhat different ideas about how to administer this and met with these students to revise our rules on several occasions during the term. We separately read our respective students’ papers, but met to discuss each paper and coordinate the assignment of a final grade so that the evaluations would be consistent.

SC: With all of the pressures of just staying a few steps ahead during the semester, we decided early on that mastery of the materials and the effort of co-teaching were demanding enough that we would not depart radically from the traditional testing model or experiment with ingenious classroom activities—no treaty negotiations, mock trials, or legislative debates.

MEF: I disagree with that assessment of our classroom activities. It’s true that we did not undertake a semester-long simulation or other comprehensive project. But, we did invest a fair amount of time in creating non-traditional classroom strategies. We used film, composed image-packed Power Point presentations, created word games, and constructed scavenger hunts. We orchestrated classroom debates with students assessing the wisdom and lawfulness of three different scenarios for trying Saddam Hussein. Faced with lengthy multiple opinions in landmark cases decided by the International Court of Justice or by the Law Lords in the United Kingdom, we assigned the students to articulate particular judges’ views of the disputes before them and of other related legal issues. This wasn’t revolutionary in terms of pedagogy, but it was much more than goes on in the traditional law school classroom with sixty students.

As I think about it, it occurs to me that our differing evaluations of the activities in our classroom reflect
a bigger point: Stacy is an experienced clinician and I’m not. Her clinical training encourages her to assess teaching methods in a different way—and to impose higher standards. This added an important element to our class throughout the entire semester, and it was visible in multiple ways. For example, she had a keen sense of when requiring students to assume a role would advance their grasp of the materials, and she was very effective at giving students written feedback on their papers that helped them deepen and improve their work without taking it over and putting it into her own voice. For me, this was an unexpected bonus of our co-teaching.

Throughout the semester, the students gave us largely positive feedback. Most frequently, their unsolicited encouraging comments were about the content of the course more than the teaching method. Some mentioned that co-teaching generated more vitality in the classroom. Others told us they sometimes felt off-kilter, unsure where to focus, and confused by our switching. As we bounced back and forth, they continually had to adjust their expectations. The classroom rhythms that usually evolve fairly quickly in a course were thrown off by alternating teachers.

In our view, the students were simultaneously impressed and disconcerted by two people in authority in the classroom. By modeling collaboration and respect, we hoped to foster the reality of most legal environments where teamwork and cooperation are valued. We understood that we were departing to some extent from the typically atomistic law school setting, and we ended up thinking it is so unusual for students to be exposed to professors who share authority in the classroom that they may simply have been unsettled by the unfamiliar.

B. Student Evaluations

Our student evaluations arrived just as we had finished revising the rest of this essay, and we eagerly opened them to see whether the student views concurred with our assessment of our performance and their reactions. Our school-wide course evaluations, which the students are required to fill out anonymously in every course each semester, ask questions about the organization, teaching methods, reading materials, and overall execution of the course, as well as the effectiveness of the instructor. For purposes of this essay, we focused on our students’ reac-
tions to the co-teaching structure of the course.27 The particular questions that seemed to elicit responses relevant to an assessment of our teaching structure (as opposed to the presentation of particular classes) follow:

- Overall, what were the professor’s strengths and weaknesses as a teacher?
- What did you get out of this course?
- In what ways did the professor’s teaching methods help (or hinder) your ability to achieve the goals for the course?

The student evaluations contained two surprises. First, although we received generally positive evaluations, the numerical rankings (1-5) were somewhat lower than those we usually saw in our individual classes. Although there might be other reasons for this, we have to concede that our students may not have been as enthusiastic about the benefits of co-teaching as we were.

Second, only a few students commented specifically on our co-teaching. Of these, only two were explicitly negative about the teaching structure we chose:

“Just have one professor. It was an interesting class, just all over the place.”

“I would recommend the course to other students, but it might be better if just one person taught it instead of two.”

27. Our school’s form is quite long—two pages containing fourteen questions, some multiple-choice, others calling for written comments. It usually takes fifteen to twenty minutes of class time to complete because students generally take the opportunity to give detailed feedback quite seriously. Because most of the form asks for information about the course itself rather than the instructor, we decided that we would ask each student to complete only one form. Although we expressly told them that they were welcome to address comments to us individually, few did. As a result, the composite answers to questions such as “Overall effectiveness” and “Would you take another course from this professor?” are at best ambiguous and definitely unreliable. We purposely have omitted the students’ comments about other aspects of the course unless they related directly or inferentially to the team-teaching aspect of the course structure. For example, as we already knew, they vocally disliked the web course, complaining about the burden of finding, reading, and printing the correct assignments. They universally loved the guest speakers and appreciated the opportunity to hear from people directly connected with the historical and legal events they were studying. Many complained that there was too much reading, and they had mixed reactions to the textbook. At least one also had mixed reactions to the professors and said so bluntly. While any set of student evaluations may contain strong criticism of the teacher, a negative comment related to only one co-teacher carries an additional sting because it is both comparative and, since the other also reads it, impossible to ignore.
We looked for commentary indirectly critical of co-teaching, too. Some students said the course was disorganized because the subject matter was diffuse. Others commented that they thought it was disorganized because it was being taught for the first time. We thought that both of these criticisms, while not linked specifically to co-teaching, may have related to our decision to alternate principal teaching responsibility. Indeed, upon reflection, we have concluded that co-teaching a course for the first time makes a demanding undertaking more intense and more rewarding, but not necessarily easier, than teaching a new course alone. Co-teaching, with its tendency to encourage ambitious and more creative teaching strategies, as well as its need to reach compromises between two individual teachers, may increase the number of first-time choices that, in hindsight, the professors will rethink, modify, or even abandon.

Furthermore, we thought that student remarks about disjointed pacing may have been a critique of our division of labor. Though these students seemed to be positive about the joint teaching in general, they had reservations about the course seeming somewhat disconnected. For example: “I liked that the class was team-taught, but it did make for a more disjointed learning experience.”

The majority of student comments about our co-teaching were fairly positive. Here are a few examples of their reactions:

“I liked the fact that this was taught by two professors. They were very effective in splitting the topics according to their expertise.”

“The fact that the teaching was divided was okay. It was a really nice break.”

“Lecture was effective, especially given the two-professor method in this case where the two professors complemented each other well.”

“The dynamic teaching duo made the class interesting and fun.”

“The team teaching was well divided.”

“The lecture component was good. The guest speakers were a fabulous component of the class . . . . I liked the team teaching.”

Some students expressed greater ambivalence:

“[The] professors wanted to be good teachers, and their methods were interesting, but [they] could not answer in-depth questions critically.”

“I found the biggest weakness was the team situation because of the extreme differences in teaching styles. However, since both
professors are extremely knowledgeable and excellent, it worked out all right.”

And others had some suggestions:

“[The] professors did a great job engaging students—[it] would have been nice to see [the] teachers engaging each other—taking different sides of an issue, debates, etc. [Having] two teachers is a great opportunity to get two view points.”

“Class itself was sometimes too dry, and class pacing was poor. It might have been better if you taught classes together, rather than taking turns.”

And the most gratifying review of all:

“I love these two! What a great team! Such opposites, such a pleasure to attend their lectures.”

V. THE FUTURE

Without doubt, we want to teach International Criminal Law together again. Many times during our co-teaching, we made plans for how to improve things the next time around. Now that the class preparation, the papers, and the exam are behind us, we have tried to reflect on a second run.

SC: So what should we do differently? Junk our course web page?

MEF: No, I think the students’ negative reactions to that were more about their sense that we were disorganized because it was the first time we had taught the course. We’ve got to be careful to separate out the reactions to a new course from the reactions to co-teachers.

There are obvious logistical adjustments we’ll want to make the next time, like deleting some topics, winnowing down assigned materials, and so on. But I’d really like to work on constructing more classroom situations in which the professors disagree with and question each other—and on occasion both engage and press the students. I don’t want to encourage the students to be passive spectators as two law professors show off, but I do want to have more intellectual debate in the classroom.

SC: I was disappointed that we didn’t get as far in developing strategies for getting students to grapple with
the concepts and the nitty-gritty legislative and treaty provisions. I’d like us to invest a significant amount of time in creating more interactive classroom scenarios.

MEF: That would be great. In addition, we need to think about how we could have made more effective use of some of the assignments we already created. My sense is that we let the students off the hook too easily whenever they resisted the roles we assigned them. We probably sent mixed messages about how seriously they should take the interactive exercises. That was all exacerbated by our sense of needing to move on in order to cover all the topics we had sketched out. Now that we’ve seen how long various subjects took, we can delete some, and that will let us allot more time for student participation in complex problems and role plays.

SC: Another thing I’d really like to work on the next time around is creating different evaluation devices. We all criticize the law school model of grades depending on how the student writes in three hours on one day. One of the reasons we feel stuck with this approach is the burden that grading multiple assignments imposes on the teacher. If there are two of us and if we can be creative, we ought to be able to use our co-teaching to bring improvements here.

VI. CONCLUSION

The success of our first offering of International Criminal Law and the continuing high profile developments in this field have assured a continuing place for this course in the law school curriculum. Having begun to master the concepts and materials of International Criminal Law during our first run, each of us could, of course, teach the course again on our own. That would be a major letdown, however, now that we have experienced the inspiration, exuberance, and reward of working as collaborators both inside and outside the classroom. It is clear to us that one semester of co-teaching has not begun to exhaust the benefits of preparing and presenting a course together. We do think that this intensive co-teaching experience has generated its own rewards—it has solidified a relationship where we can depend on each other for ideas, support, and honest criticism. But it has done more than that: it has opened a window into our future development as classroom teachers.
LEARNING INTERNATIONAL CRIMINAL LAW: ONE LAW STUDENT’S EXPERIENCE IN A TEAM-TAUGHT COURSE

Elizabeth M. Bakalar*

I. INTRODUCTION

In their collaborative article Co-teaching International Criminal Law: New Strategies to Meet the Challenges of a New Course, Professors Stacy Caplow and Maryellen Fullerton describe the myriad rewards of team teaching International Criminal Law for the first time at Brooklyn Law School in the spring of 2004.1 Both professors address the difficult and more daunting aspects of sharing the classroom with a colleague,2 but ultimately conclude that their course was a success.3 The authors write that they are “converts both to the subject matter [of International Criminal Law] and to collaborative teaching,”4 and that, “without doubt,” they want to teach the course again.5

This Essay is a three-part response to Professors Caplow and Fullerton, and an overall analysis of my experience as one of their sixty students in International Criminal Law.6 Part II of the Essay provides background on my personal perspectives and expectations upon enrolling in the class. Part III details my initial impressions of the class, charts the course’s development throughout the semester, and offers a critique of some of the course’s structural elements. Part IV responds directly to some of the professors’ observations about student impressions, their differing teaching styles, and team teaching in general, and offers specific suggestions for more effective handling of certain elements of the course in the future. The Essay concludes by agreeing with Professors Caplow and Full-


2. The professors note, inter alia, the challenges of increased preparation time, necessity of mutual decision-making, adjustments in teaching habits, and reconciliation of dissimilar teaching styles. Id. at 109, 114–15.

3. Id. at 127.

4. Id. at 105.

5. Id. at 126.

6. See id. at 114.
eron that International Criminal Law is a valuable discipline,\(^7\) and con-
curring that their team-taught class at Brooklyn Law School merits a
“next time.”\(^8\) However, in my estimation, the class should not be offered
again without some significant changes and adjustments, both to the
team-teaching structure and the overall organization of course material.

II. PERSONAL PERSPECTIVES AND EXPECTATIONS OF THE CLASS

I enrolled in International Criminal Law during the spring semester of
my second year of law school for several reasons.\(^9\) First, the class satis-
fied a requirement of my first year of membership on the Brooklyn Jour-
nal of International Law that all students take at least one international
law course per semester. Second, the class was being taught by two pro-
fessors with whom I already had established relationships. Professor
Fullerton taught my first year Civil Procedure course, and gave gener-
ously of her time in helping me with some of its more difficult concepts.
She also acted as the faculty advisor on my student note, and we worked
closely together during the previous semester in developing it. I had not
yet taken a class with Professor Caplow, but was friendly with her in the
context of Brooklyn Law School’s Edward V. Sparer Public Interest Fel-
lowship program. Professor Caplow was a member of the Fellowship’s
faculty committee, and I was one of several dozen fellows in the pro-
gram. Monthly lunches and periodic symposia sponsored by the program
had given us the opportunity to get to know one another outside the
classroom. The prospect of taking a class with both professors at once
was thus a big draw. Third, the subject matter of the class fascinated me.
I took the basic Criminal Law course during my first year and completed
the introductory International Law course that past fall. The extent of my
knowledge in these respective areas of the law was essentially limited to
these two courses, and I looked forward to harmonizing the disciplines.
Finally, the class credits and timing fit my scheduling needs.

I was certainly excited about the material, but, like Professors Caplow
and Fullerton, I was not entirely sure of what to expect from the semes-
ter.\(^{10}\) The prospect of a team-taught course—particularly where the team
was composed of two popular, tenured professors—had generated sig-

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7. *Id.* at 103.
8. *Id.* at 126.
9. The professors write that they “assumed . . . that, with a few exceptions such as
those students who might have selected the course because it met at a convenient time,
most students would be as excited about the subject matter as [they] were . . . .” *Id.* at
109.
10. The professors did not know what to expect regarding the total enrollment of the
course or the baseline knowledge of the students. *Id.* at 109.
significant buzz among my student peers. What would the classroom dynamic be like? How would the professors reconcile their differing teaching styles? How (if at all) would they divide the material? How would they evaluate our performance? Students enrolled in the course wondered aloud about these questions and more. There seemed to be some skepticism that an unconventionally-structured class such as this could really work, but everyone seemed willing to give it a chance.\textsuperscript{11}

Personally, I find it apt that one of Brooklyn Law School’s few team-taught courses was International Criminal Law. International law is, by definition, a cooperative discipline. The pillars of international law are treaties between nations, United Nations resolutions, and international custom and consensus on how we should live and govern ourselves in a global society.\textsuperscript{12} International Criminal Law embodies this spirit even more soundly—consensus and cooperation are imperative to developing universal standards of behavior and effective international law enforcement.\textsuperscript{13} A course based on material so fundamentally “cooperative” in nature seemed to naturally lend itself to a partnership in instruction.

\begin{flushright}
11. As the professors note in their article, the Brooklyn Law School administration was initially reluctant to offer International Criminal Law as a co-taught course, and “joint teaching by full-time faculty is rare.” \textit{Id.} at 104, 106.

12. \textit{See Jeffrey L. Dunoff et al., International Law: Norms, Actors, Process} 1 (2002) (“International law, in one form or another, dates back thousands of years, and reflects the felt need of most independent political communities for agreed norms and processes to regulate their interactions.”).

13. According to the introduction of our casebook:

[International Criminal Law] has undergone an enormous expansion in recent years. This expansion is a result both of (a) increasing “globalization” of criminal conduct and consequently of national criminal law, and (b) increasing reliance on criminal sanctions to enforce norms of international law, especially norms of international human rights and humanitarian law . . . .

. . . . [International Criminal Law] in its original sense also can be regarded as including, by extension, on the one hand, exceptions from criminal jurisdiction . . . and, on the other, forms of transnational cooperation . . . that enable states to circumvent the ordinary restrictions on their power to enforce criminal law outside their own borders.

\end{flushright}
III. INITIAL AND ONGOING IMPRESSIONS OF THE CLASS

A. Initial Impressions of Co-teaching and the Classroom Environment

I was immediately engaged by the first class. I remember distinctly that the hour flew by, and I left the classroom that day feeling the semester would be “easy” in terms of being able to remain attentive during class. For me, one of the biggest challenges of law school was staying focused on one person discussing and analyzing dense legal documents for hours at a time. Because I was very interested in the material, and the course was being taught by two professors, I knew this would be less of a problem.

However, I was somewhat surprised that Professors Caplow and Fullerton chose to divide up the class meetings so that each professor would teach particular topics and classes. In retrospect, I think the bifurcated approach made the most practical sense, but it was different from what I envisioned. I did not realize that each class would be so completely dominated by one professor. I had pictured more of a dual role for the professors, with both standing at the front of the room and teaching at the same time. As it turned out, the professors alternated classes with one teaching and one sitting in the back of the room, which was probably the more realistic arrangement given the large class size.

I agree wholeheartedly with the decision not to limit the class size and to teach the class as a three-credit survey course rather than a seminar. Professors Caplow and Fullerton did a good job of creating a smaller-feeling environment within the context of a large lecture hall. The first day of class, students scattered themselves throughout the amphitheater, but the professors asked everyone to move up to the front and to one side of the aisle. Condensing the room in this way gave the class a more inti-

14. See Caplow & Fullerton, supra note 1, at 114.
15. During the preparation phase, before the semester began, Professor Caplow advocated that each professor should “take responsibility for particular classes or topics,” while Professor Fullerton argued for more “collegial debate in class.” Id. at 112.
16. Id. at 109. While seminar classes are intimate and lend themselves to more collegiality and flexibility, they can also have the unwanted effect of alienating students. Although I have not personally experienced this phenomenon, some of my classmates have been shut out of popular and topical classes that they desperately wanted to take because of their interest in the subject matter, their need for the course credits, or both. Often, these specialized seminar courses are offered only once during a student’s law school career. Whether or not their feelings are justified, students who are prohibited from enrolling in the courses of their choice harbor resentment toward faculty, administrators, and the law school as a whole. With few exceptions, I believe that enrollment in law school classes should generally be unlimited.
mate feel, even though we were sitting in one of the largest classrooms in
the law school’s main building.
In creating this atmosphere, I think the professors obviated the need to
bifurcate the classes so strictly. While it may have been impractical or
distracting to have both professors sharing the floor point-for-point, it
was probably equally unnecessary for one professor to remain almost
totally silent while the other led the class. In the future, I propose more
collaboration and dialogue between the professors during class, perhaps
with one professor presiding over a given class but leaving room for the
other to contribute more actively.

B. Ongoing Impressions: Unconventional Teaching Tools

As the semester wore on, any classroom difficulties borne of a first-
time team-teaching effort were mitigated by the use of unconventional
teaching tools such as guest speakers and films. Guest lectures and the
use of film are not appropriate for every class. When utilized improperly,
these methods can give students the impression that a professor is shirk-
ning his or her teaching responsibilities or is not diligently conveying the
subject matter of the course.

In International Criminal Law, however, the guest lectures and films
were the most memorable classes of the semester and had the greatest
impact on my understanding of the issues in this burgeoning discipline.
The four guest speakers in particular did an excellent job of illuminating
various aspects of International Criminal Law’s history and future.17 The
films were all topical and poignant, and the class was almost always
struck silent by the powerful events depicted.18 Students did not rustle
their backpacks and papers or hurry out of the room at the end of the
films, but remained (uncharacteristically) seated, taking in the enormity
of what they had just watched.

17. As professors Caplow and Fullerton mention, the four guest speakers were David
N. Kelley, the former United States Attorney for the Southern District of New York,
Benjamin B. Ferencz, a former prosecutor at the Nuremberg Trials, Maxine I. Marcus, a
Brooklyn Law School alumnus and a Prosecutor for the Special Court for Sierra Leone,
and Justice Gustin L. Reichbach, New York Supreme Court (Kings County), who served
as an international judge on the United Nations tribunal in Kosovo. See id. at 110 n.15.

18. Two particularly memorable and moving films dealt respectively with the Israeli
hostage crisis at the 1972 Munich Olympics, ONE DAY IN SEPTEMBER (SONY Pictures
Classics 2001), and Nazi Adolf Eichmann’s capture in Argentina followed by his subse-
quent trial in Israel, LANDMARK WAR CRIMES TRIALS: THE TRIAL OF ADOLF EICHMANN
(Choices 2000).
IV. DIRECT RESPONSES TO PROFESSORS CAPLOW AND FULLERTON

A. Teaching Styles

Both professors write that they were “mystified by the students’ anecdotal responses that [their] classroom methods are different,” remain puzzled by the perceived variations, and characterize their teaching styles as essentially uniform. I find it fascinating that Professors Caplow and Fullerton have trouble seeing what a totally different experience it is to be a student in each of their respective classes. Perhaps the difference can be explained by the fact that Professor Fullerton regularly teaches large lecture classes and Professor Caplow often teaches in a smaller clinical setting. Whatever the explanation, Professors Caplow and Fullerton each generate totally different feelings among students in the classroom.

Professor Fullerton runs the class at a determined clip. When she asks a question, she seems to be eliciting a very precise answer. For example, she walks up and down the aisles calling on students at random, and when a response is not quite what she is looking for, she says something to that effect and moves quickly to the next student until the point she is trying to make is drawn out. She frequently speaks with her hands, moving them back and forth in a gesture that seems intended to invoke the correct response to a question, or at least the response that will lead to a particular point or principle. No feeling is worse than seeing Professor

20. The professors evaluate their teaching as follows:

   It is true that one of us tends to walk up and down the aisles, and the other tends to stick closer to the podium, but both of us spend a portion of the class behind the podium, and both of us are out in front of it in each class. We both use the blackboard to generate quick outlines and to create visual images to reinforce the topic. We both used Power Point presentations at several junctures and both were apologetic about our lack of technological savvy. One of us tends to speak in a louder voice and in a somewhat more formal manner, but we both talk with our hands and use self-deprecating humor. We have thought about the differing student perceptions a lot, and they remain a puzzle.

Id. at 116.

21. Perhaps, part of the explanation for this is the period of years that separates most law students from their professors. Indeed, the professors make note of this divide, observing that “world events that seem recent to us are faint historical references for our students.” Id. at 109.

22. Id. at 108. Professor Fullerton comments on the sense of “intellectual solitude” she often feels in the classroom, whereas Professor Caplow writes: “As a clinician, I don’t experience isolation. Many of my clinic classes are co-taught, usually around a table so that the atmosphere is more relaxed.” Id.
Fullerton fix her gaze on you and hearing her say, “What do you think, Ms. so-and-so?” and, having allowed one’s attention to wander off for a moment or simply not knowing what she is after, being forced to meet her challenge with silence and a blank and clueless stare. And heaven help you if you forget to turn off your cellular phone during class. Even though Professor Fullerton’s teaching tactics are sometimes intimidating, I think they are ultimately very productive, because they encourage students to come to class prepared and pay attention. I also found it very gratifying to deliver the point that she would be looking for—she gives her students an equal number of opportunities to feel smart and insightful in the classroom.

Professor Caplow’s teaching style seems informal by comparison. The class feels much more like a round-table discussion. Professor Caplow is more willing to let the conversation and classroom dialogue take its natural course—she appears to have a less rigid agenda, and relies mostly on volunteers to round out the discussion. Like Professor Fullerton’s teaching style, Professor Caplow’s also has its pros and cons. One downside to the more informal atmosphere is that the same students tend to contribute again and again, and it is not clear whether the non-participants are attuned to what is happening in class. Professor Fullerton’s more “Socratic” method serves as a check on preparedness and understanding. However, a big advantage to Professor Caplow’s style is that there is more room for flexibility and dialogue, and when the class discussion would veer off in an interesting direction, there were many more opportunities to pursue it. There is also less tension about being caught off guard, so it is a bit easier to relax and talk freely about some of the concepts.

B. Teaching Tools: Effective Use of Information Technology

I agree with the professors’ characterization of the web course page as something of a “hindrance,” and think “barrage” an apt word to describe the influx of document postings. Many professors at Brooklyn Law School utilize a Westlaw or Lexis web course to supplement hard copy materials. In my experience, however, these web pages become

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23. Professor Caplow characterizes Professor Fullerton as a “demanding teacher,” and feels that she herself, by contrast, lets students “off the hook easily.” Id. at 121. I think this is something of an overstatement, but it does acknowledge the different atmosphere each professor creates in class.

24. Id. at 118–19.

25. Id.

26. I have taken numerous courses with other professors who have used a web course. These included a Federal Litigation Clinic and companion seminar, International Law,
troublesome when they take on a central function in a course. Those classes where professors simply use a Westlaw or Lexis web page to post syllabi or class handouts or to host a question and answer discussion board represent the most effective use of web courses. Completing the assigned reading in International Criminal Law, however, became an exercise in information technology proficiency, rather than one in International Criminal Law. I spent the first twenty minutes of every assignment engaged in an online treasure hunt to access the assigned materials. Once I had deduced from the syllabus what we were supposed to read, located it on the web course, converted the assignment from HTML, Word Perfect, or PDF format into Microsoft Word (sometimes a requirement to print the document), printed it out, and fastened all the pages together, I had lost enthusiasm for its actual contents!

While acknowledging unanticipated hardware problems, Professors Caplow and Fullerton express disappointment that students waited until the actual day of class to read the assigned materials and did not access the web course before that time. Yet, reading shortly before class is, inevitably, the modus operandi of almost every law student I know. I consider myself to be good with time management and rarely skipped reading for class, but in order to prepare for a full course load in a given week, carving out the few hours before a class meets to prepare for that class often could not be helped. Unfortunately, it is simply unrealistic for any law professor to regularly expect more advance preparation than that.

Having to jump through technological hoops gave some students the impression that the course was more disorganized than I believe it actually was. While advance photocopying was apparently not feasible for International Criminal Law assignments on the first go-around, I think it is imperative to the future success of the course. With the exception of “current events” type articles and materials, a course packet of the rele-


27. Id. at 119 (“We had not realized that many of the students—though technologically much more capable than us—faced hardware-imposed problems that we did not.”).

28. Professors Caplow and Fullerton write:

We often heard from students around 11:00 a.m. on those days that they were having trouble accessing LexisNexis, meaning, of course, that they were getting around to the reading shortly before class. We knew, since we also had been on the web page regularly, that there hadn’t been any problems the day or the evening before!

Id. at 119 n.25.

29. Id. at 118 n.24.
vant treaties, supplemental cases, and similar documents could be compiled at the beginning of the semester and a one- or two-page syllabus could assign students the reading for each class. Additional documents could be handed out one class in advance and then posted to the web course for those who did not receive a copy during class.

C. Evaluating Students

I was among those students who opted to take the three-hour final exam rather than write a term paper.\(^{30}\) I was interested to read that each professor had written one of the two exam questions.\(^{31}\) To highlight another difference between the two professors, I immediately suspected which professor wrote each question. As mentioned earlier, I had already taken two semesters of Civil Procedure with Professor Fullerton and was familiar with her signature “evolving fact-pattern” style of exam writing. Despite—or perhaps because of—that familiarity, I thought that the two professors’ distinct voices came through clearly on the final exam. Professor Fullerton’s question—like her classes—appeared designed to lead the student down a charted path, while Professor Caplow’s left more room for creativity or alternatives.

Of course, what a law professor thinks when he or she writes or evaluates an exam question remains a mystery, so I cannot be sure I accurately matched each question with its author or identified her intent. The entire law school examination process—from start to finish—remains stubbornly opaque, despite tenacious attempts by generations of law students to crack the code. In my own experience, it was often impossible to tell how I had fared on a given examination. Exams about which I had felt the most confident were often the ones where I was the most disappointed by my grade. On other exams, I was certain I had failed, but ultimately excelled. In the case of International Criminal Law, I felt secure in my performance on the final exam. This feeling turned out to be justified, but it could have just as easily gone the other way.

For this reason, I fully support the professors’ decision to offer students a paper option.\(^{32}\) The chance to write a paper rather than sit for an exam gives law students more control over the evaluation process. Paper-writing engages students in a way that a three-hour exam simply cannot, and it may be a more reliable measure of their grasp of the course mate-

\(^{30}\) Professors Caplow and Fullerton offered students the choice between taking a traditional final exam and writing a term paper. \textit{Id.} at 115.

\(^{31}\) \textit{Id.} at 121 ("Ultimately, we each created one question, which the other read and adjusted, that comprised fifty percent of the exam.").

\(^{32}\) \textit{Id.} at 115.
rial. Further, the process of developing a paper permits students to hone in on specific areas of individual interest and explore them in depth throughout the semester, with the professor’s feedback on drafts giving the student some idea of his or her progress. Although I did not personally opt for the paper in International Criminal Law, I feel strongly that this option should remain a part of the course in the future and wish that more law school courses would give students this alternative.

V. CONCLUSION

Overall, my experience in International Criminal Law was quite positive. I left the class fully persuaded that the discipline is increasingly significant, and I hope that Brooklyn Law School will continue to offer the class to its students. The guest lectures, films, substantive course material, and techniques for evaluating students are all “keepers.” I also appreciate the theory and underlying philosophy of team teaching law students, and I am confident that this form of instruction has a great deal of potential. After all, much of a lawyer’s work is collaborative in practice, and promoting or showcasing a teamwork environment can only work to the law student’s benefit. However, some practical factors—at least in the context of this particular course—definitely merit revision.

First, where a class is co-taught, I think the professors should work more visibly as a team. One professor could still take the lead in alternating classes, but the other should have a more developed role in front of the students. Second, the course web page should supplement—not replace—a hard-copy course packet available for purchase in the school bookstore. Sending students scavenging online for required reading blunts enthusiasm for the material and excuses unpreparedness. Of course, neither of these perceived flaws is fatal. For a first-time effort, International Criminal Law earns high marks, and some significant procedural adjustments will strengthen the course immeasurably.

33. I chose the exam because writing a term paper during this particular semester would have been too time-intensive. A heavy course load combined with the fact that I was already writing a note for the Brooklyn Journal of International Law made another research project unrealistic.
OVERCOMING NGO ACCOUNTABILITY CONCERNS IN INTERNATIONAL GOVERNANCE

Erik B. Bluemel*

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I. INTRODUCTION

Accountability is the “new black” of international governance.¹ Fears of cooptation of governance by non-state, and therefore in some scholars’ minds, non-legitimate, actors pervades the literature on accountability.² This critique of non-governmental organizations’ (NGOs) participation in international governance regimes generally starts with the question: “Who elected the NGOs?”³ This is a fair question to raise, but one which does not address the whole picture or normatively invalidate NGO participation in all circumstances.

The current debate and literature over-emphasizes democratic accountability to the possible detriment of other available means of ensuring accountability in governance regimes.⁴ This Article posits the emphasis on elements such as elections and representativeness of governance actors as lone indicators of accountability is insufficient to justify participation

¹. Governance is used throughout this Article in the narrow sense of governance with governmental involvement. See generally Governance Without Government: ORDER AND CHANGE IN WORLD POLITICS (Ernst-Otto Czempiel & James Rosenau eds., 1992) (discussing the broadening concept of governance beyond governments). It is therefore “a mode of governing that is distinct from the hierarchical control model characterizing the interventionist state. Governance is the type of regulation typical of the cooperative state, where state and non-state actors participate in mixed public/private policy networks.” Renate Mayntz, Common Goods and Governance, in COMMON GOODS: REINVENTING EUROPEAN AND INTERNATIONAL GOVERNANCE 15, 21 (Adrienne Heritier ed., 2002). This is sometimes referred to as a public-private partnership arrangement, or “the formation of cooperative relationships between government, profit-making firms, and non-profit private organizations to fulfill a policy function.” Stephen H. Linder & Pauline Vaillancourt Rosenau, Mapping the Terrain of the Public-Private Policy Partnership, in PUBLIC-PRIVATE POLICY PARTNERSHIPS 1, 5 (Pauline Vaillancourt Rosenau ed., 2000). As a result, global governance is “rule making and power exercise at a global scale . . . [and] can be exercised by states, religious organizations, and business corporations, as well as by intergovernmental and non-governmental organizations.” Robert O. Keohane, Global Governance and Democratic Accountability, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 130, 132 (David Held & Mathias Koenig-Archibugi eds., 2003).

². For the purposes of this Article, an NGO shall be defined in accordance with the United Nations’ definition which notes an NGO as “any non-profit voluntary citizens’ group which is organized on a local, national or international level.” United Nations, http://www.un.org/dpi/ngosection/brochure.htm (last visited Aug. 9, 2005).


in international governance and fails to recognize the importance of delegation as another legitimate source of authority.  

Most scholars treat NGOs as a homogenous group and base their theoretical and normative arguments around such a generalization, even when recognizing NGOs vary significantly on a number of levels. This Article seeks to advance the literature on NGO accountability by unpacking NGOs by functional role in international governance and relating these roles to accountability theory. Failing to recognize these functional distinctions, many theories of NGO participation in international govern-


6. Wide variations in NGOs’ purposes, sizes, competencies, functions, membership structures, and funding sources, for example, impact the effectiveness of accountability mechanisms and counsel for greater specificity in establishing accountability mechanisms. For a discussion of some of these wide NGO variations, see, for example, Benedict Kingsbury, First Amendment Liberalism as Global Legal Architecture: Ascriptive Groups and the Problems of the Liberal NGO Model of International Civil Society, 3 Chi. J. Int’l L. 183, 186 (2002); S. Tarrow, Transnational Politics: Contention and Institutions in International Politics, 4 Ann. Rev. Pol. Sci. 1 (2001) (noting sometimes NGOs are really state bodies in disguise to gain increased political influence); J.A. Scholte, Civil Society and Democracy in Global Governance, 8 Governance 281, 295–99 (2002); Ngaire Woods, Global Governance and the Role of Institutions, in Governing Globalization 25, 28 (David Held & Anthony McGrew eds., 2002); John Micklethwait & Adrian Wooldridge, The Globalization Backlash, Foreign Pol’y, Sept.–Oct. 2001, at 16 (“NGOs claim to represent global civil society. But nobody elects them.”); David B. Rivkin, Jr. & Lee A. Casey, The Rocky Shoals of International Law, 62 Nat’l Interest 35, 37 (2001) (“NGOs are not elected, not accountable to any body politic.”); Jeremy Rabkin, International Law vs. the American Constitution—Something’s Got to Give, 55 Nat’l Interest 30, 37 (1999) (“NGOs never have to face voters or bear any sort of accountability.”). The variations are important because, for example, increasing the openness or representativeness of governance structures may undermine accountability for nondecisions when deadlocks or “joint decision traps” occur (made more likely by the increased breadth of participation). See Fritz W. Scharpf, Coordination in Hierarchies and Networks, in Games in Hierarchies and Networks: Analytical and Empirical Approaches to the Study of Governance Institutions (Fritz W. Scharpf ed., 1993).
ance have missed the mark, focusing primarily on ensuring greater accountability of NGOs generally. This Article seeks to remove the debate regarding the provision of accountability from the level of the actor to that of function.\(^7\) This Article proposes the participation of NGOs in international governance should not always depend upon democratic accountability. Instead, the accountability required of these NGOs should depend upon the particular governance function they perform. As a result, the mechanisms used to achieve such accountability will necessarily vary by function.

Part II begins with a discussion of accountability in international governance, establishing a general typology of accountability mechanisms.\(^8\) Part III then describes some of the different functions performed by NGOs in international governance, providing examples of how such systems are arranged under existing frameworks and illustrating the relationship between the function performed and the accountability needed. Part IV seeks to refine NGO accountability theory by proposing a new model to guide NGO participation: one linking accountability to function. Part IV also identifies some concerns in implementing the theory. The Article concludes by calling for further research into the potential drawbacks of implementing this new framework so an appropriate balance between fairness, operability, and accountability may be reached in international governance.

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7. While it may be argued the underlying assumption behind this framework is that it does not matter who governs, so long as appropriate accountability controls are enforced, this argument would be an over-extension of this Article’s proposal. This Article does not seek to undermine the authority of State actors in international governance, nor does it suggest States are losing power in international governance. Rather, it questions the assumption that accountability mechanisms must be differentiated between authority delegated to administrative government agencies and authority delegated to non-state actors with sufficient controls to assure adequate accountability to the delegator. It is beyond the scope of this Article to evaluate whether, after establishing a baseline accountability requirement for a particular function, particular actors must be held to different standards based upon different levels of legitimacy as international governance actors. Normatively, such a differentiation seems questionable, since accountability mechanisms are designed to constrain power, whatever its form. These actor-based legitimacy concerns may better be dealt with through other forms of legitimization, rather than through accountability controls, but this Article does not take a position on this issue.

8. This categorization is based largely upon the work of Keohane, Grant, and Nye. See generally Grant & Keohane, supra note 4; Keohane & Nye, supra note 5.
II. ACCOUNTABILITY IN INTERNATIONAL REGIMES

Although accountability is “an under-explored concept whose meaning remains evasive,” the purpose of this Article is not to define the concept with any more lucidity than theorists who have come before; instead, it is to explore a new mode of analysis for how accountability mechanisms should be structured. Generally, an “accountability system is the set of accountability mechanisms, and their interactions, that characterize a given governance system.” Accountability implies information and the ability to sanction power-wielders for misbehavior: “[a]ccountability refers to relationships in which principals have the ability to demand answers from agents to questions about their proposed or past behavior, to discern that behavior, and to impose sanctions on agents in the event that they regard the behavior as unsatisfactory.” Accountability is important in international governance because “to a greater degree than domestic lawmaking, the international process suffers from an accountability deficit.”

A. Democratic Accountability

Most theorists have defined and operationalized accountability by reference to democratic legitimacy, elections, and the sanction of removal as yardsticks of accountability and legitimacy. Democratic accountability presumes the existence of a demos whose will can be measured.

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11. Id. at 3. See also John Dunn, Situating Democratic Political Accountability, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 329, 335 (Adam Przeworski et al. eds., 1999). It is important to note the principals, or accountability holders, need not be the beneficiaries of the agents’ actions.
13. This Article does not presume democratic legitimacy is the only or necessarily the appropriate form of legitimacy to which regimes and organizations should aspire. However, it is one of the norms discussed in this Article and representative accountability (often referred to as democratic accountability) is assumed throughout many of the discussions in this Article.
14. A demos is considered “a polity with members by . . . whom and for whom democratic discourse with its many variants takes place.” J. H. H. Weiler, European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order, 44 POL. STUD. 517, 523 (1996). It has been referred to as “a sovereign authority that decides important political matters either directly in popular assemblies or indirectly through its
While the existence of an international *demos* is a matter of significant contention,\(^{15}\) some authors have suggested cross-border and international issue- and function-specific *demoi* do exist.\(^{16}\) Whether an international *demos* exists remains a debate. However, civil society registered its view on the matter in Seattle, proclaiming loudly through protests at the World Trade Organization meeting in 1999 that without abilities to relate civil society’s views to the governing bodies of international legal regimes, those regimes may become less legitimate.\(^{17}\) This has led some to conclude a “democracy deficit” exists, necessitating greater accountability.\(^{18}\) This Article agrees democratic accountability may be important and necessary to ensure the legitimacy of governance regimes, but believes the uniform requirement of democratic accountability to be excessive. Instead, this mode of accountability should be required only when functions performed by NGOs relate to the representation of a particular populace.

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\(^{15}\) Compare *Pippa Norris, A Virtuous Circle: Political Communications in Postindustrial Societies* (2000) (generally arguing national identities are not sufficiently global to support a representative global *demos*) with *David Beetham, Democracy and Human Rights* 137 (1999) (“[T]he *demos* that is democracy’s subject has come to be defined almost exclusively in national terms, and the scope of democratic rights has been limited to the bounds of the nation-state.”).


\(^{17}\) *Keohane & Nye, supra* note 5, at 22.

\(^{18}\) E.g., *Alfred C. Aman, Jr., The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 Ind. J. Global Legal Stud. 379 (2001). Other authors have argued even democratic decisions at the State level are often no longer “democratic” in so far as they create externalities on neighboring States’ citizens who had no opportunity to participate in the decision-making. See *Daniele Archibugi, Principles of Cosmopolitan Democracy, in Re-Imagining Political Community: Studies in Cosmopolitan Democracy* 198, 204 (Daniele Archibugi et al. eds., 1998) [hereinafter *Re-Imagining Political Community*]; *David Held, Democracy and Globalisation, in Re-Imagining Political Community*, supra at 11, 14.
Levels of internal democratic accountability vary significantly between NGOs, and some have argued “the role of NGOs is not to be representative but to raise awareness.” However, the vast majority of NGO accountability scholars dealing with this issue evaluate NGO accountability based solely upon these internal controls. Their claim is NGO representatives generally are not elected by their memberships, and members typically are passive contributors who do not review or direct the NGOs’ actions.

However, this criticism of NGO democratic accountability tends to conflate internal and external accountability. The external democratic accountability charge is NGOs are only accountable to their membership, without allowing the beneficiaries a right to determine the NGO actions affecting them. However, both of these criticisms depend upon the norm of democracy to legitimate NGO involvement in international governance. This Article posits legitimate governance need not always be based upon the norm of democracy, especially of elections, but recognizes it may be an appropriate focus for certain functions.

The external democratic accountability critique faces an additional problem: it does not justify requiring NGOs to represent the beneficiaries of its actions. Should a corporation be held accountable primarily by its shareholders or its consumers? The same issue applies here: members are the primary determinants of internal NGO accountability, while beneficiaries are rightly viewed as external accountability holders who at all times possess reputational controls, but who may possess greater rights to hold NGOs accountable depending upon the function performed by

20. Id. at 340 (internal quotation omitted). See also Johan Galtung, Alternative Models for Global Democracy, in GLOBAL DEMOCRACY: KEY DEBATES 143, 155 (Barry Holden ed., 2000).
22. Id.
23. See id.
24. A. Claire Cutler et al., The Contours and Significance of Private Authority in International Affairs, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 333, 369 (A. Claire Cutler et al. eds., 1999).
25. Therefore, this Article does not go so far as some scholars as to suggest NGOs can claim legitimate representative rights over beneficiaries without being democratic or accountable to such beneficiaries. See Klaus Dieter Wolf, Private Actors and the Legitimacy of Governance Beyond the State, paper presented at ECPR Joint Session Workshop, Grenoble (2001), http://www.ifc.tu-darmstadt.de/fileadmin/pg/media/papers/civil.pdf.
the organization. For instance, where the NGO claims to represent the beneficiaries in a lobbying activity, beneficiaries should have a stronger right to constrain NGO actions than where NGOs are merely establishing standards they believe will help certain populations.26

Although democratic accountability can be important, a leading democratic political theorist, Robert Dahl, noted, “international organizations are not and are not likely to be democratic.”27 Dahl suggests international institutions be analyzed as bureaucratic bargaining systems, not as democratic governance regimes.28 This view has begun to take hold, as the traditional *demos* theory of legitimacy has largely been replaced by international relations theorists who break legitimacy into two basic components: input or institutional legitimacy, which is derived from democratic expressions of the affected public’s will,29 and output or task-specific legitimacy, which is based upon the effectiveness of actions taken to achieve normatively salient goals.30 This Article posits accountability, recognized to contribute to legitimacy,31 should undergo a similar dual analysis.32

Although traditional task-specific accountability analyses have focused on the effectiveness of governance outcomes,33 this Article seeks to rede-

26. See id.
27. Dahl, supra note 14, at 32.
28. Id.
29. Institutional legitimacy can also be found through tradition and symbols. See Keohane & Nye, supra note 5. Since these forms of legitimacy are not readily encompassed within accountability structures or applicable to international institutions, they are not discussed in this Article. See id.
32. This follows Grant and Keohane’s analysis of democratic and non-democratic forms of accountability. See id.
fine the analysis to legitimize the performance of the tasks themselves through procedural mechanisms which promote both greater internal and external accountability. A task-specific approach makes clear not all tasks or functions need to be legitimized by governance outcomes even at the international level where the existence of a demos is heavily questioned. Varying combinations of input and output controls can promote legitimacy in different functional circumstances and, depending upon the mechanisms required, can promote democratic accountability. This Article does not propose a democracy- or delegatory-based accountability control system is appropriate in all cases, but rather legitimizing controls will depend upon the functions performed. Accordingly, this Article posits the traditional emphasis on democratic principles to guide accountability controls is misplaced.

B. Moving Beyond Democratic Accountability

Although there has been a historic over-reliance on democratic controls, alternative measures to hold non-state actors accountable, such as profitability, are not necessarily appropriate or valuable yardsticks for determining NGO performance. Basing their typology on a delegatory model of international governance, Keohane, Grant and Nye demonstrate the existence of multiple forms of internal and external accountability, though they question the ability of some of the mechanisms they describe to adequately hold some international governance actors accountable in

34. While authors have discussed procedural mechanisms in terms of internal accountability constraints, it may be equally applicable to external accountability, where stakeholders are not members of NGOs, but rather beneficiaries. See U.N. Dev. Programme, Human Dev. Report Office, Civil Society and Accountability 2 (2002), available at http://hdr.undp.org/docs/publications/background_papers/2002/Kaldor_2002.pdf (prepared by Mary Kaldor).

35. This combination of input- and output-based accountability controls exists even in the United States, widely hailed as a country with strong democratic accountability controls. See Keohane & Nye, supra note 5, at 6–7, 26 (noting legal accountability might promote both input- and output-based legitimacy).

36. For a discussion of the need for an international demos to support democratic governance, see Zürn, supra note 16.

37. Grant & Keohane, supra note 4.

38. Spar & Dail, supra note 30, at 176. For different approaches to assessing NGO performance, see id. at 176 n.12.
certain circumstances.\(^{39}\) The grab bag of control mechanisms derived from the delegatory system of governance referenced by Keohane, Grant and Nye include fiscal, market, supervisory, legal, peer, market, reputational, and hierarchical accountability mechanisms.\(^{40}\)

Fiscal accountability, also known as financial conditionality, refers to the external controls which the individual or institution holding the purse string can exert over the governance actor.\(^{41}\) These controls include not only conditions a financier may impose upon an NGO, but also may include, \textit{inter alia}, national regulations preventing an NGO from engaging in for-profit activities or decisions made by individuals with conflicts of interests. Keohane and Grant suggest this form of accountability is particularly strong for NGOs which are highly dependent upon external grants and funding.\(^{42}\) The necessity of financing for sustainability creates a competitive financing market, with NGOs seeking to carve out market niches and branding.\(^{43}\) This competitive effect may cause NGOs to act like for-profit actors—similar to the situation in which NGOs compete for government contracts—and therefore may cause NGOs to act contrary to the interests of their memberships, their funders’ interests, or their beneficiaries.\(^{44}\)

Similar to fiscal accountability, market accountability, or the means by which NGOs obtain financing or membership in a competitive NGO environment, can also be a powerful external method to control runaway NGO behavior.\(^{45}\) This form of accountability in the NGO context, however, is less compelling, as most NGOs create particular niche markets or brands, making their services less substitutable and thereby decreasing the likelihood perfect NGO markets for financing, services, or memberships exist.

Supervisory accountability is another form of external accountability whereby those who have delegated authority to the NGOs may withdraw such authority or censure the NGOs for failing to follow instructions. In

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39. Keohane & Nye, supra note 5, at 1–5; see also Grant & Keohane, supra note 4; Alfred C. Aman, Jr., \textit{Globalization, Democracy, and the Need for a New Administrative Law}, 49 UCLA L. REV. 1687, 1692 (2003) (arguing market accountability mechanisms may not be sufficient to ensure proper provision of some social services by non-state actors).
40. Keohane & Nye, supra note 5, at 4–5; Grant & Keohane, supra note 4, at 8.
41. Grant & Keohane, supra note 4, at 8.
42. \textit{Id.}
43. Kaldor, supra note 34, at 24.
45. \textit{See} Grant & Keohane, supra note 4, at 9–10.
international governance this is a particularly powerful type of accountability mechanism, as evidenced by the adherence of the World Bank and IMF to the standards demanded by the Member States overseeing (and funding) their operation.\textsuperscript{46} This form of accountability control is even more powerful for NGOs dependent upon government contracts and relationships for viability and financing.

Another external constraint upon NGO behavior is legal accountability. Although this form of accountability has potency at the domestic level to prevent private inurement or other self-serving behavior of officers, at the international level, without greater harmonization, it will likely be fairly weak at ensuring accountability.\textsuperscript{47} Additionally, no international law governs the operation of NGOs. Rather, legal accountability in international governance might be considered contract accountability, whereby NGOs are required to follow the terms of a contract signed with other governance actors. Failure to abide by those terms could have the same individual and organizational consequences as those imposed by legal sanctions or penalties. This revised view of legal accountability in the international governance context indicates such constraints might be important for NGOs acting in a governance capacity.

Peer accountability is how actors in a horizontal relationship with the NGO performing a governance function hold the NGO to certain standards of accountability. NGOs often act as coalitions to coalesce the necessary resources, expertise, and relationships to achieve particular functions,\textsuperscript{48} peer accountability regulates the relationship between these partnerships to a certain extent. However, as discussed below, this form of accountability is questionable as a source of normatively justified constraints on actor behavior.

Concerns of exacerbating representational imbalances through participation of unaccountable NGOs have caused some scholars to suggest the greater use of peer accountability mechanisms to ensure the appropriate representativeness of NGOs.\textsuperscript{49} This argument suggests, however, it might be limited to a situation of network governance.\textsuperscript{50} To the author’s mind,

\textsuperscript{46} See id. at 8–9.
\textsuperscript{47} See id. at 9–12.
\textsuperscript{48} Id.
\textsuperscript{49} See Goodin, supra note 5, at 29–30.
\textsuperscript{50} Partnerships and linkages, especially with local groups, are crucial for the success of many international NGOs. See Margaret E. Keck & Kathryn Sikkink, Activists Beyond Borders 23–29 (1998); Grant & Keohane, supra note 4. In such situations, the partnership has a normative right to hold members of the partnership (externally) accountable with respect to actions taken affecting the partnership. See Paul Wapner, De-
peer review is rarely, if ever, a normatively satisfactory means by which to hold actors accountable, but is only a second- or third-best solution. Since peer organizations are only very indirectly affected by the actions of other similarly situated NGOs, their normative right to hold other NGOs accountable is limited at best (when not a partner in a particular governance function) and may be limited further based on the particular functions performed by NGOs.

Additionally, little normative support is provided for the concept of using peer accountability mechanisms instead of other accountability controls in non-network governance structures. This is important because where NGOs perform actions similar to government entities, or replace what might otherwise be government activities, requiring less accountability assurances of NGOs than of government actors may present opportunities for game-playing and other self-serving activities. This Article does not directly oppose such theories, although it seemingly conflicts with existing theories of accountability which suggest different actors should not be required to meet the same accountability controls, relying upon (unequal) checks and balances as accountability controls. Rather, this theory suggests function, rather than actor, is how accountability controls should be established.

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*fending Accountability in NGOs*, 3 CHI. J. INT’L L. 197, 202 (2002) (“Whenever an NGO links or otherwise collaborates with another, it opens itself up to scrutiny and evaluation. To the degree that NGOs find strength in doing so, however, accountability becomes part of the price of increased transnational effectiveness.”). However, the right to hold actors accountable or impose sanctions upon those other organizations is normatively suspect. Funding competition may promote such self-serving behavior, but the right of these peer organizations to hold each other accountable is limited, since they do not purport to act on each other’s behalf.

51. Other NGOs might be affected by the actions of a particular NGO through reputational effects on the NGO sector or as a result of information failures attributing improper NGO actions not exclusively to the offending NGO. See Eugene Bardach, *Getting Agencies to Work Together: The Practice and Theory of Managerial Craftsmanship* 144–46 (1998). Sole reliance on peer accountability mechanisms may, in fact, promote the creation of collusive networks. See Goodin, *supra* note 5, at 45.

52. See, e.g., Goodin, *supra* note 5, at 37–38. Goodin’s analysis, however, often conflates internal and external accountability, making theoretical extrapolations from his argument difficult. See id. at 42.

53. This Article is open to the possibility the theory it propounds might require incorporation of the two theories insofar as actors performing a particular function would require particular accountability controls, though the exact form or extent of those controls might vary depending upon the actor. Practically, the form of accountability must necessarily vary by actor, as different procedural mechanisms are necessary to implement intended accountability controls. However, this Article considers the constraining effect on
Reputational accountability is the least well-defined of the various accountability mechanisms laid out in Keohane, Grant, and Nye’s typology. They recognize this form of accountability is often dependent upon, or even coterminal with, other forms of accountability, especially market accountability, though it is possible reputational effects may exist outside those of other accountability constraints.\footnote{Keohane & Nye, supra note 5, at 17; Grant & Keohane, supra note 4, at 9.}

The argument goes: reputational forces regulate the extent to which NGOs must address internal accountability, since no exit barriers exist for members, and the NGO “markets” for membership are generally competitive.\footnote{See Spiro, supra note 21, at 163–64,166–67 (also noting some concerns regarding monopoly power may exist in certain circumstances).} Albert Hirschman, however, has shown the dangers of this reasoning. He notes where individuals can exit an organization’s membership easily and join another organization; there is little incentive for the individual to use her voice to improve the organization.\footnote{ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 84 (1970).} Given the sheer number of NGOs, even in a particular issue area, competition between NGOs is not likely to significantly contribute to greater internal accountability. So long as a particular NGO captures the majority of an individual’s preferences, the NGO may make a number of minor policy choices without membership support or fear of significant reprisal.\footnote{See generally Jonathan R. Macey, Packaged Preferences and the Institutional Transformation of Interests, 61 U. CHI. L. REV. 1443 (1994).}

Additionally, where members seek to hold their representative organizations accountable, there are significant barriers to entry, which come in the form of information costs.\footnote{Scholars on this topic have typically assumed basic, media-related monitoring is sufficient to achieve internal accountability, but this again conflates the issue of internal and external sovereignty to the extent it is assumed media-related monitoring is accurate and wholly accepted by the membership. See, e.g., Moisés Naim, Lori’s War, FOREIGN POL’Y, Spring 2000, at 28, 39. Spiro analogized NGO membership to corporate shareholder management (who can similarly enter and exit with relative ease) which Spiro claims is formally clear, but practically limited due to the high costs of monitoring and collective action problems. Spiro, supra note 21, at 165. But see Goodin, supra note 5, at}
significant amount of energy into learning about an organization’s activities, and after review of those activities, suggested new directions for the organization. If those suggestions fall on deaf ears, she may choose to leave. However, prior to joining an organization, she does not necessarily know whether it is highly representative without a significant amount of research.

Additionally, in order for any organization to be held truly accountable by its internal membership through reputational mechanisms, the individual members must also incur significant information-gathering costs to learn about the organization’s activities and then incur moderate participation costs. It therefore may be unrealistic to expect NGO competition alone would achieve greater internal accountability and representativeness. This is borne out in practice, where such competition exists, but few organizations are held accountable to their memberships directly, especially in lower-order decisions.

While the competition issue is usually buttressed by assertions NGOs’ claims to legitimacy depend upon self-regulation, or the creation of internal accountability mechanisms, this approach falls short as a framework for establishing accountability. As an accountability control, competition establishes a reliance upon other, (generally) non-regime-related organizations to hold the participating NGOs to account. From both systemic and normative perspectives, this seems as undesirable as peer accountability mechanisms.

Finally, NGOs might regulate themselves through the internal accountability mechanism of hierarchy. Individual officers and agents of an NGO are held accountable to standards established by the NGO’s management and organizational structure. Failure to abide by the NGO’s own standards may result in salary cuts or firing and therefore can act as significant deterrents to impropriety. For instance, incorporation creates hierarchical internal accountability within the organization. However,

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7 (“[I]n the non-profit sector there is simply no equivalent to ‘voters’ in the state sector or ‘shareholders’ in the market sector.”). The likelihood of media-related monitoring is perhaps even greater in the corporate context than in NGO context, so this argument seems to lack much merit. At best, Spiro’s argument counsels for greater monitoring of corporate accountability when corporations are acting in democratic international governance schemes.

59. See Spiro, supra note 21, at 163.


61. *Id.*


63. *Id.* at 6–7.
while incorporation may control some rent-seeking behavior by individual officers, it does little to influence the behavior of a fly-by-night or otherwise wholly corrupt NGO. It does, however, create transparency and reporting obligations which may increase the cost of being corrupt and thereby increase accountability.

As this cursory discussion illustrates, non-democratic accountability mechanisms exist. However, each method of control has its own unique strengths and weaknesses and range of applicability, all of which is often highly context- and function-dependent. Often, however, a particular action may be held to account by a number of different mechanisms. The task of the accountability holder is then to determine both the type and extent of the particular mechanism to be applied. This is no easy task. This Article seeks to begin this process by aligning particular governance functions to the type of accountability controls most appropriate from a normative standpoint. Although not definitive in its approach, the Article does suggest a prototypical framework which the author expects will require further refinement and development to make it fully operational.

Although this Article breaks new ground in establishing a function-based approach to accountability controls, some scholars have already illustrated some of the context-dependency of delegatory or non-democratic accountability controls, noting, for instance, market and reputational accountability depend upon transparency for effectiveness. Despite these contextual concerns and prerequisites to effectiveness, many authors have seemed to assume the mere existence of these accountability mechanisms somehow means such mechanisms are sufficient to hold actors accountable. For instance, even Keohane has suggested NGOs

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65. See Thomas Hale & Denise L. Mauzerall, Thinking Globally and Acting Locally: Can the Johannesburg Partnerships Coordinate Action on Sustainable Development?, 13 J. ENVTL. DEV. 220, 226–29, available at http://www.wws.princeton.edu/mauzerall/papers/Hale.Mauzerall.JED.final.pdf. Hale and Mauzerall argue reputational, market and, indirectly, financial accountability, can hold private partnerships accountable to a broad-based constituency of affected stakeholders. Id. See also Hale, supra note 64, at 22. However, they do not identify which stakeholders should have a right to hold the actors accountable or how they are affected or even relate to the accountability mechanisms assumed to be effective. Additionally, they undermine their own argument by recognizing ‘reputational and market accountability . . . does not work equally well on all types of actors. ‘Brand-less’ corporations, non-democratic governments, and projects with guaranteed funding sources are resistant to the kind of reputational and market enforcement powers the proposed regulatory regime would apply.” Hale & Mauzerall, supra at 19;
are highly vulnerable to threats to their reputations.” 66 This Article argues even where contextual prerequisites can be met, accountability mechanisms are not necessarily appropriate or effective constraints on actor behavior when performing different functions. This is particularly important since “[a]ccountability is not a pure good” where more is necessarily better, 67 and “the total possibilities for participation are inescapably constrained by the need to accomplish the institution’s tasks.” 68 NGO involvement in global governance must be limited both by number and type of organizations in order to ensure governance occurs.

While contextualizing these issues is difficult and should necessarily be beyond the scope of academic work such as this, the importance of this analysis is to reveal the level of generality and false grouping is standard practice in NGO scholarship and the need for a more function-based analysis of accountability. The amount of allowable government support, for instance, should depend upon the particular functions performed by the NGO. Some political groups may receive government...
funds while others do not; if an NGO is to lobby an international organization for a particular policy, is it appropriate to include political groups funded by States? Or should only fully independent groups be allowed to participate? The answers to these questions and others can and should vary based upon the function the NGO seeks to perform and the international regime’s normative values. This Article seeks to establish a basic functional typology for establishing accountability controls for NGOs participating in international governance.

Most prominent NGO scholars, including those demanding greater internal and external accountability controls, consider NGOs to be relatively weak institutional players. For instance, Keohane does not recommend strong accountability controls of “relatively weak NGOs,” but notes “as a particular NGO gains influence, it can exert effects, for good or ill, on people not its members. At this point, it can be legitimately held externally accountable as other powerful entities operate in world politics.” Keohane suggests such limited controls because he considers NGOs to be mere lobbyists. This Article agrees with Keohane’s passing comment regarding the increasing power of external accountability controls as an NGO gains influence, but takes a slightly different approach: as NGOs perform different functions, the level of power they wield over an international governance system changes, and therefore the strength of controls based on internal accountability and external accountability to the regime itself should vary according to the importance of its function and level of control over outcomes. External accountability to beneficiaries, on the other hand, should only be implicated where there is a possible impact upon the choice or rights of beneficiaries. Departing from most scholarship on NGO accountability, this Article seeks to determine which forms of accountability are appropriate when. As Keohane explains, “[T]o establish that some accountability exists is not to reach a normatively significant conclusion. From a normative standpoint, the relevant question is whether a given set of accountability relationships is appropriate with respect to their type and extent.” This theory extends the normative debate to the function of the actor as well, recognizing

69. Keohane, Global Governance and Democratic Accountability, supra note 1, at 148.

70. Id.


72. Keohane, Political Accountability, supra note 5, at 9.
“the particular configuration of accountability mechanisms in individual institutions matters.”

Though accountability controls are necessary, both the form and strength of the controls should be, in the first instance, dependent upon the function which the NGO intends to perform, as opposed to analyzing the NGO itself (whether based upon a comparative power analysis or otherwise). NGO legitimacy in international governance is largely derived from claims of representation of under-served, disenfranchised, or otherwise disempowered populations.

[NGO’s] claims to a legitimate voice over policy are based on the disadvantaged people for whom they claim to speak, and on the abstract principles they espouse. But they are internally accountable to wealthy, relatively public-spirited people in the United States and other rich countries, who do not experience the results of their actions. Hence there is a danger that they will engage in symbolic politics, satisfying to their internal constituencies but unresponsive to the real needs of the people whom they claim to serve.

This is especially acute since the United Nations (UN) defines NGOs as not-for-profit entities.

From a normative standpoint, however, NGOs need not be externally accountable to the beneficiaries of NGO action, but rather only to its members (funders, etc.), unless the NGO is acting as a “public” operative arm of a governance regime or affects the rights or choices of its beneficiaries. This helps to resolve the problems arising when NGOs become


74. See Anderson, supra note 3, at 378. Since the beginning of NGO involvement in international governance, however, NGOs have gained significant policy expertise and have gained a new source of legitimacy for involvement in international governance.

75. Keohane, Global Governance and Democratic Accountability, supra note 1, at 148.

76. See supra note 2.

77. See Brühl, supra note 16, at 378 (“As long as private actors do not decide authoritatively on public policy, they neither have to have a democratic structure nor do they have to be elected by (sectoral) demos.”) (internal citation omitted). Although the definition of “authoritatively” is not clear, this Article agrees with Brühl’s proposition insofar as NGOs are not decision-makers. Where NGOs are decision-makers, even if part of a larger group of decision-makers, then NGOs should be held accountable under democratic accountability mechanisms. However, this Article does not argue such accountability should necessarily extend beyond its membership.
service providers on behalf of governance regimes but apply incorrect strategies, undermining the effectiveness of other approaches, or diverting funds away from other, more successful ones. In such circumstances, the regime must be accountable to the beneficiaries to some extent, and output-based legitimacy concerns contain some validity. However, the NGO’s function, rather than its participation, is what determines the choices available to beneficiaries. Therefore, it does not matter for the beneficiaries who provides the service, but only the manner in which it is provided.

Table 1 provides a basic overview of the typology established by this Article, which shall be developed in greater detail in Part IV.A. Political functions are those functions which generally involve some level of representation, and therefore require some modicum of democratic accountability to those represented, the level of which depends upon the level of representation needed and the influence over the process exerted by the NGO. Administrative functions, on the other hand, do not require democratic representation, as such actions are related to performing governance functions designed to improve the management of the governance regime. Representation of internal member interests is therefore correlated to that function, but can be achieved without necessitating democratic accountability; fiscal and hierarchical controls may achieve the needed efficiencies and spending controls to ensure good governance. At all times, however, NGOs are acting as delegated authorities, performing governance functions in lieu of the regime and are therefore primarily responsible to the governments sanctioning the NGO administrative actions. NGOs performing enforcement functions, depending upon the NGO’s role in the enforcement process, must ensure accountability both to their memberships and possibly their beneficiaries, as well as to the regime generally. Authority under such a governance arrangement is less one of delegation, however, as NGOs are generally involved in an enforcement role to ensure independence and regime accountability to the global demos. The next Parts will discuss the relationship between

80. See Grant & Keohane, supra note 4; Keohane & Nye, supra note 5. This table excludes market and reputational controls, since they are not imposed by the listed actors. Additionally, “hierarchical” subsumes all principal-agent relationships, including those of member or beneficiary representation.
Table 1: Mapping Accountability Controls to NGO Governance Functions

<table>
<thead>
<tr>
<th>FUNCTIONS</th>
<th>ACCOUNTABILITY HOLDERS</th>
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<td></td>
<td>Internal-Membership</td>
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<tr>
<td><strong>Political Activities</strong></td>
<td></td>
</tr>
<tr>
<td>Agenda-setting</td>
<td>High: hierarchical, fiscal</td>
</tr>
<tr>
<td>Norm and Rule Formation</td>
<td>High: hierarchical, fiscal</td>
</tr>
<tr>
<td>General Participation</td>
<td>High: hierarchical, fiscal</td>
</tr>
<tr>
<td><strong>Administrative Duties</strong></td>
<td></td>
</tr>
<tr>
<td>Certification</td>
<td>Limited: hierarchical, fiscal</td>
</tr>
<tr>
<td>Standard Setting</td>
<td>Limited to High: hierarchical, fiscal</td>
</tr>
<tr>
<td>Training and Information</td>
<td>Limited: hierarchical, fiscal</td>
</tr>
<tr>
<td>Service Provision</td>
<td>Limited to High: hierarchical, fiscal</td>
</tr>
<tr>
<td>Other Administrative Functions</td>
<td>Limited: hierarchical, fiscal</td>
</tr>
<tr>
<td><strong>Enforcement</strong></td>
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</tr>
<tr>
<td>Arbitration</td>
<td>Limited: hierarchical, fiscal</td>
</tr>
<tr>
<td>Monitoring</td>
<td>High: hierarchical, fiscal</td>
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</table>
the accountability needed, normatively appropriate accountability mechanisms, and the functions performed by NGOs in greater detail.

III. THE VARIED FUNCTIONS OF NGOs IN INTERNATIONAL GOVERNANCE

The deconstruction of accountability theory as applied to NGOs in the previous Part suggests accountability controls depend upon the functions undertaken by NGOs in international governance. Absent such a functional approach, NGOs participate in various governance functions without having duties to participate appropriately.81 This Part discusses the varied functions NGOs perform in international governance to illustrate the complexity of the issue and the need for more nuanced accountability theories regarding NGO participation.82


82. NGO participation in international governance has blossomed in recent years and has taken many different avenues. See Kal Raustiala, The “Participatory Revolution” in International Environmental Law, 21 Harv. Envtl. L. Rev. 537, 538–39 (1997); Jonathan P. Doh & H. Teegen, Nongovernmental Organizations as Institutional Actors in International Business: Theory and Implications, 11 Int’l Bus. Rev. 665 (2002). See generally A. Dan Tarlock, The Role of Non-Governmental Organizations in the Development of International Environmental Law, 68 Chi. Kent L. Rev. 61 (1992). While some have distinguished between various different civil society actors based on purpose, function, and funding, limiting evaluation of NGOs to service provision and advocacy, this Article expands the analysis of NGOs to whenever they perform any of the functions associated primarily with non-NGO groups, including social movements, social organizations, and religious groups. See Kaldor, supra note 34, at 12 tbls. 1, 17, 19 (noting although distinct, social movements and social organizations may be considered NGOs). Additionally, the analysis set forth by Kaldor and others is an actor-based model, as opposed to a function-based model, and does not attempt to map different accountability controls to the different actors or functions performed. Similarly, other authors have discussed the role of NGOs in partnership arrangements with companies and in the creation of corporate codes of conduct or privately-created standards. See, e.g., Jonathan P. Doh & Terrence R. Guay, Globalization and Corporate Social Responsibility: How Nongovernmental Organizations Influence Labor and Environmental Codes of Conduct (manuscript on file with Brooklyn Journal of International Law); Bas Arts, “Green Alliances” of Business and NGOs: New Styles of Self-Regulation or “Dead-End Roads?”, 9 Corp. Social Resp. & Envtl. Mgmt. 26 (2002); Adelle Blackett, Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct, 8 Ind. J. Glob. Legal Stud. 401 (2001). See also U.S. DEP’T OF LABOR, THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM? 124–207 (1996), available at http://www.dol.gov/ILAB/media/reports/
“[Public-private partnerships] can . . . be classified according to their purposes and function into one of three categories,” either rule and standard setting, rule implementation, or service provision.83 This model, established by Börzel and Risse, is a very useful start to this Article’s analysis, despite excluding an examination of NGO participation when performing political or lobbying functions.84 This Article follows the same basic process in categorizing NGOs by function, with some slight variations and greater detail. Despite this greater detail, of course, the following categorization by no means provides an exhaustive list of functions NGOs may perform in governance regimes, but it does provide a basic categorization and framework of NGO functions, thereby establishing a starting point for more nuanced discussions of NGO participation in international governance.

A. Policy Formulation

Traditional scholarship on NGO participation in international governance has focused on NGO involvement in the creation of norms and policies. Thus begins this Article’s function-based analysis. Although direct NGO involvement is “less frequent in the areas of international rule setting and implementation,”85 it nevertheless exists and is likely to increase in the future.86 NGOs performing these functions are often likened to Kaldor’s analysis of social movements, which depend upon the ability to

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83. Börzel & Risse, supra note 82, at 199 (noting public-private partnerships might be categorized by ways in which they regulate behavior).
84. See id. at 198.
85. Börzel & Risse, supra note 82, at 204.
86. See id. at 204–06.
mobilize members into action. This, in a sense, is a reliance upon the “market accountability” mechanism. As will be shown in the following sections, there are a number of different functions falling within the broad category of policy formulation relying upon the purpose and representativeness of the NGOs seeking to perform those actions.

1. Agenda-Setting

Agenda-setting is one of the most important governance functions an organization can perform, as it places items onto the table for discussion and analysis, initiating the possibility of governance changes. Generally, agenda-setting functions are limited to State actors in international governance regimes. However, where NGOs are instrumental in the formulation of the overarching policy framework or where they are incorporated into a state’s delegation directly, NGOs may have the ability to set the agenda for discussion. The World Conservation Union (IUCN) is the proto-typical example of this. The IUCN drafted the first version of the Convention of Biological Diversity and then was successful in setting the agenda of the Convention’s negotiations.

Agenda-setting is important for accountability purposes since whoever controls the agenda has control over the scope of the governance system and its ability to change over time. Self-interest may dominate such agenda-setting formulations, as actors with an interest in the status quo may reject change through the formulation of the agenda.

2. Norm and Rule Formulation

Norm and rule formation, or rule-setting, is the most contentious role NGOs play in international governance. Some suggest such a role implies a loss of State sovereignty. While this Article does not tackle this

87. See Kaldor, supra note 34, at 22.
88. Keohane & Nye, supra note 5, at 5.
89. Although awareness building is generally considered an agenda-setting function, this aspect of agenda-setting is evaluated in the general participation section below. For the purposes of this section, agenda-setting is limited to formalized processes by which participants in a governance regime place issues on the table for negotiation and action. See P.J. Simmons & Chantal de Jonge Oudraat, Managing Global Issues: An Introduction, in MANAGING GLOBAL ISSUES: LESSONS LEARNED 3, 12 (P.J. Simmons & Chantal de Jonge Oudraat eds., 2001).
90. See Brühl, supra note 16, at 373.
91. See generally Peter J. Spiro, New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace, 18 CARDOZO L. REV. 957, 958 (1996) (suggest...
issue, it does recognize NGO involvement in rule-setting can be legitimized. NGOs have successfully participated in rule-setting nationally, as well as in intergovernmental organizations and through independent initiatives.

The extent of NGO involvement in rule-setting, like any other functional role an NGO might take, varies significantly. NGOs are primarily involved as rule setters through incorporation into official delegations, which has occurred in the nuclear non-proliferation treaty regime, for instance. However, NGOs might also be involved in rule-setting in their own right. Amnesty International was crucial in shaping the Convention Against Torture and in establishing the International Criminal Court. Similarly, the International Campaign to Ban Landmines had the right to make statements and table treaty language (though not to vote) during negotiations of the Convention on the Prohibition of Anti-Personnel Landmines. To a lesser extent, NGOs are involved in the World Trade Organization and help to shape its outcomes.

A shining example of the role of NGOs in rule-setting is found in the World Commission on Dams (WCD). WCD consists of the World


93. See Brühl, supra note 16, at 373–74.

94. See Börzel & Risse, supra note 82, at 199.


98. See Sanjeev Khagram, Toward Democratic Governance for Sustainable Development: Transnational Civil Society Organizing Around Big Dams, in The Third Force:
Bank, national governments, private industry, and NGOs. Although the WCD’s work is advisory, it is a powerful source of international “soft law.” Indeed, WCD has been nearly universally lauded as a successful experiment to involve NGOs in rule-setting without undermining the authority of the regime or stymieing negotiations and has led to high quality outcomes considered unattainable under different circumstances.

Norm and rule formation begs slightly different questions regarding NGO accountability than does agenda-setting. Here, representation of issues and interests is important to ensure organizational accountability to its membership, and in some cases, its beneficiaries.

3. General Participation and Lobbying

The most widely recognized role of NGO participation in international governance is one of lobbyist. NGOs are renowned for their ability to mobilize public awareness and opinion and catalyze action on particular issues. This differs from the agenda-setting function insofar as NGOs do not have the right to set the agenda, but due to the force of NGO lobbying, issues are placed upon the agenda by other governance actors.

Examples of NGO influence, both positive and negative, in international governance abound. NGO pressure is widely recognized as catalyzing the formation of the North American Commission on Environmental Cooperation (NACEC) under the North American Free Trade


101. See WCD, supra note 98, at 2 (“Many felt that the contested nature of the dams debate would pull the Commission apart.”); id. at 26 (“The multi-stakeholder process followed by the Commission led to recommendations for a new way forward that no single perspective could advocate on its own.”).

102. Simon Zadek and Murdoch Gatward, Transforming the Transnational NGOs: Social Auditing or Bust?, in Beyond the Magic Bullet, supra note 30, at 227.

Agreement (NAFTA), for dismantling negotiations of the Multilateral Agreement on Investment, and for assisting in the creation of the Convention on the Prohibition of Anti-Personnel Landmines. Like the Kosovo Transition Council, which was comprised of political parties, religious leaders, and representatives of ethnic minorities, these international governance discussions afforded NGOs the opportunity to influence State action, without providing any real political power to the NGOs. The impact of NGO involvement in such lobbying situations depends upon the willingness of both the governance regime and the governance actors within the regime to listen to and adopt NGO positions.

Lobbying activities are another political governance function which counsels unique accountability controls. Lobbying may or may not imply a sense of representation of affected persons, which may counsel external accountability to NGO beneficiaries, may only require internal accountability to ensure adequate member interest representation, or may require no representativeness, depending upon the issue and the purpose with which the NGO claims to act. There is little need, however, for external accountability to the regime, apart from perhaps ensuring participating NGOs do not knowingly provide false information or omit information, as the organization can dismiss NGO arguments quite readily.

108. The circumstances surrounding the dismissal of NGO arguments may affect, either positively or negatively, the perceived legitimacy of the governance regime. Therefore, dismissal may not be so readily done for political reasons. However, the power to dismiss arguments does exist and can be exercised, especially if the regime’s legitimacy is high.
B. Administrative Duties

Administrative duties differ from political activities because rule-implementation is the function, rather than rule-setting. As noted above, NGO participation in rule-implementation is somewhat minimal, though less so than in rule-setting activities.109 These governance functions have come to being as international organizations and networks have sought to regulate behavior, rather than simply establish norms to be implemented at the national level. This specificity has necessitated a more complex governance structure, and as a result of institutional or systemic capacities, has sometimes involved NGOs in the implementation of such regimes.

The literature on NGO participation in international governance has focused little on NGOs acting in an administrative capacity. It is appropriate, however, to distinguish democratic and delegatory models of governance.110 NGOs performing the functions of a typical administrative agency in the domestic context have authority delegated to them by the international regime and therefore must be accountable to the regime. Questions regarding democratic representativeness of the NGOs themselves are less important, as proceduralizing the actions of agencies is the dominant accountability control applied in such circumstances, not the assurance of direct representation. However, greater representation is increasingly sought in administrative actions, though typically limited to the role of lobbyists or Advisory Councils, so concerns regarding representation may surface to a greater extent in the future.

1. Certification

A powerful role NGOs may play in the administration of international governance is certification of actors for participation in the regime itself. The power to enable participation is significant.111 While this Article suggests a shared role in such an accreditation process between the regime, the State hosting the applicant organization, and an independent NGO dedicated to certification issues,112 such a system is not always existent.

For instance, the Framework Convention on Climate Change, under which the Kyoto Protocol on climate change operates, provides the op-

110. See generally Grant & Keohane, supra note 4.
112. See infra Part IV.C.5.
portunity for NGO participation as a certification body, without significant co-regulation by the regime, though delegation authority is retained by the regime. Article 7.2(a) of the Convention provides the possibility NGOs may contract with the Conference of the Parties, where appropriate, to supervise and implement the Convention. Article 12.4 provides the Conference of Parties with a clear mandate to establish guidelines for the certification of carbon sequestration and other projects under the Clean Development Mechanisms (CDM). Article 12.9 gives the Executive Board authority to provide guidance on participation of various stakeholders, both governmental and non-governmental, in that certification process. The Board, as well as its “operational entities,” which may include NGOs, could become a further compliance enforcement mechanism under the CDM. As a result, Article 7.2(a) may provide NGOs the opportunity to act in an implementing role in the CDM.

Here, the accountability issues relating to NGO involvement as certification entities are complex. External accountability to the regime is important, but excessive accountability to the regime might undermine the expression of, or adherence to, stakeholder interests which the CDM

113. United Nations Framework Convention on Climate Change art. 7.2(a), May 9, 1992, 1771 U.N.T.S. 107 (hereinafter UNFCCC). Additional opportunities for non-State participation in the Kyoto Protocol were also suggested for consideration, but have not yet come to fruition. See Chiara Giorgetti, From Rio to Kyoto: A Study of the Involvement of Non-Governmental Organizations in the Negotiations on Climate Change, 7 N.Y.U. ENVT’L. L.J. 201, 213 (1999). See also Report of the Subsidiary Body for Scientific and Technological Advice, UNFCCC, 2d Sess., Provisional Agenda Item 7, at 11, U.N. Doc. FCCC/SBSTA/1996/4 (Feb. 2, 1996) (hereinafter Subsidiary Body Report) (pushing the consideration of greater NGO participation). Since most of the proposed requirements depend upon host country implementation, as opposed to the CDM administrative structure, they are not addressed in this Article. Id. at 6. See also Peggy Rodgers Kalas & Alexia Herwig, Dispute Resolution Under the Kyoto Protocol, 27 ECOLOGY L.Q. 53, 128 (2000) (“Where dispute settlement regimes and international tribunals deny access to non-State actors, the ability of domestic courts to decide disputes under international law and to enforce their decisions domestically is particularly salient.”).


115. Id. art. 12.9.


117. See supra text accompanying note 113.
seeks to support. Despite this, internal representation seems of little importance, as does external accountability to beneficiaries, since such representation would disfavor other relevant interests.

2. Standard Setting

NGOs are involved on a somewhat limited basis in actual standard setting in the administrative context. However, where NGOs do have such authority, the power they wield is tremendous. While the majority of scholars treating this subject focus on private standards (adopted later by international regimes, domestic governments, or industry), this Article deals only with those standards established by NGOs through a public international governance system. While limited in its analysis, this Article does not agree with most scholars who posit that the International Organization for Standardization’s (ISO) standards are completely informal and private. Instead, this Article views ISO as somewhere between wholly informal and formal, since its members come from national standards bodies, but are not exclusively comprised of government entities. For instance, the American National Standards Institute, a member of ISO, is comprised of government and non-governmental

118. UNFCCC, supra note 113, art. 4.1(i).
119. See, e.g., Colin Scott, Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance, 29 J. LAW & Soc’y 56, 74 (2002) (“[M]any] non-statutory private regulators operate complete regimes in the sense of having the capacity to set standards, to monitor and enforce without the intervention of other organizations. Where this is the case, they wield more power than those public regulators which are constrained by the need to follow standards set by legislatures or government departments and to pursue litigation in order to apply legal sanctions. There is thus a remarkable concentration of private power over public organizations. This is perhaps most striking with those private regulators operating internationally whose judgments on such matters as financial or fiscal credibility, probity or greenness significantly affect decisions of notionally democratic governments.”). See also Peter M. Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 Int’l Org. No. 1, at 1 (1992). Such regulation may be desirable to promote international harmonization, make transactions more secure, avoid harsher command-and-control type regulation, or to respond to market accountability forces. See Virginia Haufler, Private Sector International Regimes, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM 121, 127 (Richard A. Higgott et al. eds., 2000).
121. Haufler, supra note 119, at 127.
organizations. Therefore, this Article views the ISO standards as non-binding standards created through public-private partnerships and therefore within the purview of this Article.

A more powerful example of NGO involvement in standard-setting, however, is the International Labour Organization (ILO). The ILO, an inter-governmental organization designed to protect workers from exploitation and poor working conditions, provides a role for NGOs, primarily trade unions, in standard-setting. For example, NGOs worked as members of the ILO to pass the ILO Minimum Age Convention No. 138 regarding child labor. This Convention has been ratified by approximately 141 countries, some of which have a history of using very young child labor. The actual impact NGOs have on the content of these standards is uncertain. However, State delegations include four members: two representatives from government, one representative of employer interests, and one representative of worker interests. Each delegate is provided an individual right to vote, so NGO votes do matter.

While many of the ILO’s standards are non-binding recommendations, including codes of conduct, resolutions, and declarations, these standards

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126. See Börzel & Risse, supra note 82, at 202–03; Charnovitz, supra note 111, at 216–19.
128. See id. art. 4, para. 1.
do have the weight of “soft law.”\textsuperscript{129} Disputes regarding the definition of many of these voluntary standards are interpreted by the ILO.\textsuperscript{130} The ILO is also involved in the creation of treaties, which establish binding labor and workplace standards, though its role is largely limited to lobbying and agenda-setting in treaty formulation.\textsuperscript{131}

While the ILO is not the only body establishing international corporate codes of conduct, it is the most influential source of “soft law” regarding labor and workplace standards and has the unique ability to enforce its codes.\textsuperscript{132} As a result, accountability is important to ensure proper NGO participation in the ILO standard-setting. While the level of external accountability to the regime is less important when the regime can ensure countervailing interests are represented in the standard-setting process, external accountability to beneficiaries and internal accountability to members may be important to ensure a fair and balanced standard-setting process.

3. Training and Information Provision

Training administrators and others is a well-known role of NGOs in international governance. Capacity-building organizations working with the UN Development Programme, for instance, focus on inter-organizational learning and training,\textsuperscript{133} serve as experts to governance actors,\textsuperscript{134} and gather information. These NGOs often act in an advisory capacity for international governance regimes, serving as “epistemic


\textsuperscript{130} See Doh & Guay, supra note 82, at 11.

\textsuperscript{131} See About the ILO, supra note 123.

\textsuperscript{132} See Doh & Guay, supra note 82, at 11–12, 18 (discussing the OECD 1976 Guidelines for Multinational Enterprises, which was revised in 2000 to allow NGO consultation, and the Global Compact, which provides an NGO role in monitoring compliance).

\textsuperscript{133} See Brown et al., supra note 60, at 18.

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communities” in policy formulation. The United States, for instance, incorporates NGOs into international policy making through the Federal Advisory Committee Act (FACA), which provides a role for NGOs to advise United States representatives on international policy issues and ensure appointments to federal committees are “fairly balanced in terms of the points of view represented.” While the participation of NGOs as members of a policy Advisory Council is limited and controlled by other governance actors, usually State delegations, such participation, when it does occur, can be quite influential. Indeed, these committees have often engaged in important international regulatory negotiations, also known as “reg-neg.” It has even been claimed NGO advisors determine much of World Bank policy.

The UN system of Working Groups is probably the best example of the involvement of NGOs in Advisory Councils. Working Groups are commissioned to review technical details of a proposal or provide information and guidance in relationships with particular groups, including indigenous communities, women, children, and others. While these

135. See generally Haas, supra note 119.


138. For instance, the chair of any advisory committee is usually a government representative who has the authority to choose representatives. See, e.g., 7 U.S.C. § 5843 (2001). Further, all interests need not be represented equally to meet the FACA. 60 Comp. Gen. 386, 387 (1981).

139. See Charles C. Caldart & Nicholas A. Ashford, Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy, 23 HARV. ENVTL. L. REV. 141, 143–44, 164 (1999) (discussing an OSHA advisory committee’s negotiated rulemaking for coke oven emissions and noting that often such negotiated rulemaking occurred under the auspices of the FACA).

140. See Citizen’s Groups: The Non-governmental Order, ECONOMIST, Dec. 11, 1999, at 20, 21 (“From environmental policy to debt relief; NGOs are at the centre of World Bank policy. Often they determine it.”).

Working Groups operate outside the purview of official UN policy making circles, they report to various UN committees and have substantial legitimacy. Membership on these Working Groups is therefore highly prestigious, especially since Working Groups are treated as insiders in the UN system, are accorded significant access privileges, and may wield significant power as expert bodies. The level of Working Group influence varies by committee and issue, but can be quite powerful and frame entire negotiation processes, formulate draft texts, or even reject negotiated solutions.

In the case of Advisory Councils or training activities, the accountability question is about who has the right to provide information or be treated as experts. There are also questions related to the quality of the information provided. All of these concerns tend toward issues of competence, rather than issues of representation. Accordingly, participation in Advisory Councils represents a functionalist approach to international governance and must be cordoned through delegatory models of accountability.

For accountability purposes, this is the least problematic of the administrative functions an NGO may perform. Accountability concerns focus mainly around the production and content of information, ensuring the information is full, fair, and accurate. As such, training and information is supposed to be largely objective, and concerns about representativeness are limited. More important is external accountability to the organization to ensure it is not misled by the NGO providing the information.

4. Service Provision

Some authors have categorized NGOs partially by function, classifying them as operational- or advocacy-oriented. However, the classification

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142. See Fact Sheet No. 27, supra note 141.
144. See Wapner, supra note 50, at 203.
of NGOs as operational is limited primarily to the deployment of services.\textsuperscript{146} While the preceding sections have illustrated how NGO involvement in the enforcement of international governance systems extends beyond the simple deployment of services, service provision by far constitutes the main avenue of NGO participation in the enforcement and furtherance of international governance systems.\textsuperscript{147}

NGOs are good actors in this capacity as they are generally more responsive to beneficiary needs than government institutions. However, they may be less accountable than government institutions in the delivery of those services.\textsuperscript{148} In fact,

\begin{quote}
[i]t’s not as if there is a long list of parties able to deliver medical aid in Chechnya, or run refugee camps in Congo, or vaccinate children in southern Sudan. Whatever the rest of their political agendas, international NGOs are often not only the best positioned to do these jobs, they are the only organizations with any possibility of doing them.\textsuperscript{149}
\end{quote}

It is often argued NGOs are best able to provide development assistance and non-profit services such as community health care and the management of natural resources\textsuperscript{150}—especially for populations unable to pay since they do not fall neatly within any particular category ser-

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146. See Doh & Guay, \textit{supra} note 82, at 3.
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viceable by the government. This view is generally held because self-selection of personnel and NGO purpose statements serve to create organizations with officers having altruistic motivations, giving greater assurance they will carry out the provision of public goods and other public interested actions with less rent-seeking relative to other organizations.

However, when non-profits compete for public contracts with for-profit entities, the competitive process may cause non-profits to act similarly to for-profit entities. Despite this concern, “[s]ervice providers accrue government funding largely on the basis of client choices rather than on the basis of competitive tendering for contracts providing blocks of funding from government.” Additionally, when acting as contract agents, NGOs generally have performance requirements built into the public service contracts. This illustrates a distinct subject of accountability: results- or outcome-based accountability. Principal-agent accountability issues are also raised when NGOs provide services. In such arrangements, NGOs are held externally accountable by the governments or international governmental organizations with whom they contract, and by the beneficiaries who seek to ensure the services fulfill their needs, and internally accountable by their members, who determine the manner through which the services are provided.

5. Other Administrative Functions

NGOs might also perform other, more difficult to categorize, administrative functions. For instance, the World Conservation Monitoring Unit compiled State data on trade in endangered species and prepared reports regarding such data, implementing the Convention on International

151. See Smith & Lipsky, supra note 148, ch. 6.
152. See Goodin, supra note 5, at 21–22.
153. See id. at 3. See also Brown et al., supra note 60, at 16–17.
154. Goodin, supra note 5, at 42. However, competitive bidding processes do exist in a number of circumstances. See id.
155. Id. at 31.
Trade in Endangered Species (CITES). Though taking a more involved administrative role, the Internet Corporation for Assigned Names and Numbers (ICANN) has taken on similar duties. ICANN allocates and assigns internet space, manages top-level domain names (e.g., .com, .org, and other generic and country-code top level domains), and manages root servers. Although ICANN is largely considered the provision of private standards, domestic governments are involved in the process of establishing the standards, thereby making the process a quasi-public-private partnership. Accountability for these administrative activities will depend upon the functions performed, but is expected to be primarily based on external accountability controls to the regime, with minimal representational concerns or internal mechanisms needed.

C. Enforcement

While the involvement of NGOs in standard setting and general administrative duties of international organizations is currently relatively low (though likely to increase in the future), NGO involvement in the enforcement of established codes has been characterized as moderate in scope and nature.

1. Arbitration and Mediation

Private arbitration is a major way international regimes are enforced. Many international treaties and regimes provide the opportunity for litigants to pursue arbitration as either the sole remedy or one of a litany of potential remedies for violation of provisions of those instruments. The leading international arbitration organization providing for the settlement of these disputes is the International Centre for the Settlement of Investment Disputes (ICSID), which is an "autonomous international organi-
zation” established by the World Bank through an international convention and comprised of World Bank Member States. However, other arbitral NGOs also serve to enforce international regimes. For instance, the International Chamber of Commerce’s International Court of Arbitration hears more than 500 new cases each year. Having heard over 12,000 cases since its inception in 1923, the Court is responsible for hearing many of the arbitrations arising under the UN Commission on International Trade Law (UNCITRAL). Similarly, the American Arbitration Association, operating under the International Dispute Resolution Procedures, also hears cases dealing with international governance issues.

Questions about accountability are particularly poignant when NGOs take on the role of mediating or arbitrating disputes. External accountability to the governance regime and NGO independence are important. Internal accountability or external accountability to its beneficiaries may be seen as biased and would be largely undesirable. However, some measure of external accountability to beneficiaries (and the regime itself) may be important in certain contexts where the governing rules require consideration of civil society’s participatory needs in dispute resolution.

2. Monitoring

Although untested, some claim under specific conditions, NGO lobbying and information provision can pressure norm-violating govern-


166. However, some concerns may be addressed if the impropriety of NGO actions affects its status in future dealings.

167. See Brühl, supra note 16, at 378–79.
ments into compliance.\textsuperscript{168} However, it is not clear whether NGOs undertaking these approaches actually influence State behavior.\textsuperscript{169} While it has been noted most NGOs are not well-suited to serve as comprehensive and exclusive enforcement agents,\textsuperscript{170} NGOs have nevertheless been provided the authority in some regimes to act as enforcement agents where States are believed to have violated international rules.\textsuperscript{171}

For instance, under the Montreal Protocol, NGOs may act as enforcement agents by notifying the Secretariat of non-conforming States, who in turn may sanction the non-conforming States.\textsuperscript{172} Although NGOs need not show injury to enforce the regime, they do not have substantive rights under the Montreal Protocol, and Parties must consent to NGO participation, limiting the effectiveness of NGO enforcement significantly.\textsuperscript{173} Conversely, under a number of human rights regimes, NGOs are granted \textit{locus standi} to enforce human rights instruments.\textsuperscript{174} As a result, “the regular provision of information by the [international NGO] community to various UN human rights committees and national governments has not only greatly improved our knowledge about human rights violations, but also increased compliance with international human rights norms.”\textsuperscript{175}

\begin{itemize}
  \item \textsuperscript{168} See generally \textit{The Power of Human Rights: International Norms and Domestic Change} (Thomas Risse et al. eds., 1999).
  \item \textsuperscript{169} See Chandler, supra note 19, at 335–36.
  \item \textsuperscript{170} See Ruth Mayne, \textit{Regulating TNCs: The Role of Voluntary and Governmental Approaches}, in \textit{Regulating International Business: Beyond Liberalization} 235 (Sol Picciotto & Ruth Mayne eds., 1999).
  \item \textsuperscript{171} See generally Paul Wapner, \textit{Politics Beyond the State: Environmental Activism and World Civic Politics}, 47 \textit{World Pol.} 311 (1995).
  \item \textsuperscript{175} Börzel & Risse, supra note 82, at 209, \textit{citing The Power of Human Rights: International Norms and Domestic Change} (Thomas Risse et. al eds., 1999).
\end{itemize}
Other, weaker versions of NGO participation as monitoring and enforcement agents also exist. For instance, NGOs can participate in the WTO dispute settlement system through submission of *amicus curiae* briefs.\(^{176}\) Though this is a relatively weak method of enforcement, what is important about the WTO example is, in order to submit a brief, the organization must make clear its objectives, affiliations, funding sources, and plan for uniquely contributing to the resolution of the dispute.\(^{177}\)

Allowing NGOs to participate in the monitoring and enforcement of international regimes raises different accountability concerns than does the situation where an NGO acts as the mediator or arbitrator in a dispute concerning such violations. Similar to the previous discussion, NGOs must remain accountable to the regime itself, ensuring NGOs constrain their charges of States violating international norms to instances where the NGOs actually believe such violations to exist. More significant however, is the importance of NGOs to adequately represent those interests for which they claim to stand. If the enforcement scheme is designed to leave vindication of the rights of unrepresented or disempowered groups to NGOs, then it is essential NGOs be accountable to their beneficiaries. Internal accountability in this circumstance is only marginally important to the proper functioning of the regime.

The question then remains as it began: are NGOs sufficiently accountable to the appropriate entities or populations? The following Part answers this question generally in the negative and seeks to apply a function-based analysis to NGO accountability theory.

IV. REFINING THE CRITIQUE: GUIDING NGO INVOLVEMENT

The previous Part illustrated some of the distinct accountability concerns related to particular functions performed by NGOs in international governance. This function-based approach to categorizing NGOs is not unique to this Article. Börzel and Risse categorize NGOs by function and their source of authority in international governance systems, noting NGOs can perform various functions within governance systems based upon cooptation, delegation, co-regulation, or self-regulation in the

\(^{176}\) Esty, *supra* note 97, at 11. This has been discussed in significant detail by other scholars and will not be reiterated here. See, e.g., Jacqueline Peel, *Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization*, 12 *Colo. J. Int’l Envtl. L. & Pol’y* 47, 63–64 (2001).

shadow of hierarchy. This authority-based analysis is useful in understanding the context within which NGO governance functions occur. However, it is only useful in establishing accountability controls insofar as they assist policy makers in determining the needs and purposes of the organization itself.

Although recognition of the source of authority may legitimate NGO involvement under some governance systems and not others, such a framework does not suggest differentiated accountability controls when the same function is performed across different governance systems. Rather, differentiation is a function of the overall regime needs and purposes with respect to NGO participation and may significantly vary by type of governance regime. As a result, the authority-based analysis performed by Börzel and Risse is part of a separate accountability analysis and should be treated as an addendum to, but not a replacement of, the framework established by this Article. This Part seeks to define some of the major issues and parameters involved in establishing a function-based accountability control system.

The UN system has the clearest and most direct method of ensuring the accountability of NGOs seeking to participate in governance activities. The 1996 policy established under the Economic and Social Council (ECOSOC) grants “consultative status” to NGOs upon a demonstration of purpose and accountability. While this “consultative status” does not grant NGOs the right to participate in all functions of governance described above in Part III, the procedure used by ECOSOC to accredit participation is a useful starting point for a discussion of NGO accountability requirements. The ECOSOC procedures require NGOs to provide their charters, bylaws, financial statements, annual reports, sample publications, and explain how their participation will contribute to the goals of the UN. These requirements are needed to evaluate NGOs’ structure, internal (public) accountability, and external accountability through funding sources. From the application, ECOSOC determines which NGOs may participate, limiting involvement to those having expertise in

178. Börzel & Risse, supra note 82, at 200.
180. Id.
181. Id. ¶¶ 10–13, 21.
182. Id.
the particular matter.\footnote{183} Once accredited, NGOs can maintain their “consultative status” by submitting a four-page, double-sided report every four years.\footnote{184} Though this requirement may be criticized as insufficient to ensure accountability, the consultative process generally enables international organizations to assert external accountability controls on NGOs, thereby minimizing “non-cooperative behavior.”\footnote{185}

While the UN procedures signify a step in the right direction, there are over 6,400 intergovernmental organizations with which NGOs might engage and very few of them have similar accountability procedures.\footnote{186} Additionally, the ECOSOC requirements “need to be reconsidered in light of the increasing number of NGOs.”\footnote{187} While providing a good starting framework, the ECOSOC procedures do not deal with the many variations of international governance activities in which an NGO might participate and are limited to the very narrow “consultative status” akin to participation on the Advisory Councils discussed above in Part III.B.3. Furthermore, the ECOSOC procedures conflate internal accountability with external accountability to the beneficiaries of the NGO.\footnote{188} While this creates a significant concern for some governance functions, it clearly demonstrates a failing of the ECOSOC procedures to separate their requirements based upon the functions performed by the NGO. For example, Advisory Councils are highly technocratic epistemic communities designed around expertise.\footnote{189} It is therefore not clear why internal accountability or external accountability to beneficiaries is particularly important to performing the governance function. On the other hand, where “consultative status” implies the right to act as an observer and participant in UN policy making procedures, the necessity and appropriateness of such representation is far greater. The ECOSOC procedures do not distinguish between these two types of NGOs in terms of qualifications to perform various governance functions, illustrating how accountability controls not tailored to function are simultaneously both over- and under-inclusive.

\footnote{183} Id. ¶ 9.
\footnote{184} Id. ¶¶ 55, 61(c).
\footnote{185} Börzel & Risse, supra note 82, at 201.
\footnote{188} See ECOSOC Procedures, supra note 179, ¶ 12.
\footnote{189} See Haas, supra note 119, at 3.
Although this Article proceeds primarily from an institutional perspective, similar issues are raised in network governance structures, since “network governance representation is at least partly defined in functional terms.” Additionally, even in a network situation,

the relationship between representatives and represented has to conform to norms that usually are established in an institutional framework . . . establish[ing] rules which determine the selection of representatives, and [those institutions] have to create formal structures of communication and control, in which rulers can be effectively hold [sic] accountable for their decisions.

As a result, this Article agrees although the process may be somewhat distinct and the accountability needs of network governance structures somewhat different than traditional institutional governance structures, “from a normative point of view, institutional structures of governance are decisive for democratic legitimacy, and this holds true for network governance, too.” In fact, given “[g]overnance networks . . . serve as a corrective for deficits of the institutions,” creating distinctions in accountability requirements for networks as opposed to institutions seems normatively suspect.

This Part seeks to assist international governance regimes in defining the universe of NGOs eligible to perform a particular governance function. It is not, however, intended to determine whether NGOs should perform a function or which particular NGO or NGOs should be selected to perform particular functions. “[T]he essential differences between various types of NGO activity seem to warrant some kind of typology, some way of grouping NGOs by the functions they perform.” Grouping organizations by function “would, at a minimum, allow us to approach an individual NGO on its own terms, evaluating the particular organization

190. See Benz & Papadopoulos, supra note 73, at 2.
191. Id.
192. Id.
193. Id. at 3.
194. This issue has significant nuances, including considerations of whether networks increase or decrease institutional ability to perform and maintain its own accountability. See id. at 4–5. These relational issues have not been analyzed to an extent sufficient for the author to conclude whether networks should be held to significantly different forms or extents of accountability control than traditional institutions.
195. Spar & Dail, supra note 30, at 173 (suggesting classifying NGO activities similar to the Standard Industrial Trade Classification system).
with regard to its specific purpose.”196 In evaluating NGOs for base accountability purposes, three major types of accountability exist: (1) intentions or purposes; (2) actions or competence; and (3) outcomes.197 Given the resource constraints and distance of international regimes from NGOs, this Article suggests accountability controls be established at both the international and national levels.

A. Standardizing Procedures by Function

At the national level, function-based accountability controls are especially crucial to achieving the appropriate level of NGO accountability. At the international level, this need is accentuated by the lack of institutional regime capacity or experience in providing the ever-expanding range of international governance functions, necessitating the inclusion of NGOs and other non-State actors in international governance—a need less significant at the national level. As a result, there is no significant normative difference (putting aside the democratic deficit debate) between international and domestic governance to warrant different approaches to determining when accountability mechanisms should be applied. However, NGO participation in domestic governance may be far more limited in the scope of roles performed, making a function-based approach not economically feasible.198

A function-based approach is particularly important for NGOs because, although it is assumed NGO officials are typically more altruistic than other governance actors (with the possible exception of government officials), “[domestic] non-profit corporate law is in any event unlikely in any jurisdiction to constrain NGO executives to the extent that public officials routinely are constrained by ethics legislation and regulations.”199 While NGOs may have a lower starting baseline of accountability (given existing frameworks), this does not mean we should demand greater total accountability of NGOs than of other governance actors.

196. Id. at 174. The classification system proposed by Spar and Dail would include outcome-based accountability mechanisms involving cross-comparisons. Id. This would enhance competition between NGOs and speaks to the competence issue, but is overly broad in its analysis. Such outcome-based accountability mechanisms are not appropriate in every situation where NGOs perform some governance function.

197. See Goodin, supra note 5, at 10–11.

198. See Benz & Papadopolous, supra note 73, at 10–11.

199. Spiro, supra note 21, at 963.
As noted above, traditional theory relates the strength of accountability relationships to “the power of the entity being held accountable.” While significantly different from the view of accountability in this Article, its basic premise is implicitly applicable to the project set out here. In fact, “with respect to legitimacy, the nature of the issue may be an important factor in determining whether we care about procedures for accountability.” If power is determined in part by function, as this Article posits, then accountability controls and their strengths should be mapped to those functions. This section seeks to undertake such an effort, moving away from the mainstream literature which aligns accountability mechanisms with type of governance actor or regime. The following sections attempt to map broadly political-, administrative-, and enforcement-related functions to accountability controls analyzed by others. While greater specificity of the functions performed is likely necessary to achieve a truly normatively justified accountability system, this Article seeks to serve as a starting point for such an analysis, leaving further nuances and discussion for another time.

While this Article believes it exponentially preferable for domestic governments to undertake a harmonization process similar to the one described below in Part IV.B, where domestic governments do not utilize procedures sufficiently similar to those described, international governance regimes must do so in order to properly certify NGO participation and prevent favoritism to NGOs located in countries where such procedures are followed.

201. Keohane & Nye, supra note 5, at 18.
202. See generally Kaldor, supra note 34; Keohane & Nye, supra note 5.
203. See supra Table 1. One danger in the approach of applying function-based accountability controls at the micro-function level is someone must determine what controls are appropriate for which functions. The greater the number of functions to which accountability controls are applied, the greater the power held by the individual(s) or entity making such determinations. Therefore, it might be best to utilize a second-best approach to function-based application of accountability controls, opting for categories of broadly-defined governance functions. As a preliminary view on this topic, this Article would see the importance of such broad definition dependent upon whether an independent accreditation organization to perform such determinations similar in nature to the process described in Part IV.C.5 is available to perform such determinations and whether NGO participation is intended to hold the governance regime accountable or whether the regime seeks to hold the NGO accountable, or both.
1. Political Functions

As described above in Part III.A, NGOs have a very important role to play in policy formulation. It has been claimed “[t]ransnational actors who are not active participants in governance arrangements or negotiating systems [but merely lobby or perform advocacy functions] pose few challenges to existing concepts and theories in political science and international relations.”204 Despite this claim, “policy-making accountability” is still very important in international governance.205 As mentioned above, representation issues rightfully dominate the discussion concerning NGO accountability in performing political activities.206

Democratic accountability is important when NGOs perform political functions because they are acting in a representative function. Authority for NGO participation in policy formulation is often justified in terms of intrinsic rights to political participation.207 Although not all political functions are necessarily representative in nature, the overwhelming majority of NGOs involved in policy formulation claim to represent some interest, providing them with the legitimacy sufficient to justify participatory rights.208 However, where such representation is crucial to achieve this legitimacy, assurance must be made the NGOs are properly representative. This is important because if an NGO falsely claims to represent a group and is allowed to participate, the NGO may serve to delegitimize or otherwise thwart the true representation of the group.209 Although such representation need not be necessarily democratic in nature—especially since democracy is not a universally accepted form of

204. Börzel & Risse, supra note 82, at 198.
206. See Charnovitz, supra note 106, at 56.
207. See generally Charnovitz, Two Centuries of Participation: NGOs and International Governance, supra note 111.
governance—many international regimes do base their authority and participatory requirements upon some modicum of democratic legitimacy.\textsuperscript{210}

The literature on democratic, or representational, accountability focuses on NGO representation of beneficiary interests, rather than upon member interests.\textsuperscript{211} While this Article acknowledges external accountability to beneficiaries is important where NGOs claim to represent beneficiary interests, not all NGOs which provide services to beneficiary groups or act altruistically on behalf of third-parties claim to speak on behalf of those groups.\textsuperscript{212} Therefore, accountability controls related to the performance of political functions should be determined primarily by representation of the NGO’s internal membership. Representation of beneficiary groups is necessary when an NGO claims to represent the views of its beneficiaries; otherwise, representation requirements merely serve to decrease the participatory opportunities of otherwise qualified NGOs.\textsuperscript{213} As a result, under the democratic or representative model of governance authority, representational, hierarchical, and fiscal accountability controls are important to constrain NGO behavior in the performance of political functions.\textsuperscript{214}

Additionally, peer accountability mechanisms are fairly appropriate under situations where NGOs perform what might be considered political functions, since negotiated outcomes depend upon the willingness of participants to enter into a meaningful negotiation process.\textsuperscript{215} These functions are also most closely aligned with traditional state-state relations, which operate based upon balance of power constraints and are most related to peer accountability constraints in accountability theory. This is therefore relevant under theories considering “accountability as . . . responsiveness, obligation and willingness to communicate with others across the various agencies (the various government departments, quasi-

\textsuperscript{210} While this Article conflates representative and democratic accountability for simplicity’s sake and to align it more squarely with the existing literature on democratic accountability, adequate representation of some form is crucial for most NGO participation in policy formulation.

\textsuperscript{211} See generally Wapner, supra note 50; Charnovitz, Two Centuries of Participation: NGOs and International Governance, supra note 111.

\textsuperscript{212} NGO Monitor, Different Types of NGOs, http://www.ngo-monitor.org/ngo/types.htm (last visited Aug. 28, 2005).

\textsuperscript{213} See generally Blitt, supra note 209.

\textsuperscript{214} As noted above in Table 1, hierarchical controls are considered to include democratic or other representative accountability to members or beneficiaries (where explicitly stated).

\textsuperscript{215} See Wapner, supra note 50, at 202 (discussing the effects of NGO cooperation and coalitions on accountability).
governmental organizations and private contractors) constituting the relevant policy community responsible for the ‘joined-up government’ of, and service delivery in, that sphere.” However, peer accountability controls are only valid to the extent they identify failures to adequately represent member or beneficiary interests, and when peer organizations identifying such failures have the authority to present the regime with such information. Since peer accountability controls are typically outcome-based, this type of control for the most part will be unacceptable to resolve issues of effective representation.

From a regime perspective, then, NGO intentions should be the primary determinant of accountability controls which should be designed by reference to the NGO’s structure and ability to uphold its intentions. NGO intentions relate to the motives or purposes with which NGOs act. NGOs representing or claiming to represent particular interests must actually attempt to do so. Whether the NGO is able to fully represent the interests of its membership or beneficiary populations is another matter, though it certainly should be an ultimate goal. However, representation need not be perfect in order to be legitimate. To determine an organization’s representativeness, then, the actual level of representativeness should be gauged against the NGO’s stated intentions to determine the veracity of their claims.

2. Administrative Functions

While intentions dominate accountability controls of NGOs performing political functions, actions (or competence) are most important for determining accountability of NGOs undertaking administrative functions. The role of NGOs in performing administrative duties in international
governance is one primarily of functionality for the organization. Generally, a high level of technocratic expertise is required for such activities, and therefore, issues of representation are less significant.\textsuperscript{220} Instead, external accountability to the regime is most important from a regime perspective.

NGO authority to participate as administrative governance actors is derived from the privileges granted by the regime.\textsuperscript{221} NGOs and their represented memberships have no intrinsic rights to participate as administrative actors. Rather, their participation serves instrumental purposes for the regime. As a result, NGO authority and legitimacy are derived from and delegated by the regime and can therefore be proscribed and withdrawn by the regime.\textsuperscript{222} Adequate representation of members or beneficiary groups is therefore not a normative prerequisite to properly serving as an administrative agent of an international regime (assuming authority to perform such a function).

Supervisory and legal accountability controls, derived from the power of delegation, are therefore the primary mechanisms used in ensuring accountability. Secondary means of ensuring external accountability to the regime are enforced through budgetary and other fiscal controls, hierarchical controls for managers in their individual capacities, and to a certain extent, peer accountability controls where other NGOs are also involved in the provision of particular administrative duties.\textsuperscript{223} Internal accountability (necessary to ensure membership fees and other base revenue and organizational sources of power are not mismanaged or abused) to members is achieved not through representational accountability mechanisms, but through procedural controls to ensure fiscal (through membership exit and loss of membership fees) and hierarchical accountability.\textsuperscript{224}

Action-related accountability concerns dominate administrative actions.\textsuperscript{225} NGO actions are evaluated to ensure they do not exceed the scope of the mandate provided by the delegating authority.\textsuperscript{226} Outcome-related concerns also exist, but are less significant in the performance of administrative functions, since action-related accountability concerns

\textsuperscript{220} See generally Goodin, supra note 5, at 23–30 (suggesting homogeny is not necessary because the desire to achieve a negotiated outcome is enough to succeed).

\textsuperscript{221} Id. at 1.

\textsuperscript{222} Id. at 3.

\textsuperscript{223} Id. at 3–4.

\textsuperscript{224} Keohane, Political Accountability, supra note 5, at 15.

\textsuperscript{225} Keohane & Nye, supra note 5, at 27.

\textsuperscript{226} See Goodin, supra note 5, at 11.
determine which qualified NGOs participate and require those NGOs to perform their assigned duties. Therefore, if the NGO is to produce documentation or training programs, outcome-oriented accountability mechanisms provide little additional guidance, since NGO authority is derivative and delegated and can be withdrawn if the NGO fails to meet the quality expectations of the regime. Nevertheless, a minimal level of outcome-related constraints should also be imposed to ensure NGOs produce well-researched neutral information, for instance.

3. Enforcement Functions

Different from both political and administrative functions, NGOs’ performance as enforcers of the rules of an international regime is derived both from intrinsic rights and instrumental privileges. NGO participatory rights may be delegated to NGOs by the international regime based upon reasons of expertise or such rights may be intrinsic to ensure regime adherence to the rules established by the regime and its Member States. As a result of this bifurcated source of authority, NGOs may be held to account by multiple groups: the regime (including the regime’s beneficiaries if the regime acts outside its scope of authority), the beneficiaries of the NGO, and, to a lesser extent, the internal membership of the NGO.

NGOs performing enforcement functions must maintain accountability to the regime and its purposes to ensure the regime is held to account and for the regime to ensure the NGOs act within the authority properly delegated to them, depending upon the particular enforcement function. NGOs must also ensure accountability to the regime’s beneficiaries and the beneficiaries of the NGO, whether internal or external. Generally, however, external beneficiary interests will dominate, and therefore adequate representation of such interests must be assured. External accountability to beneficiaries, while predominantly achieved through the regime’s policies and supervisory mandates, must also be ensured through a modicum of hierarchical accountability to the beneficiaries directly, where such enforcement functions directly affect them.

227. For a discussion of how these rights and privileges interact, see Erik B. Bluemel, Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule-Making (forthcoming 30 AM. INDIAN L. REV. (Fall 2005)).

228. See Charnovitz, Two Centuries of Participation: NGOs and International Governance, supra note 111, at 276–77; Grant & Keohane, supra note 4, at 8.

229. Charnovitz, supra note 111, at 277–78.

230. Id. at 278–79.
While beneficiary accountability is primarily determined by intentions and actions, external accountability to the regime is determined mostly by reference to actions and performance outcomes, especially in the provision of services. Effectiveness, expertise, and experience are crucial determinants for outcome-based accountability controls. For delegated non-public service provision NGO functions, external accountability to the regime generally is ensured through outcome-oriented supervisory, legal, and fiscal controls. The basic internal accountability necessary to ensure managerial compliance is achieved through fiscal and hierarchical requirements established (in the framework of this Article) under domestic law, as will be discussed in the next section.

B. Harmonizing Domestic Procedures

National governments often have processes by which NGOs are established and verified under domestic law. Recognizing this, it would be inefficient to require international governance regimes to duplicate domestic requirements. Implicit legitimacy is often established through domestic government recognition of NGOs as legal entities. This legitimacy, however, should not be taken for granted, since the international regime may have interests which are not purely based upon the aggregation of interests of its member States. As a result, international regimes must validate the rigor with which the national governments apply their accreditation procedures, much as the NACEC evaluates the enforcement of national environmental laws under NAFTA, and apply more stringent requirements where necessary and appropriate. As a result, domestic procedures should be viewed as baseline requirements for participation in international governance, but should be appended with international requirements where necessary to ensure accountability appropriate to the governance function involved.

The view of this Article is efficiency requires domestic governments to certify NGOs as legitimate actors with the international system focusing on legitimizing NGO involvement in particular international governance functions. However, where domestic governments do not have procedures or an effective process of legitimizing NGOs, the international sys-

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231. See generally Charnovitz, supra note 106 (discussing examples of NGOs, issues arising from their involvement, and their functions).
232. See generally Grant & Keohane, supra note 4.
234. See Aman, supra note 39, at 1705.
235. Id. at 1712–14.
tem must do so to prevent unfairness between countries’ NGOs. This Article considers it highly desirable to harmonize the domestic NGO legitimizing processes to both improve the effectiveness of the process itself and to conserve resources. This Article also considers domestic governments far superior in the basic legitimizing process given their proximity to the NGOs and their (typically) preexisting information collection processes. Domestic governments are also most capable of understanding the variety of local organizational structures and purposes and therefore should play a central role in certifying NGOs as eligible for participation in international governance.

However, establishing domestic accountability mechanisms for NGOs is no easy task considering the great variety in NGO organizational forms:

[T]here are wide differences among NGOs concerning their forms of organisation—formal versus informal, hierarchy versus participation, networks versus federations, centralised versus decentralised, not to mention differences in organisational culture. Some NGOs are membership organisations; others are governed by boards or trustees. Moreover, the meaning of membership varies.236

Nevertheless, most national governments have, and continue to establish, requirements NGOs must meet to earn a particular, usually special, legal status.237 Of particular difficulty is the issue of distinguishing between local and international NGOs and determining what role national governments might play in certifying such organizations.238 There are over 200,000 local NGOs in the developing world alone.239 In addition, there are approximately 29,000 international NGOs.240 International NGOs often seek beneficiary legitimacy by allying with local NGOs and are

236. Kaldor, supra note 34, at 24.
237. Requiring national governments to impose some requirements on NGOs prior to allowing their participation in international governance is not new to this Article, as the UN defines NGOs as non-profit organizations, implying those NGOs are established under some domestic legal structure as non-profit entities. See supra text accompanying note 2.
238. Tavis, supra note 122, at 510.
240. NGOs with operations in more than three countries are generally considered “international NGOs.” COMM’N ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBORHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE 32 (1995); NGOs: Sins of the Secular Missionaries, supra note 147, at 25 (referring to the Commission on Global Governance’s report).
frequent sources of funds for their local partners. Thus, while international NGOs may have greater legitimacy as actors at the international governance level, domestic NGOs have a significant role to play as well. Limiting participation to international NGOs may seriously undermine the funding and effectiveness of domestic NGOs, ultimately to the detriment of local beneficiaries. Additionally, many, if not all, of the governance functions described above in Part III could be performed by local NGOs having the proper level of competence to perform such functions. Therefore, this Article does not discount the participation of local NGOs in international governance as do the ECOSOC procedures. However, this Article does recognize the difficulty in relying upon domestic governments to certify international NGOs as potential participants in international governance. This Article favors (though by no means requires) an alliance between international NGOs and local NGOs to alleviate the disadvantages of limiting participation to either local or international NGOs, especially where beneficiary interests are represented and experience or expertise are important (as in the provision of services).

In countries certifying NGOs, domestic accountability requirements generally require NGOs: (1) serve disempowered or underserved populations; (2) are established to promote the public interest; (3) are fiscally responsible so monies do not inure to private individuals; and (4) have an organizational structure holding its managers and directors accountable to its membership through some means. These basic requirements create

241. See Tavis, supra note 122, at 510; Tarlock, supra note 82, at 65–66.
243. See ECOSOC Procedures, supra note 179.
244. See infra Part IV.A for a discussion of how this difficulty might be resolved.
245. In the United States, Internal Revenue Code § 501(c)(3) provides the test for organizations not organized for profit, but operated solely for the advancement of social welfare. Of course, for-profit entities can still perform services and other international governance functions. This Article, however, is intended as a direct response to the wealth of literature on NGO accountability.

Although this Article only analyzes NGO accountability, its analysis may be portable to other actors performing similar functions for the reasons described above. This Article does not believe NGOs should have a right to participate while other for-profit associations do not. However, the latter may require different accountability controls, an issue not directly addressed by this Article. See Charnovitz, Two Centuries of Participation: NGOs and International Governance, supra note 111, at 276; Peel supra note 176, at 73–74; see also supra notes 53, 65. While it is possible different concerns exist regard-
ate a good base for establishing mechanisms to hold NGOs internally accountable when performing functions associated with international governance. However, “the absence of standard public law safeguards concentrates significant power in NGO secretariats” and may encourage forum shopping or a race-to-the-bottom in NGO domestic regulation. Therefore, the following sections call for harmonization of domestic regulation of NGOs to ensure a minimum level of accountability. This minimum level of accountability is based upon the process of legitimizing NGOs as valid actors in any sphere of governance and includes the four accountability controls discussed above.

1. Representation

While domestic regimes generally require NGO service-orientation toward underserved or disempowered populations, this requirement is to ensure the NGO operates for a “public purpose,” rather than representation of beneficiary interests. Representation controls in this context should ensure members have some hold over policy decisions or agency leadership, such as occurs in a principal-agent relationship. Therefore, for harmonization purposes, accountability mechanisms should ensure only representation of member interests. External accountability to beneficiaries is not necessary for all governance functions. Therefore, analysis of accountability to beneficiaries, while best done at the domestic level, should not be a requirement harmonized prior to participation, but should be evaluated (by the domestic government) based upon the particular function the NGO seeks to perform.

One criticism to this approach is rules governing NGO interactions with local communities can have significant positive consequences on NGOs as compared to other actors, counseling for different or fewer accountability controls, this Article suggests these concerns may be neither rational nor supportable distinctions when NGOs perform governance functions capable of being performed by other entities (even if not equally well). In fact, “it is important for global institutions, international institutions and governments, not to privilege NGOs in debates about social justice.” Kaldor, supra note 34, at 27.

Additionally, some have suggested government agencies do not have the same “ethos of mutuality” as NGOs (though officials would) and therefore should not be full participants in network governance structures. See Goodin, supra note 5, at 43–44. Of course, interest polarization may occur with or without government involvement and is usually a more likely outcome than cooperation-based approaches in international governance. See Brown et al., supra note 60, at 28–32.

246. See Brown et al., supra note 60, at 23–32.
247. See Keohane, Political Accountability, supra note 5, at 8.
NGO relations with its beneficiaries. As NGO memberships are not usually comprised of NGO beneficiaries, it is important to differentiate NGO representativeness from NGO adherence to its intended beneficent goals as well as from representativeness of beneficiary views/desires, all of which may differ significantly. The disjuncture between the views and interests of intended beneficiaries and members can significantly impede the effectiveness of NGOs. While this is a sound criticism, it is valid only in relation to the organization’s purpose, claims to representativeness, or situations where NGO effectiveness can be decreased by the membership/beneficiary disjuncture. Therefore, it shall be discussed along with other NGO purposes below in Part IV.B.3.

Although traditionally considered in the context of democratic accountability akin to states, NGOs need not be highly representative of beneficiary interests to perform governance actions. Some have argued outcome-based measures should be more important than the representativeness of the NGO. However, this Article does not believe such generalizations are appropriate, and argues different accountability measures must be evaluated in light of the function the NGO seeks to perform, as discussed in greater detail in Part IV.A.

While the requirement NGOs be non-profit entities helps ensure actions in the “public interest” to a certain extent, it has been recognized that NGOs still operate under a profit motive, despite being non-profit, and therefore may not be entirely representative of member views. It is improper to assume NGOs are no more than a mere aggregation of their memberships’ interests. Rather, bureaucratic theory suggests NGOs may


249. Wapner, supra note 50, at 199; see also Tarlock, supra note 82, at 75.

250. See Delbrück, supra note 106, at 41–42 (recognizing “providing a stringent legal framework . . . that NGOs would have to abide by in order to be admitted as participants in the international system could enhance their legitimacy”).

251. See Bjorn Møller, “Civil Society Romanticism”: A Sceptical [sic] View: Reflections on Håkan Thörn’s Solidarity Across Borders (unpublished paper), available at http://www.ihis.aau.dk/~bm/NGOs-SA.doc (last visited Aug. 19, 2005). While this Article considers NGO actors distinct from other potential civil society and economic actors in global governance, a regime may not consider such a distinction important, or, as a second-best alternative, verifying the “public interest” nature of the organization might prove exceedingly difficult. See Peel, supra note 176, at 73–74. In such a case, however, the regime would still need to filter out organizations with improper or falsified purposes, making this analysis mostly pertinent, though with a slightly different focus.
have public-interest values not derived from any interest-aggregation theory of representation. As a result, adequate member representation must be viewed in part in terms of process, and not wholly in terms of results, and must ensure the results are not contrary to the purpose of the NGO.

Representativeness is difficult to verify, but local variations demand it be addressed at the local or national level as opposed to the international level. Three indicators, however, may be a useful starting point in determining NGO representativeness: “the institutional ability of [members] to sanction leaders, the de facto capacity of [members] to sanction leaders, and the [organization’s] responsiveness to the expressed will of the [members].”

2. Accountability

At the international level, accountability of NGOs generally focuses on analyzing the democratic accountability of NGOs. However, other accountability issues exist and are the dominant forms of control imposed at the domestic level. Because NGO self management and internal accountability procedures are insufficient to guarantee NGO accountability, various mechanisms to improve internal NGO management have been proposed. Therefore, despite the fact NGOs can be held accountable to their members through member exit, financial conditionality re-
requirements, advisory boards, and other externally-imposed accountability requirements are often deemed desirable from a national policy perspective.

Specifically, financial accountability controls are used to ensure fiscal responsibility of the organization so self-serving “for-profit” personal motives do not exist. Hierarchical accountability controls are used to further constrain NGO managers and employees from inappropriate actions and rent-seeking behavior. For this reason, the method of board selection is important to NGO accountability. Both fiscal and hierarchical controls are more readily obtained and verified at the national level as opposed to the international level. Therefore, requiring controls at the national level in the first instance may make economic sense.

3. Validity of Proffered Goals

Another issue best harmonized at the domestic level is the requirement that NGOs serve the “public interest.” Definitions regarding the “public interest” will certainly vary by state. In fact, not all States define NGOs as non-profit entities. Since “moral accountability arises from the mission of the civil society actor,” it is important to ensure the legitimacy derived from an organization’s NGO status is justified. The requirement NGOs be non-profit entities serves in part to ensure NGOs serve, or in some cases represent, marginalized interests imperfectly serviced or represented by the State. In this sense, some NGOs serve a “second-best”

258. Wapner, supra note 50, at 201–02 (“Many professional institutions use outside experts or boards of directors that watch out for the organization’s long-term well-being. These boards are usually comprised of people who are uninvolved in day-to-day operations and therefore possess a broader perspective on the issue area and the organization’s political role. Boards can have authority to depose NGO leaders and shape the broad outlines of campaign work. While board members implicitly share the overall normative orientation of the organization and its officials, they come to the group as outsiders. In fact, they are invited onto the board precisely because they have some distance from the organization.”).

259. See Brown et al., supra note 60, at 24–27.


261. See, e.g., Felicidad Soledad, Accountability as a Sector: The PCNC Experience, in CSRO ACCOUNTABILITY, supra note 260, at 9 (noting the Philippines did not certify NGOs for tax deduction purposes until recently).

262. Kaldor, supra note 34, at 21.
function of representation or service-provision.\textsuperscript{263} However, the legitimacy of distinguishing between NGOs serving underserved populations and NGOs serving more politically powerful associations is normatively suspect. Failure to limit the participation of these more powerful NGOs, however, means increasing NGO participation generally may in fact further disempower underrepresented groups as they must then battle against potential capture of organizations by more powerful NGOs.\textsuperscript{264}

As a result, it is important to link the international regime’s goals of NGO participation to the purpose with which the NGO is formulated. The purpose of the NGO is important not only to determine which NGOs are actually serving the public interest but also to ensure NGO institutional competence in particular fields.\textsuperscript{265} Relationships with marginalized populations on specific issues creates a measure of competence important to proper international governance. Although one society may be comprised of marginalized populations which are politically powerful in other societies, this variation does not overcome the significant need to establish a harmonized approach to tackling the issue of NGO purpose to determine whether organizations act for the public-interest or private profit.\textsuperscript{266}

4. Veracity of Proffered Goals

Harmonizing domestic requirements for initial NGO certification is insufficient, however, to ensure NGOs are appropriately accountable and formulated at the domestic level. Without a requirement NGOs be evaluated for the veracity of their goals and the imposition of other accountability controls, it will be difficult to weed out NGOs which serve as mere fronts for states seeking increased political power or organizations misrepresenting their purposes or engaging in other fraudulent rent-seeking behavior.

\textsuperscript{263} See Ngaire Woods, Good Governance in International Organizations, Global Governance, Jan.–Mar. 1999, at 39, 45.


\textsuperscript{265} Goodin, supra note 5, at 25. This, of course, assumes application of the UN’s definition of NGO. See supra note 2.

\textsuperscript{266} This is not to say that industry or for-profit associations have no right to participate in international governance. However, this Article is limited to an analysis of NGOs, as defined by the UN.
2005] NGO ACCOUNTABILITY CONCERNS

It has been argued, relative to other actors, intentions play a much greater role in ensuring accountability of the non-profit sector and regimes should continue to focus on the intentions of NGO actors, monitoring NGO intentions undertaken through peer accountability mechanisms.267 Despite these claims for the greater use of peer accountability in holding NGOs to account to their purposes,268 fly-by-night NGOs have not been successfully regulated through internal codes of conduct or peer accountability controls.269 Instead, requirements at the national level help validate NGO actions against the purposes with which they are established and are therefore important to ensure long-term NGO accountability and public-interest oriented behavior. As noted above, NGOs in international governance often do not disclose or are not required to disclose their funding sources.270 International validation of domestic data is therefore necessary to ensure the veracity of the data collected and NGOs are not merely State funded or controlled organizations. The continued requirement of financial accountability is also important to ensure the organization does not engage in for-profit activities. However, determining whether an NGO has faithfully adhered to its mission and vision can be a difficult task.271

267. See generally Goodin, supra note 5; Grant & Keohane, supra note 4.
269. See Soledad, supra note 261, at 9.
270. Maura Blue Jeffords, Turning the Protestor into a Partner for Development: The Need for Effective Consultation between the WTO and NGOs, 28 BROOK. J. INT’L. L. 937, 982 (2003).
271. See, e.g., Abdi Suryaningati, The YAPPIKA Experience, in CSRO ACCOUNTABILITY, supra note 260, at 12. This Article does not necessarily advocate the use of effectiveness measurements as means to determine the adherence to an organizational mission and vision, both for normative reasons and because of the difficulty of attributing outcomes with NGO actions. See id.; Eugenio M. Caccam, Jr., Measuring Results and Impact, in CSRO ACCOUNTABILITY, supra note 260, at 14. Nevertheless, it recognizes such outcome-based measurements may be useful, and therefore applies the three subjects of accountability described by Goodin (intentions, actions, results) to NGO participation in international governance. See Goodin, supra note 5, at 10–11 (noting although the three subjects are not necessarily exhaustive, they do relate to the three main ethical forms of virtue: ethics, deontology, and consequentialism). Although “[n]o non-profit is sensitive only to intentions and wholly insensitive to results,” for participation purposes, it is not clear a results-orientation is appropriate, since a consideration of results may occur when seeking funding, as donors look both at qualitative and quantitative financial accountability. See id. at 16, 25 n.32; Nipa Banerjee, Donor Sharing, in CSRO ACCOUNTABILITY, supra note 260, at 65; Brown et al., supra note 60, at 16–17.
Often, formal means are lacking to ensure organizations are meeting their stated objectives.\textsuperscript{272} This issue may also be exacerbated by financial conditionality, which may not perfectly align with stated objectives and goals.\textsuperscript{273} In fact, issues of multiple accountability often make coherent management difficult.\textsuperscript{274} Establishing accreditation procedures at the international governance level may serve to streamline multiple accountability concerns into a single accountability source. This may occur as donors adopt the accreditation procedures used by international regimes, thereby minimizing conflicting accountability concerns and loyalties significantly. While loyalty issues surrounding financing will likely inevitably occur given donor financing preferences, accreditation procedures may be used to ensure only those organizations with goals appropriately aligned with such donor preferences will be financed, rather than allowing NGOs to constantly redefine their priorities to meet donor demands.

One concern with such an arrangement, however, is donor financing may be given even greater power under such an arrangement. Only those NGOs whose goals are aligned with donor preferences will receive funding for participation in international governance activities.\textsuperscript{275} NGOs which could normally receive financing upon a redefinition of their goals may be left without funds, causing some populations or issues to go unserved. Whereas these NGOs might have been able to incorporate some of their preferences into a donor-driven project previously and at least to some extent servicing those populations or issues, now those NGOs would be precluded from doing so in the international governance context. Although not precluded from doing so in an informal, non-governance context, international donors may adopt the accreditation procedures of international regimes throughout all of their financing arrangements, thereby running the risk such a policy might result in sub-

\textsuperscript{272} See Johnson, supra note 248.

\textsuperscript{273} See id. at 5.

\textsuperscript{274} See id. See also Edwards & Hulme, supra note 147; David Stark, \textit{Ambiguous Assets for Uncertain Environments: Heterarchy in Postsocialist Firms, in The Twenty-First-Century Firm: Changing Economic Organization in International Perspective} 69, 101 (Paul DiMaggio ed., 2001) (“To be accountable to many different principles becomes a means to be accountable to none.”); Goodin, supra note 5, at 6–8 (noting generally different accountability mechanisms operating upon NGO actions); Keohane & Nye, supra note 5; E.A. Brett, \textit{Voluntary Agencies as Development Organizations: Theorizing the Problem of Efficiency and Accountability}, 24 Dev. & Change 269 (1993).

\textsuperscript{275} This is not far from what happens currently, as there “has been a proliferation of NGOs that are organized more to take advantage of [donor] resources than to accomplish their nominally value-based missions.” Brown et al., supra note 60, at 12.
optimal financing of various populations’ needs. The danger accreditation procedures will limit the servicing of various issues, however, seems overstated, as many NGOs pursue multiple objectives simultaneously and even under very strict donor financing arrangements and still find means to adapt the donor requirements to meet the needs of both the NGO and the intended beneficiaries.\(^{276}\)

In the end, for NGOs to be held accountable in a coherent and consistent manner at the international governance level, some harmonization in definition and regulation at the national level is required. NGOs have a sense of moral legitimacy due to their focus on public interest or non-profit issues. It is therefore important for national governments to ensure an organization seeking NGO certification meet some requirements to be labeled a non-profit organization, including purpose- and population-based requirements, financial and hierarchical accountability controls, and controls ensuring alignment between the purposes and actions of the organization. These mechanisms together establish the minimum requirements necessary to create some coherency to NGOs in the international sphere, thereby reducing the costs and improving the correctness of international governance systems’ certification of NGO participants.

C. Implementation Issues

This is a theory-based Article, leaving most of the details of implementation to further study. However, some general implementation concerns should be noted.

1. Cost

The ability to implement a unified system of NGO certification unique to each regime’s mandates and purposes will inevitably impose a number of significant costs. While some of these costs may be minimized through economies of scale if performed by a single certification organization,\(^{277}\) they will nevertheless be significant for international regimes. These costs may be borne by applicant NGOs, depending upon the regime mandate, making distributional inequities a danger. Despite this potential pitfall, these concerns do not appear particularly worrisome since significant funding is available from various organizations to support NGO capacity-building and participation in international govern-

\(^{276}\) See Johnson, supra note 248, at 14–15 (noting such flexibility is enhanced by requirements seeking greater incorporation of intended beneficiaries in the decisionmaking processes but some ambiguity is still necessary to allow such flexibility).

\(^{277}\) See infra Part IV.C.5 for a discussion of this type of arrangement.
ance. Additionally, this Article seeks to place some of the costs of implementing this framework upon national governments, which typically have greater resources for certification than international regimes.

2. Feasibility

a. Regime Perspective

From a regime perspective, implementing the framework laid out might not only impose costs, but might be difficult to achieve even absent financial constraints. Lack of adequate data or resources to verify the veracity of organizations may present significant challenges in implementation. Recognition of these problems is the primary reason why this Article suggests a two-tiered approach to certification: domestic- and international-level procedures. However, despite these data gaps, it is important to provide the indicators by which future studies may be conducted and to identify areas of further research.

Additionally, international regimes may not be particularly competent in certifying NGOs to participate, as most have not undertaken such certification requirements. As a result, a significant learning curve and proceduralization of the certification process will be required to guide regime behavior. While a dedicated, independent certification agency may significantly assist regimes in this process, this learning curve will nevertheless exist and may present significant short-term equity and justice concerns.

Finally, significant concerns exist regarding the ability of international organizations to pierce through domestic regulations serving as mere window dressing. This Article assumes such a process is possible, as it has faith in the approach undertaken by NACEC in the NAFTA regime.


279. Cf. Peel, supra note 176, at 74 (“Greater institutional constraints in the international setting may mean that tribunals do not have the resources to devote to screening individual applications and submissions by NGOs. However, such considerations do not dictate the exclusion of NGOs from the international environmental dispute resolution processes altogether. Rather, they suggest the need for development of a process of accrediting NGOs in the international environmental arena to ensure an empirical basis for determining their claimed representativeness and expertise.”).

280. See infra Part IV.C.5.
This Article counsels for freedom of information laws to the extent they provide information regarding government funding and NGO purposes, structures, and funding sources. Nevertheless, the difficulty of determining whether an organization is a mere political arm of a state where such laws do not exist will be immense, and without greater standardization, including the use of standard accounting procedures, data gathered from national governments or independently may require significant analysis to decipher their importance.

b. NGO Perspective

From the NGO perspective, the requirements imposed by this Article will likely undermine organizational efficiency to a certain extent. While this Article does not advocate significantly different accountability mechanisms than current literature, it does call for particular arrangements of accountability mechanisms, the strength of which may vary depending upon the functions performed (or the type of organization performing them). As a result, certain combinations of accountability mechanisms may prove to be more stringent and hinder organizational efficiency to a greater extent than existing requirements or theories. As a result, such requirements might limit the number of NGOs capable of performing governance activities to the larger NGOs capable of absorbing such additional costs. In the view of this Article, these concerns do not seem particularly compelling as an argument to reject a function-based approach to accountability, but certainly must be considered in determining the strengths of accountability mechanisms applied to particular governance functions.

3. Western Bias

A significant concern for this framework is its potential to favor Western forms of organization. While the departure from democratic accountability theory opens the door for participation by non-Western NGOs possibly left out of other accountability theories, the certification process established by this Article’s framework nevertheless may create a potential bias against non-Western organizational forms which are not established according to the typically Western corporate model. Additionally, this Article continues to rely on representation as being a normative basis

281. See, e.g., Hale, supra note 64, at 16, 20 (noting worries “the costs of compliance will detract from the partners’ ability to carry out their project, an issue of special concern to small-scale partnerships and developing country partnerships,” but arguing “innovative policy tools can avoid this danger”).

for internal, and to some extent, external accountability to beneficiaries. While less concerning than mainstream accountability theory, which primarily relies upon democratic representation models and elections, this Article’s reliance on representation might be seen to imply a democratic model—an issue of concern since only approximately sixty percent of global society is democratically governed through elections. However, this analysis does not assume such a requirement unless one is established at the regime level.

As noted in the previous section, the certification requirements imposed by this framework might also favor wealthier NGOs, typically from Western or Northern countries. Even more disconcerting to some might be the departure from typical accountability critiques of NGOs, which disclaim NGOs’ failure to adequately represent their beneficiaries’ interests. Focus on internal accountability as accountability to members, who are typically wealthy Northern individuals and organizations, might advantage Northern policies. Southern countries may therefore oppose general increases in NGO power, out of fear Northern NGOs’ policy goals will not sync with local developing country realities, and may be coterminous with Northern governments’ policy platforms. Additionally, Southern countries may fear allowing NGO participation will favor Northern NGOs due to inequities in power, access to technology and resources, and the predominance of the English language in international


283. See CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875 (John Boli & George M. Thomas eds., 1999).


This fear, however, is not particularly significant, as the theoretical framework established by the Article would actually reduce the number of Northern NGOs claiming to represent Southern beneficiary interests where such beneficiaries are not properly represented in NGO policymaking, spurring the formation of Southern NGOs or Northern NGOs truly representative of Southern interests. Additionally, this Article posits it is the responsibility of the regime itself to ensure full and fair representation of all affected interests, so failure to ensure fairness in representation would be a shortfall of the regime, not of the NGOs.

Finally, the certification requirements established under this Article run the risk of privileging particular organizational forms. Requiring NGOs to conform to a particular organizational structure, while perhaps making them more easily verified and held to account, risks undermining cultural forms of organization and hierarchy, as well as the overall effectiveness of various organizations. Internal accountability structures vary significantly by culture and must be weighed against local custom. International regimes seeking to validate domestic non-profit legal structures should not demand particular organizational forms, but should evaluate the appropriateness of domestic legal non-profit structures against the reasoning used by domestic governments. Therefore, while harmonization of domestic procedures is important in this context, it is also important to allow for local variation. In applying context-dependent accountability controls, therefore, formalism can be the enemy of the good.

One major obstacle is the requirement that NGOs be non-profit, which may require some states to redefine their tax codes, thereby contravening the will of the populace. Since the UN requires participating NGOs to be non-profit, this Article assumes this issue has not presented significant distributional equity problems, though it recognizes such concerns can

287. This is the case because international NGOs can claim any beneficiary constituency and act on their behalf without accountability to the beneficiaries. This Article suggests a modification to this approach under certain circumstances, thereby either mandating greater direct representation of beneficiary interests or limiting NGO participation to those organizations sufficiently representative of beneficiary interests.
288. See Kingsbury, supra note 6, at 188–93.
289. See id.
290. See id. at 189.
exist and should be dealt with on a case-by-case basis to ensure fair treatment across national borders.

4. Moral Hazard

There is potential concern the proceduralization of NGO participation in international governance might create a presumption of NGO accountability. This presumption, in turn, might lead some actors to give more credence to NGO positions than to other governance actors, such as states or other less procedurally governed entities. This concern is especially acute in enforcement situations where NGOs hold international governance regimes accountable. These NGOs might be less inclined to evaluate the regimes’ performance (in holding the regime accountable) if NGOs are participating in the structure, even when the NGO is not acting as an accountability control to unwieldy regime power. This is a potential concern, but one easily avoided through clear and simple certification procedures which outline the exact reasons and functions the NGO is allowed to perform.

Another moral hazard concern might present itself with respect to domestic certification requirements, whereby international regimes might presume domestically certified NGOs are proper participants in international governance and therefore over-include NGOs in the governance regime. These dangers, however, appear to be insignificant where proceduralization is designed to ensure greater accountability. Although formalization may increase legitimacy without increasing accountability, the system proposed by this Article is intended to ensure accountability and thereby avoid this problem.

5. Regime Accountability

Finally, significant concerns exist regarding overall regime accountability. Allowing the international regime to hold the NGO accountable or require particular mechanisms places strong power in the hands of the regime to dispel criticism by not accrediting NGOs with views critical of the regime. As has been noted before, real power is held by those who accredit the participating NGOs. Some have taken the position greater inclusion is better, and therefore providing certification power to international regimes might increase their ability to restrict NGO participation to only weak or already co-opted organizations: “[i]f NGOs are to be held accountable to intergovernmental organizations, controlled ulti-

291. See Charnovitz, supra note 111.
nately by governments, their most outstanding virtue—indepen-
dence from governmental authority—would be threatened.292 However, I do
not share the conclusion this danger is so large as to warrant the appli-
cation of external accountability only through peer and reputational ac-
countability mechanisms.293

While many NGOs do act through NGO networks, this is an issue
separate from governance; peer accountability mechanisms are subject to
tailure through collusion, and normatively, NGOs not involved in gov-
ernance have no or limited normative right to hold other NGOs account-
able.294 Additionally, reputational mechanisms, highly dependent upon
the provision of perfect information, are likely to be more effective in
ensuring internal NGO accountability to members than external account-
ability to beneficiaries, who are in a dependent situation. That is, donors
may cease or reduce their donations to organizations, but so long as the
organizations still have funding, it is likely the assistance such organiza-
tions seek to provide will not be significantly rejected by beneficiaries.

In the governance context, however, this is a non-issue, since NGOs
would be authorized to act under a contract to provide services on behalf
of the regime, so controls other than reputational mechanisms would be
applicable to hold NGOs accountable to beneficiaries under such circum-
stances. In a governance setting, NGOs are not necessarily weak actors
and therefore accountability controls previously asserted as sufficient in
the private NGO context are no longer so.295

As a result of this Article’s reluctance to rely upon peer accountability
controls, the framework proposed suggests the international regime be
involved in ensuring NGO accountability to the regime. These concerns
are significant in the context of holding the regime to account for its ac-
tions, but less so where the NGO is performing governance functions on
behalf of the regime. Nevertheless, the concern of cooptation, although
not significantly increased by this Article’s framework over the status
quo method of including NGOs, does counsel for the creation of an in-
dependent accreditation organization. This reviewing body would be based
upon a pool of actors and should include, at a minimum, one standing,

292. Keohane, Commentary on the Democratic Accountability of Non-Governmental
Organizations, supra note 67, at 478.
293. See id.
294. See Tanaka, supra note 285, at 120–35.
295. See Keohane, Commentary on the Democratic Accountability of Non-Govern-
mental Organizations, supra note 67, at 479 (“Since NGOs are themselves relatively
weak, their external accountability deficits are not as severe as the accountability deficits
for other organizations in world politics.”).
independent member of the accreditation organization, one member of the international regime to which the NGO applied for participation in its governance activities, and an official from the country where the NGO’s headquarters or field office is located, whichever is most pertinent to the particular issue and international organizational mission. This reviewing body should dispel most of the concerns associated with NGO cooptation and regime rent-seeking behavior.

V. CONCLUSION

This Article has reviewed accountability theories related to NGO involvement in international governance and found such theories lack precision and clarity and have proven to be overly general. NGOs may perform two major roles in governance: serving to act as accountability checks on international governance regimes or performing governance functions on behalf of those regimes. This Article focused primarily on the latter of the two roles, describing in detail in Part III some of the varied functions NGOs have performed in international governance regimes. Deconstructing NGO participation in international governance reveals different accountability concerns are raised by the different functions performed by NGOs. As a result, accountability theory must recognize these differences and seek to apply controls based on the particular functions performed by NGOs. Part IV provides a starting point for such a function-based accountability theory. While a function-based framework may present some significant implementation challenges for international and domestic regimes, from both a normative and efficiency perspective, such an approach is highly desirable because it avoids over- and under-inclusion of NGOs in governance and ensures greater competition between NGOs for the performance of particular functions, allowing international regimes to select the NGO best fit to perform the particular function. These implementation challenges warrant further study to detail the contours of a function-based accountability theory and to illustrate methods of determining the optimal balance between organizational and institutional costs and ensuring suitable levels of accountability to the appropriate individuals or entities.
COURTING ISLAM: PRACTICAL ALTERNATIVES TO A MUSLIM FAMILY COURT IN ONTARIO

How do we honor two commitments, to multiculturalism and equity to the rule of law, that often seem to come into conflict? We have been struggling a bit. There really are conflicting values.*

I. INTRODUCTION

In the modern secular state there is a tension between the desire of the state to keep religion out of the public sphere, and thus not interfere with individual freedoms, and the need of religious individuals to live as required by the tenets of their particular faith. Liberalism may concern itself with individual autonomy, but critiques of liberalism within the West have emphasized the need to consider the communal rights of minority groups, including religious groups.1 Islam, like some other faiths, prescribes a model of living for its adherents that encompasses the spectrum of daily life whether they live in an Islamic state or not.2 Critiques of liberalism have made a range of suggestions for minority groups, such as Muslims living in non-Islamic, Western democracies, that would grant them the ability to exercise communal rights.3 But this ongoing debate has yet to find the optimal way of protecting liberal ideals while also accommodating religious needs. Canada, like other liberal


2. See generally FREDERICK M. DENNY, AN INTRODUCTION TO ISLAM (2d ed. 1994) (discussing the Islamic religious system in Part III).

3. See generally KYMLICKA, supra note 1; INTERCULTURAL DISPUTE RESOLUTION IN ABORIGINAL CONTEXTS (Catherine Bell & David Kahane eds., 2004) [hereinafter INTERCULTURAL DISPUTE RESOLUTION]; THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995).
democracies, faces the challenge of accommodating the needs of its Muslim citizens while staying true to the ideals of its founding principles. Religious accommodation requires the state, the believer, and the religious community to compromise in order to reconcile fidelity to religion with fidelity to the secular ideals that make religious freedom possible.

Syed Mumtaz Ali, the President of the Canadian Society of Muslims, sees a major problem with Canadian democracy, in particular its handling of minority rights, and has proposed a way to reconcile these competing fidelities. He believes that the system has "[fallen] far short of the promise and potential that democratic theory has for meeting the social and political needs of a truly multicultural society." The Canadian Society of Muslims suggests that a way of dealing with this failure of Canadian democracy is to establish Muslim arbitration tribunals. These tribunals would enable Muslims to consent to their jurisdiction for disputes involving family law, including marriage, divorce, inheritance, and custody. The tribunals would issue binding, court-enforceable decisions based on Muslim family law, subject to review in limited circumstances only.

In Part II, this Note will examine the Canadian Society of Muslims' criticisms of Canadian democracy and their plan to establish Muslim arbitration tribunals. It will also describe attempts made to reconcile secular and religious law in other countries including England, Australia, and the United States. It will focus on divorce as an example of the way in which compromise can be achieved between the state and religious

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4. Ayelet Shachar has defined “accommodation” in the multicultural context, including religion, as referring to “a wide range of state measures designed to facilitate identity groups’ practices and norms.” AYELET SHACHAR, MULTICULTURAL JURISDICTIONS 17 (2001).

5. The Canadian Society of Muslims is a non-profit Islamic organization founded in the 1960s by Dr. M. Qadeer Baig in Toronto, Ontario, and describes its main purpose as follows, “to promote interest in an intellectual, philosophic, and esoteric approach to the research, development and understanding of Islamic culture and civilization . . . and to co-operate with other organizations . . . which have objects similar in full or in part to the objects of the corporation.” Canadian Society of Muslims, Who We Are, http://muslim-canada.org/whoarewe.htm [hereinafter Who We Are] (last visited Oct. 31, 2005).


7. Id.


9. Id.
communities. In Part III, this Note will examine the meaning of religious freedom in Canada. In Part IV, this Note will examine the suggestions made by court reform commissions in Ontario and how the Muslim arbitration tribunals would fit into the Ontario court structure. It will look at the concerns inherent in incorporating Alternative Dispute Resolution (ADR) into family law generally and more specifically at questions surrounding the incorporation of religious ADR into family disputes. In Part V, this Note will examine the legal basis for the Muslim arbitration tribunals through the Ontario Arbitration Act of 1991. In Part VI, this Note will utilize a model of multicultural accommodation to suggest the practical alternatives available to Ontario. Finally, this Note will conclude that while the Act may allow for the establishment of Muslim arbitration tribunals, policy concerns advise against it and warrant an approach similar to the one used by England, Australia, or the United States. This approach is a combination approach that utilizes the private, ad hoc mechanisms of the Muslim community together with an awareness and openness of the courts and legislatures to take into account the needs of its Muslim citizens.

II. CRITICISMS OF DEMOCRACY AND ATTEMPTS AT RECONCILIATION

A. Mumtaz Ali’s Criticisms of Canadian Democracy

While all religions seek to provide believers with a blueprint for daily living, Islam, along with Judaism, provide much more. With detailed systems of law, Islam and Judaism have maintained a closer kinship to one another than to their third counterpart, Christianity. Concerned with


11. See F.E. Peters, CHILDREN OF ABRAHAM (1982). According to Peters,

It is the person and the acts of Jesus that are crucial to Christianity, and it is precisely Jesus who separates the typology of Christianity from that of both Judaism and Islam. Both Muslim and Jew are covenants for whom the path to holiness lies in fidelity of heart and observance to that covenant. The Christian is asked not so much fidelity as faith, faith in Jesus who is, in his own person, the New Covenant. Jew and Muslim measure their fidelity by a deeply considered and articulated body of halakoth, behavioral norms that are the touchstone of orthopraxy; the Christian measures his faith by the instruments of orthodoxy, creeds, and definitions. The archetypical figure in traditional Judaism and Islam is the legal scholar, the rabbi or 'alim; in traditional Christianity it is the priest, the mediator who, like the Arch-Mediator Christ, bridges the gap between the human and the divine.

Id. at 198–99.
the here and now, both Islam and Judaism place an emphasis on the perfect practice of their believers, referred to as orthopraxy by some scholars, rather than on the intricacies of metaphysics. The names for their divine law, *sharia* and *halacha,* mean “the way” or “the path” indicating that the manner in which the journey is undertaken is just as, if not more important than acceptance of doctrine. More than simply a sketch, they provide adherents with a detailed guide accompanied by precise regulations for daily life that encompass everything from prayer to personal grooming, religious sacrifice to diet, and charity to banking. In some areas, the religious regulations do not infringe upon the requirements of the secular state. In other areas, adherents may find they must either choose between the two or perform a double set of obligations, one religious and one secular, as in the case of divorce.

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12. See Denny, supra note 2, at 113. Denny succinctly states the relationship between the orthoprax religions of Islam and Judaism and the metaphysical centered Christianity, “Judaism, like Islam, is an orthoprax religion. Law has been the characteristic preoccupation of religious scholarship in Judaism, whereas theology has been central in Christianity.” Id. at 151.

13. Literally, *sharia* means “the way to the water hole” but other meanings include “the right path” and the late Islamic scholar, Fazlur Rahman, referred to it as “the ordaining of the way.” Id. at 195.


15. Although Islamic law provides very detailed guidance to the believer, it is not monolithic and the law is not found entirely in the *Quran.* The two main sources of Islamic law are the *Quran,* the divine revelation, and the *Sunnah,* the sayings and deeds of the Prophet Muhammad. *Fiqh,* or Islamic jurisprudence, is derived from these main sources through their early interpretation by Muslim jurists. Varied interpretation of the sources led to several schools (*madhahib*) of Islamic law. There are four major schools of Islamic law in the Sunni tradition (Hanafi, Malaki, Shafi’i, Hanbali) of which 90 percent of Muslims around the world belong to. The other 10 percent of Muslims belong to one of several Shia traditions (including the Zaydis, Ismailis, and Imamis). See Denny, supra note 2, at 195–215; Bill Powell et. al., Struggle for the Soul of Islam, TIME, Sept. 13, 2004, at 46. In many ways the early development of Islamic law bears similarities to the development of Anglo-American common law. The divine statutes of the *Quran* and *Sunnah* were interpreted through judicial opinion (*ra’y*), analogy (*qiyas*), adoption by others (*istihsan*), and consensus (*ijma’*). See generally Jamal J. Nasir, The Islamic Law of Personal Status (3d ed. 2002); John L. Esposito & Natana J. DeLong-Bas, Women in Muslim Family Law (2d ed. 2001); Denny, supra note 2; David Waines, An Introduction to Islam (1995).

16. As Jamal Nasir writes, “From the days of the Prophet, Islam was not just a religion but a complete code for living, combining the spiritual and the secular, and seeking to regulate not only the individual’s relationship with God, but all human social relationships.” Nasir, supra note 15, at 2.

17. For a discussion of the dilemmas faced by religious adherents in the modern state and those faced by the state in accommodating religion as an integral part of human
ety of Muslims’ critique of Canadian democracy stems from the situations in which the individual believer or the Muslim community as a whole cannot adhere to Islam’s mandates.

The Canadian Society of Muslims’ critique of and plan to overhaul Canadian democracy is laid out in Mumtaz Ali’s 1991 discussion paper, *Oh! Canada! Whose Land, Whose Dream?* Mumtaz Ali’s criticism begins with the notion that a key component is missing from Canadian democracy, and that component is sovereignty. Sovereignty “involves the desire to have substantial control over, or play a fundamental role in, shaping one’s destiny.” *Oh! Canada!* asserts that white Canadians are the only group with sovereignty over their affairs and that while democracy should be based on a social contract, the majority precludes the minority from participating fully in the agreement.

*Oh! Canada!* goes on to argue that rights afforded by the government are not absolute, but rather, based on a compromise to ensure that competing interests are taken into account on behalf of both the individual and the collective. Canadian democracy, in order to live up to its ideals, must spread the wealth of sovereignty evenly. Achieving equality does not require everyone to be treated identically but rather requires that no ...

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18. *See Oh! Canada!, supra note 6, at 2.*

19. *See Oh! Canada!, supra note 6, at 12.* The discussion of sovereignty begins with a discussion of a decision of the British Columbia Supreme Court that “denied the land claims of a group of Native people” because they had been superceded by the British colonial power. *Oh! Canada!* interprets this decision as saying, “that one source of sovereignty has a perfect right to extinguish the sovereignty of another people, and, thereby, make any claim for autonomy, on the part of the latter people, null and void.” *Id.*

20. *Id.* at 19.

21. *Id.* at 13. *Oh! Canada!* equates “white” Canadians with “‘mainstream,’ majoritarian Canadians or their political representatives” excluding Quebecois and immigrant communities. *Id.*

22. *Id.* at 18. *See also JEFF SPINNER, THE BOUNDARIES OF CITIZENSHIP (1994).* In his chapter on Pluralistic Integration, Skinner recognizes the critique that “demands for diversity [in the liberal state] . . . have often fallen on deaf ears.” *Id.* at 79. This critique has led some to argue that although liberals may like the idea of “neutral rules,” which treat everyone the same, in reality, it does not work this way. *Id.* Rather, the “most powerful group will define the standards of a society’s institutions” and other groups will “have to adhere to these standards.” *Id.* at 79.

23. *See Oh! Canada!, supra note 6, at 20.*

24. *Id.* at 21. *See also Iain T. Benson, Notes Towards a (Re)definition of the “Secular”,* 33 U.B.C. L. REV. 519–49 (2000) (arguing that liberal society must begin to understand what aspects of faith are necessary to society and then allow religiously informed belief to become a part of the public arena).
group be given a preference. Democracy can offer a spectrum of possibilities for individuals and groups to make choices in line with their own needs if they are given the ability to control their affairs internally.

In another report of the Canadian Society of Muslims, President Mumtaz Ali recounts the history of the campaign to create a more suitable environment for Muslims living in Canada. In 1986, the founder of the Canadian Society of Muslims, Dr. Baig, submitted a proposal to the Ontario Courts Inquiry suggesting that Muslim Personal Law be taken into account in the commission’s study. Dr. Baig’s recommendations were not adopted and after his death, Syed Mumtaz Ali assumed the leadership of the Canadian Society of Muslims.

Oh! Canada! includes a detailed plan for constitutional reform, election reform, senate reform, and judicial reform. The authors use French Canadians and the Native peoples as examples which illustrate

25. See Oh! Canada!, supra note 6, at 22.

26. Id. Mumtaz Ali’s criticisms of Canadian democracy are similar to the theories of multicultural theorists like Will Kymlicka, Charles Taylor, and Iris Young who argue that the so-called neutral institutions of society will always have some bias towards the cultural tradition of the majority. See SHACHAR, supra note 4, at 22–25 (summarizing the arguments of early multicultural theorists).

27. See Syed Mumtaz Ali, A Word from the President: Campaign up to 1997, Canadian Society of Muslims (on file with the Brooklyn Journal of International Law) [hereinafter A Word from the President].

28. Muslim family law and personal status law are used interchangeably. One helpful definition of the areas included within personal status law is the one used by the Tunisian government:

Personal Status shall include disputes over the status of the persons and their legal capacity, marriage, property dispositions between spouses, mutual rights and duties of the spouses, divorce, repudiation and judicial separation, parentage, acknowledgement or disavowal of paternity, family and descendants relationships, maintenance duties among relatives and others, rectification of parentage, adoption, tutelage, guardianship, interdiction, attainment of majority, gifts, inheritance, wills and other acts taking effect subsequent to death, the absent person and the declaration of a missing person to be dead.


29. See A Word from the President, supra note 27.

30. Id.

31. Oh! Canada!, supra note 6, at 29–33.

32. Id. at 10–12.

33. Id. at 23–27.

34. Id. at 27–29.

35. The comparison of the plight of the Native peoples to the problems facing the Muslim community is not a convincing comparison. The aboriginal peoples of North America and elsewhere were forcibly uprooted from their lands and deprived of their
the problems of sovereignty and how they have been addressed within Canadian society. These examples are then correlated to the problems facing the Muslim minority in Canada. The authors argue that rather than having separation between church and state, those in positions of government leadership promote an “anti-religious” rather than a “neutral” perspective. This anti-religious perspective conceals animosity towards particular religions, such as Islam, and hinders the free exercise of religion. Public education is one area where these biases become evident. Another area where Muslims find themselves at a disadvantage, argue Mumtaz Ali and Whitehouse, is in the area of family and personal status law. The authors initially sought to gain official recognition sovereignty by European settlers who saw the Natives’ land as vacant. Aboriginal peoples have been forced to adapt to an uncompromising legal system that ignores their viewpoints. See Larissa Behrendt, Cultural Conflict in Colonial Legal Systems: An Australian Perspective, in INTERCULTURAL DISPUTE RESOLUTION, supra note 3, at 116. See also SHACHAR, supra note 4, at 26 n.42 (noting that theorist Will Kymlicka views minority nations as having greater claims than religious groups because minority nations are entitled to “territorial self-government” whereas religious groups are not); FREEDOM OF RELIGION AND BELIEF: A WORLD REPORT 105 (Kevin Boyle & Juliet Sheen eds., 1997) [hereinafter FREEDOM OF RELIGION AND BELIEF] (stating that some of the worst acts of religious discrimination have been committed against indigenous Canadian peoples).

36. See Oh! Canada!, supra note 6, at 39.
37. Id.
39. Oh! Canada!, supra note 6, at 39. See Ahmad Yousif, Islam, Minorities and Religious Freedom: A Challenge to Modern Theory of Pluralism, 20 J. MUSLIM MINORITY AFF. 1, 32 (2000) (arguing that despite the emphasis on religious freedom and equality in the Western liberal state, Christian religions are “more equal” than non-Christian minorities). See also SPINNER, supra note 22. Spinner looks at liberal society and the experiences of several ethnic, racial, and national communities in the United States and Canada including two, the Jews and the Amish, which are both ethnic and religious. Spinner discusses the division of liberal society into the public and private realms and suggests that liberal society encourages individuals to keep things like religious identity in the private sphere. Id. at 6. Spinner admits that “the demands of liberal citizenship in the public sphere and in civil society,” a third realm he identifies in liberal society, “make it hard, although not impossible, for liberal citizens to maintain robust ethnic identities.” Id.
40. See Oh! Canada!, supra note 6, at 40. Roman Catholic schools remain publicly funded because of the carryover of a clause into the Charter from the British North America Act that gave protected status to “denominalational, separate or dissentient” schools. For a concise explanation and comparison of funding of religious schools among Canadian provinces see FREEDOM OF RELIGION AND BELIEF, supra note 35, at 108–09.
41. See Oh! Canada!, supra note 6, at 41. Mumtaz Ali and Whitehouse include marriage, divorce, separation, maintenance, child support, and inheritance in personal law. Id.

of Muslim personal law in order for the Muslim community to be able to regulate this area internally.\textsuperscript{42} This would allow the Muslim community to establish and fund tribunals to settle disputes in the area of personal law.\textsuperscript{43} The logistics for implementing such a plan are detailed in a later proposal by Syed Mumtaz Ali.\textsuperscript{44} Since 2002, however, Mumtaz Ali has taken a different approach.\textsuperscript{45} While it is not clear that Mumtaz Ali has abandoned the idea of court-connected tribunals, for now he has opted to establish private Muslim arbitration tribunals under the auspices of the Ontario Arbitration Act of 1991\textsuperscript{46} that would nonetheless issue court-enforceable decisions.\textsuperscript{47}

One area over which the Muslim arbitration tribunals could eventually have jurisdiction is divorce.\textsuperscript{48} While the laws governing Muslim marriage and divorce vary throughout the schools of Islamic law, there are several shared principles that will aid in understanding how the tribunals will operate and their potential consequences.\textsuperscript{49} Marriage in Islam is

\textsuperscript{42} Id. at 43.

\textsuperscript{43} Id.


\textsuperscript{45} See Darul Qada, supra note 8. See also Syed Mumtaz Ali, Why Was the Institute Formed? (Canadian Society of Muslims 2004), http://muslim-canada.org/IICJ.html [hereinafter Why Was the Institute Formed?] (last visited Oct. 31, 2005).


\textsuperscript{47} See Darul Qada, supra note 8. According to Mumtaz Ali,

We will be able to . . . appoint our own Muslim arbitrators and non-Muslim associate arbitrators to act as ‘private judges’ apply our own Muslim Personal Law, including family law (e.g. marriage, khula [divorce initiated by wife or by consent of both spouses], divorce, custody, guardianship, mehr [dowry], division of property, wills and inheritance, gifts, waqf [charitable trusts], etc.) . . . . Arbitrators’ decisions (“awards”) are final in almost all cases. In the event that one of the parties [to] arbitration decides to renege on their initial agreement to accept and comply with the Arbitration decision, we will be able to enforce those arbitration decisions (“awards”) with the help of the Ontario/Canadian justice system.

\textsuperscript{Id.}

\textsuperscript{48} Id. Currently, divorce law is governed by federal law, not Ontario provincial law, but establishing jurisdiction over divorce is one of the goals of the Islamic Institute of Civil Justice. Id.

\textsuperscript{49} See generally Dawoud S. El Alami, The Marriage Contract in Islamic Law (1992) (discussing the variations among the schools of Islamic law).
viewed as a contract and, while expected to be permanent, Islam places importance on allowing spouses to separate who are unable to live out the ideals of marriage. The most common form of divorce is known as *talaq*, or repudiation, which gives the husband the right to divorce his wife for any reason or no reason. In such cases, the husband must pay the wife her *mahr*, or dowry, to which she is entitled. Another form of divorce is known as *khul’*, which is initiated by the wife, consented to by the husband, and usually requires the wife to sacrifice part or all of her dowry. By no means comprehensive, these terms will aid in understanding not only the Ontario Muslim arbitration tribunals but the approaches taken in England, Australia, and the United States as well. As will be seen below, the Canadian Society of Muslims’ proposal is neither the first time a Muslim community has sought to gain recognition of Muslim family law in a secular state, nor is Canada the first country to confront the dilemmas of a conflict between religious and secular law.

**B. Attempts to Reconcile Secular and Religious Law**

Muslims living in the West have always faced difficulties obtaining recognition for Muslim family law. Unlike the status of Islamic law in predominantly Muslim countries such as in South Asia or the Middle

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50. See Esposito & Delong-Bas, supra note 15, at 28.
51. See Dawoud Sudqi El Alami & Doreen Hinchcliffe, Islamic Marriage and Divorce Laws of the Arab World 22 (1996) (providing an overview of Islamic marriage and divorce law before discussing the codified Muslim personal law of the Arab world). There are several variations of *talaq*, some of which are considered more acceptable such as *talaq al-Sunna* (divorce in accordance with the teachings and customs of the Prophet Muhammad), but the variations all include a unilateral repudiation by the husband that in most cases does not have to be in writing or witnessed. Id. at 23–25. See also Esposito & Delong-Bas, supra note 15, at 27–32.
52. See Esposito & Delong-Bas, supra note 15, at 18–35.
54. See David Pearl & Werner Menski, Muslim Family Law (3d ed. 1998).
55. Id. at 51 n.1. Pearl and Menski discuss that Muslim personal law “is the majority law in Pakistan and Bangladesh and it also governs a substantial minority in India.” Id. at 29. South Asian Muslim law is “a hybrid form of Islamic law . . . with many national and regional variations. The authors write, “some of the liveliest jurisprudential debates about Muslim law today are conducted in South Asia.” The authors suggest that the discussions, debates, and difficult questions raised in South Asia “bring with [them] many instructive parallels for the development of Muslim law in the West today.” Id. at 30. In the era of European colonization, the European powers applied European law to matters of business but left family law to the realm of local custom and religion resulting in a
East, most Western nations, such as England, Australia, and the United States, do not incorporate religion into the legal system. Western states have prevented the recognition of Islamic law and have relegated it to the private realms of culture. Western nations have viewed Islam as inconsistent with notions of human rights and have characterized Islam in general as opposed to Western values. Although this rejection by their governments creates tension, many Muslims living in Western nations have not or will not abandon Islam or Islamic law.

1. English Muslim Law—Angrezi Shariat

Muslim family law in England is an example of a creative and pragmatic interplay between Muslim law and the Western state. Although, the government has been resistant in many ways to accommodate non-Christian religious traditions, it has made some progress in conjunction with the creative initiatives of the Muslim community. In the late 1960s and early 1970s, the United Kingdom witnessed an influx of Muslim

“pluralist family law” in those places with “culturally and religiously diverse populations.” Ann Lacquer Estin, Embracing Tradition: Pluralism in American Family Law, 63 Md. L. Rev. 540, 548 (2004). In the case of British colonization, while matters of family law were left to the jurisdiction of the religious communities, Britain made use of so-called repugnancy clauses that reserved to the colonial power the right to not recognize certain practices if they were viewed as irreconcilable with “morality, humanity or natural justice.” The relics of this system can still be found today in countries such as Kenya and India. Shachar, supra note 4, at 79.

56. See generally Nasir, supra note 15.
57. See Pearl & Menski, supra note 54, at 51.
58. Id.
60. See Pearl & Menski, supra note 54, at 52.
61. Education is one realm where the British government continues to resist religious accommodation. The Anglican Church remains the state church of England and religious education and worship remain a part of state schools. In the Education Reform Act 1988, the government reaffirmed its commitment to Christian tradition and teachings in schools by requiring religious teaching in schools to “reflect the fact that the religious traditions in Great Britain are in the main Christian whilst taking account of the teaching and practices of other principal religions represented in Great Britain.” Andrew Bainham, Family Law in a Pluralistic Society: A View From England and Wales, in Families Across Frontiers 301–02 (Nigel Lowe & Gillian Douglas eds., 1996) (quoting the Education Reform Act of 1988).
immigrants seeking economic and educational opportunities but wishing to retain their religious and cultural practices. As the community grew in strength and numbers, it began to organize and build institutions to protect the interests of the growing Muslim community. In 1975, in an attempt to demand official recognition of Muslim family law, the Union of Muslim Organisations (UMO), an association aiming to be the representative and lobbying group of Muslims in the United Kingdom and Ireland, proposed changes to England’s family law. The UMO’s proposal was very similar to that of Mumtaz Ali’s plan, but failed miserably. Although the UMO’s proposal had the support of over 150 Muslim organizations, it did not, however, suggest the establishment of

62. In 1970, there were 300,000 Muslims in Great Britain. By 1987, that number grew to 1.5 million. See Anthony Bradney, Religion, Rights and Laws 3 (1993). As of 2001, there were 1.6 million Muslims comprising three percent of the population and more than half of the total non-Christian population. National Statistics, Britain, Religious Populations (2001), DirectGov, United Kingdom, http://www.statistics.gov.uk/cci/nugget.asp?id=954.

63. Manazir Ahsan, The Muslim Family in Britain, in God’s Law Versus State Law 21 (1995). The overwhelming majority of these immigrants came from India, Pakistan, and Bangladesh. Id. at 23.

64. Among the institutions built at the time were mosques and Islamic centers, and the establishment of movements to increase the availability of Halal food and Islamic education. Ahsan also points out that the community grew through British converts to Islam. See Ahsan, supra note 63, at 21.

65. See ReDirectory of Faith Communities, Union of Muslim Organisations of UK and Eire, http://www.theredirectory.org.uk/orgs/umouk.html (last visited Oct. 31, 2005). The aims of the UMO include “coordinating the activities of all Muslim organisations in the UK and Eire, and to be the representative body of British Muslims in negotiations with the British government and other governments and international bodies. The UMO has also established a National Muslim Education Council which “offers help to teachers, such as guidelines and a syllabus for Islamic education. The UMO offers help to individual Muslims to practice the tenets of Islam while at work.” Islamic Shari’a Council, Introduction, http://www.islamich-sharia.co.uk/main.html.

66. See Pearl & Menski, supra note 54, at 58.

67. The Islamic Shari’a Council recognizes this failure on its website in its description of the necessity of the Council. It does not mention the UMO’s proposal by name but refers to a proposal fitting its description and states that, “The answer was clear, unequivocal: one country, one law! We have abandoned in our legislation, what was traditionally known as the Christian viewpoint, so how can we be expected to legislate according to Islamic Law?” Islamic Shari’a Council, Preface, http://www.islamich-sharia.co.uk/preface.html [hereinafter Preface].

68. See Sebastian Poulter, The Claim to a Separate Islamic System of Personal Law for British Muslims, in Islamic Family Law 147 (Chibli Mallat & Jane Connors eds., 1990). Mumtaz Ali does not claim to have the support of any organization beyond the organization he leads, the Canadian Society of Muslims, and although it has a rather inclusive name, the Society does not appear to represent a significant number of Canadian Muslims. See Who We Are, supra note 5.
separate Muslim tribunals. The late author Sebastian Poulter, a specialist in law relating to ethnic minority traditions in England, posits several reasons why the UMO’s plan received such a negative reception. He suggests that the conflict between the English tradition of a unified family law and the Muslim desire to incorporate Muslim personal law into English law, the conflict between the various schools of Islamic law and deciding which one would apply, the conflict between the civil courts applying religious law or instead a separate religious court, and the conflict between certain aspects of Muslim family law and various human rights treaties all contributed to the plan’s cold reception. But even if the UMO had chosen a particular school of Islamic law, proposed the establishment of Muslim arbitration tribunals, and excised all practices of gender inequality from Islamic law, it is unlikely that the proposal would have had a greater success. As Poulter points out, considering the centrality of the issues and values dealt with in family law, the possibilities are remote that English society would accept the complete division of family law into religious denominations.

Notwithstanding this rejection, Muslims have continued to seek recognition for Muslim family law in England and have made progress. This has been evident in the courts and the legislature as well as in the development of an ad hoc, extra-legal system known as angrezi shariat, or English Muslim law. English Muslim law remains unrecognized by the state, but this hybrid law, which allows English Muslims to adhere to both English and Islamic law, has become a conspicuous and accepted

69. See Notes on the Contributors, in ISLAMIC FAMILY LAW ix (Chibli Mallat & Jane Connors eds., 1990); Contributors, in GOD’S LAW VersUS STATE LAW viii (Michael King ed., 1995).

70. See Poulter, supra note 68, at 157.

71. See generally Denny, supra note 2 (describing development of Islamic law and the various schools of Islamic jurisprudence).

72. Unlike Muntaz Ali’s proposal, the UMO proposal did not suggest the establishment of separate Islamic courts.

73. See Poulter, supra note 68, at 157–64. Treaties potentially implicated by official recognition of Muslim family law include the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Discrimination Against Women. Id. at 160.

74. Id. at 158. For a review of marriage law in Great Britain including the Marriage Acts 1949 to 1990 see Bradney, supra note 62, at 39–58. For a review of the history of freedom of worship in England see Sebastian Poulter, ENGLISH LAW AND ETHNIC MINORITY CUSTOMS 207–27 (1986).

75. See Pearl & Menski, supra note 54, at 58. The term angrezi shariat was coined by Professors Menski and Pearl. It is a transliteration of Urdu and reflects the South Asian majority in the British Muslim community. Id.
part of the Muslim community in England. The Islamic Shari’a Council has been influential in the establishment of angrezi shariat. The Council, modeled after the Jewish community’s Beit Din, advises in marital disputes and gives guidance on other matters of Muslim family law. The Council also gives expert advice to lawyers and courts and is comprised of representatives of the major schools of Islamic jurisprudence. Spurred by the failure of the UMO’s proposal and the sense of alienation among some English Muslims, the Council seeks to provide an Islamic forum for dealing with the problems and disputes of the Muslim community while also increasing acceptance for Islam and Islamic law in the West. Since its formation in 1982, the Council has presided over 4,500 cases, over 95 percent of them related to matrimonial problems.

The Islamic Shari’a Council has played an important role in resolving the dilemmas that adherence to both English and Islamic law can create for English Muslims, particularly in the areas of marriage and divorce. For example, a divorce recognized by the civil courts but not Islamic law will create a “limping marriage” which is recognized as dissolved by the larger community but as still intact by the Muslim community. Through the Council and other organizations, the Muslim community in England

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76. *Id. See also* Yilmaz, supra note 59, at 118.
77. The Islamic Shari’a Council states its objective as:

>[Advancing] the Islamic Religion by: Fostering and encouraging the practice of the Muslim Faith according to the Quran and the Sunnah. Providing advice and assistance in the operation of the Muslim family. Establishing a bench to operate as court of Islamic Shari’a and to make decisions on matters of Muslim Family law referred to it. Doing all such other lawful things as may be in the interest of promoting the proper practice of the Muslim faith in the United Kingdom.


78. *See Pearl & Menski, supra* note 54, at 78. Pearl and Menski define the *Beit Din* as “a quasi-judicial body, which regulates the affairs of a large number of British Jews.” *Id.* It should be noted that the *Beit Din* is a relevant body to orthodox Jews, not the Jewish community in general.


80. Of the requests to help resolve matrimonial disputes, the majority come from Muslim women seeking a divorce. Islamic Shari’a Council, *How it works?*, http://www.islamic-sharia.co.uk/works.html [hereinafter *How it Works??*]; Islamic Shari’a Council, *See Who it Represents??*, http://www.islamic-sharia.co.uk/represents.html. Those wishing to seek the Council’s assistance must register either electronically or by mail and pay a registration fee of £60. There are additional fees of £30 if an interview with a member of the Council is needed or £60 if a divorce certificate is requested. Islamic Shari’a Council, *Forms*, www.islamic-sharia.co.uk/forms.html.

81. *See Pearl & Menski, supra* note 54, at 78.
has created dispute resolution settings that put both civil and religious recognition on the same page. In the area of divorce, for example, a woman whose husband refuses to pronounce *talaq*, and therefore, prevents the religious dissolution of the marriage, can seek assistance from the Council. The Council allows both the husband and wife to make their case known to the Council and attempts to bring the parties to reconciliation. But if the husband should refuse to respond to the wife’s petition, the Council will take into account the wife’s position only and grant the divorce provided she meets the remaining requirements. Resolving disputes outside of the British court system has grown in popularity among England’s Muslim community and many non-matrimonial disputes appear to be resolved in these extra-legal settings without resort to the civil courts.

The English legal system has also played an important role in facilitating the recognition of Islamic culture into the formal legal system. In several cases, the courts have taken into account the religious practices of the parties in making their decisions. Additionally, Parliament has

82. *Id.*. See also *How it Works?*, supra note 80.
83. See *How it Works?*, supra note 80.
85. In the context of divorce, the Islamic Shari’a Council strongly recommends that divorcing couples also go through the civil process of divorce as well, presumably to avoid a “limping marriage.” Islamic Shari’a Council, *How it Works?*, supra note 80.
86. See PEARL & MENSKI, supra note 54, at 79.
made efforts through legislation that accommodates religious practices including laws regarding the ritual slaughter of animals for both Muslims and Jews, laws accommodating Sikh men’s wearing of turbans and carrying of daggers,\(^8^9\) laws protecting religious dress in school,\(^9^0\) and a law seeking to avoid the problem of the limping marriage.\(^9^1\) Legislation such as the Children Act of 1989 requires authorities to give consideration to a child’s religious persuasion when considering placement in foster homes.\(^9^2\) Parliament has also noted the success of the British Muslim community in dealing with Islamic divorce. While the House of Lords considered the passage of the Religious Marriages Act, a statute not unlike the New York law discussed below, to assist in integrating Jewish religious and civil divorce, it mentioned that the Council had successfully developed its own solution to the problem of limping marriages and

both the Islamic and the secular British law. \(\text{Id.}\) The husband sought a divorce in the British courts and the wife petitioned for her dowry, which the husband refused to pay. \(\text{Id.}\) The High Court judge in London awarded the wife £30,000 (the dowry minus £1). \(\text{Id.}\) at 7. Menski, who acted as an Islamic law expert in the case, explained to the judge that he must consider the “multicultural scenario” because if he only focused on English law and ignored the dowry situation the wife would be driven to a private Shari’ a council and out of the public courts. \(\text{Id.}\) at 6–7. The judge, concerned about the wife seeking relief outside of the civil courts, but not willing to fully take into account Islamic law, awarded the wife £1 less. \(\text{Id.}\) at 7. Menski writes,

| By giving her £1 less, he applied not Muslim law, but asserted the application of English law, through the English law on equity, with its strong notions of justice and fairness. Thus, he not only helped the woman, but also protected English law from the unrelenting pressure to accept personal laws, such as that of the Muslims, as part of the new British legal framework. The missing £1 is a powerful indicator of how close the contest has become, and how well aware of this problem the English judges now are.


89. Bradney quotes the Member of Parliament, Sidney Bidwell, who proposed the bill to exempt Sikhs from the Road Traffic Act 1972, which had made it a criminal offense to ride a motorcycle without a helmet and forced Sikhs to choose between their religious requirement of wearing a turban or forsaking it to ride a motorcycle. MP Bidwell asked, “[c]an we seriously say that we are carrying on our tradition of religious tolerance if . . . society imposes its will in such a way that a Sikh begins to turn away from his family religion . . . . ?” Bradney, supra note 62, at 5.

90. See Poulter, supra note 87, at 82.

91. Divorce (Religious Marriages) Act, 2002, c. 27 (Eng.).

92. Bainham, supra note 61, at 301–02 (citing various sections of the Children Act 1989).
therefore did not require the assistance of this legislation. In its final form though, the Act, originally intended to apply only to Jewish divorce, included all religious divorces.

In the area of Muslim family law, this unrecognized *angrezi shariat* status is interestingly in accordance with the historical development of Islamic law, which never regarded family law as a matter for the state. Rather, family and other local disputes were regulated internally by the community. This internal regulation, akin to ADR, did not involve state law or its representatives. British Muslims have carried on this tradition while also continuing to observe the secular laws of England.

93. See 614 PARL. DEB. H.L. (5th ser.) (2000) 115. Lord Lester of Herne Hill described the goal of the proposed legislation:

The Islamic community has sought to resolve problems of “chained” marriages by developing its own solutions and a mechanism for a non-consensual divorce, and British Muslims argue, according to the books I have read, that traditionally the sphere of family law has not been a matter for state law. The Jewish community is not able to deal with the problem without assistance from Parliament because of the biblical nature of the get requirements and the absence of any rabbinical authority to override those requirements in most circumstances . . . . However, it is important to avoid any unfair discrimination against the adherents of any religion in our multicultural, plural and democratic society. If there are similar problems in relation to other religions, the victims should have access to the courts for appropriate relief . . . . As Mr. Singh indicates in his Opinion, the Bill could be amended to deal with any gap in protection for other religions by empowering the Lord Chancellor to add other religions by order as appropriate, no doubt after consultations before the order is made.

94. See Divorce (Religious Marriages) Act, 2002, c. 27 (Eng.). The text of the Act demonstrates its universal applicability:

This section applies if a decree of divorce has been granted but not made absolute and the parties to the marriage concerned—(a) were married in accordance with—(i) the usages of the Jews, or (ii) any other prescribed religious usages; and (b) must co-operate if the marriage is to be dissolved in accordance with those usages.

95. PEARL & MENSKI, supra note 54, at 71. Modern states, which officially recognize Muslim personal law have attempted to take control over family law. Examples of countries that recognize Muslim personal law and have attempted to regulate it include Pakistan and Bangladesh. This recognition has led to clashes between the “state-sponsored codified Muslim personal law” and “the traditional shari‘a rules.” But, nonetheless, Pearl and Menski argue that “mutual non-recognition” between the Muslim community and Western legal centralists “is not a viable option from either perspective.”

96. Id. at 72.

97. Id. at 72 n.70.
The Muslim community in Australia remains small, but ever growing. While the total number of non-Christians was reported to be only 2.6 percent of the population in 1991, that number continues to increase due to burgeoning immigration trends.\footnote{See Freedom of Religion and Belief, supra note 35, at 167.} The 2001 census reported a record number of 281,576 Muslims in Australia with more than one-third of those native-born Australians and an increase of approximately 40 percent over five years.\footnote{See Australia Now, Australian Government, Department of Foreign Affairs and Trade, http://www.dfat.gov.au/facts/islam_in_australia.html (last visited Oct. 10, 2005).} In response to the changes, particularly through immigration, then Prime Minister Bob Hawke instituted a National Agenda for a Multicultural Australia in 1989.\footnote{See Sebastian Poulter, Ethnicity, Law and Human Rights 383 (1998). See National Agenda for a Multicultural Australia, 1989 Report, Australian Government, Department of Immigration and Multicultural and Indigenous Affairs, http://www.immi.gov.au/multicultural/_inc/publications/agenda/agenda89/toc.htm.} This agenda included a focus on the right of all Australians to express their cultural identity through religion.\footnote{Poulter, supra note 100, at 384.} While the agenda centered on the individual right to express one’s cultural identity, it also emphasized a commitment to Australian unity and the principles of democracy and individual rights, including gender equality.\footnote{Id.}

Since employing this strategy, Australia has made a start towards accommodating aboriginal marriages. These reforms could be extended to religious marriages as well, but have not been to date. The aboriginal reforms came about as a result of the Australian Law Reform Commission’s task of considering how a range of laws could better accommodate cultural diversity.\footnote{The Commission was asked to report on criminal law, family law, and contract law. Id.} In response to the Commission’s work, the Australian government has employed a rule of non-recognition.\footnote{See Patrick Parkinson, Multiculturalism and the Regulation of Marital Status in Australia, in Families Across Frontiers 309, 311 (Nigel Lowe & Gillian Douglas eds., 1996). See also Parkinson, Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities, 16 SYDNEY L. REV. 473, 480 (1994) (discussing the Australian Law Reform Commission’s choice that non-recognition would be the best means for respecting indigenous culture).} The rule of non-recognition operates in the legal sense that aborigines may marry outside of the Australian Marriage Act of 1961 but still obtain societal recognition and an expectation of permanency. The benefit of the rule of non-recognition is that it allows aborigines to marry without the impos-
tion of the “western legal and cultural framework” and exempts them from the strictures of the laws of divorce, which have no aboriginal equivalent. Moreover, the State is exempt from codifying aboriginal customs that may conflict with western legal norms and thus not conflict with the National Agenda’s commitment to Australia’s democratic norms. Australia recognizes certain exceptions to the rule of non-recognition through government acts, which protect various interests, among them family interests including those of children, decedent’s property, the ability to adopt, and spouses of government employees.

Patrick Parkinson, Professor of Law and specialist in family law at the University of Sydney, suggests that the rule of non-recognition be extended to all marriages performed by ethnic or religious communities. Legal regulation of marriage should be kept at the minimum necessary to protect the human rights of individuals. Principles intrinsic to the western legal tradition and recognized as human rights by the international community should not be compromised. In 1992, the Australian Law Reform Commission agreed with Professor Parkinson and recommended that Australian law should be more receptive to its multicultural society, but the Commission has failed to implement its recommendations.

On the subject of divorce, while the Commission was willing to recognize customary marriages, it was not willing to extend that recognition to divorce. Parkinson argues that while this stance was justified because of the public interest in allowing time for reconsideration and reconciliation, as well as an interest in the welfare of children, an attempt at compromise could have been reached. One such compromise would continue to require the requisite time of separation subject to consideration...
of the welfare of the children but without the usual filing requirements. The government would ensure that these procedures would be open to men and women in order to guarantee that customs not in line with gender equality would not prevent a spouse from seeking a divorce on the basis of their gender. The government would allow parties of a customary divorce to seek a civil declaration of dissolution if they wish.\textsuperscript{114} Such an approach does not really seem, on its face, like much of a compromise. It seems to retain the government’s requirements while only doing away with some filing requirements. The public’s interest in the welfare of children and the rights of both men and women to dissolve a marriage seem to warrant the close governmental oversight here, and perhaps Parkinson’s approach is mindful of that.

The Australian Commission, like the English Parliament and the New York legislature, also responded to the question of whether the civil law should require a party to grant a religious divorce before being granted a civil divorce. The Commission recommended that a court could use its power to postpone the finality of a divorce decree until the impediment to religious divorce had been removed unless a child would be harmed in the process.\textsuperscript{115} This stance took the concerns of minority groups seriously and Parkinson suggests that concerns about women being denied the right to divorce and remarry may have prompted this multicultural recommendation.\textsuperscript{116}

In reflection, Parkinson questions whether a society deeply rooted in traditions of European law is willing to go beyond passing antidiscrimination laws or providing multilingual court interpreters as a means of implementing multiculturalism. He questions whether true multiculturalism is even possible without the willingness to consider ways to allow minority groups to utilize their own set of laws without compromising individual freedoms.\textsuperscript{117} This question is at the heart of the decision facing Canada in its consideration of the Canadian Society of Muslims’ proposal.

\textsuperscript{114} Id. at 487.
\textsuperscript{115} Id.
\textsuperscript{116} Id. This recommendation mainly affects Jewish and Muslim divorces. Both Jewish and Muslim divorce law allows for the unilateral repudiation of a wife by her husband. Under Jewish law, a husband must give a written document called a \textit{get} to his wife to enable her to remarry. Under Islamic law, a husband must pronounce a verbal declaration called \textit{talaq} releasing his wife in order for her to remarry. See Judith Romney Wegner, \textit{The Status of Women in Jewish and Islamic Marriage and Divorce Law}, 5 \textit{Harv. Women’s L.J.} 1, 16 (1982).
\textsuperscript{117} See Parkinson, \textit{supra} note 104, at 505.
The United States—The Melting Pot Goes Multicultural

The United States, a nation of immigrants, has maintained a fiercely uniform, if not secular, family law, traditionally allowing little room for cultural accommodation. In the past forty years, however, as immigration trends have shifted away from Europe and expanded to include more immigrants from Asia, Africa, and South America, the needs of these immigrants have forced the American legal system, as well as society in general, to find practical ways of accommodating their needs. While the challenges of developing a multicultural family law remain, there is evidence that courts are beginning to take into account the needs

118. However, the roots of American family law, particularly those laws involving marriage, are heavily influenced by Christian tradition. Estin, supra note 55, at 542–43. An alternative to the extreme separation, or rather the imposed secularist approach of religious freedom in states such as the United Kingdom and United States is the “millet system” that operated in the Ottoman Empire. See Kymlicka, supra note 1, at 156. The millet system allowed Muslims, Christians, and Jews the ability to self-govern, impose religious laws on members of their respective communities, establish religious courts, and subdivide for ethnic or linguistic convenience. Id. The Empire recognized and enforced individual groups’ decisions and rules on matters of family law but also strictly regulated non-Muslim communities’ interactions with Muslims. These restrictions included a rule against proselytizing for non-Muslims, a rule requiring licenses for building churches, and a rule requiring non-Muslims to pay special taxes. The disadvantage of this system, because of its lack of recognition for individual rights, was its inability to allow for or protect dissent within each religious community. Id. at 157. The system allowed each group to suppress individual dissent and define the terms of membership as it saw fit which could severely impact an individual’s civil status. In the mid-eighteenth century, the millets lost much of their self-governing authority when the Ottomans began to prefer a more unified citizenship. Id. at 183. Israel, a Jewish and democratic state, with a diverse religious population both within its Jewish population and among its various minority groups, employs a modified version of the millet system. This system delegates many personal status issues to religious authorities. A compromise reached between secular and religious Jews during the founding of the State of Israel delegated the regulation of personal status issues to the orthodox rabbinate. Today, Israeli Jews seeking to marry under the Reform, Conservative, or Reconstructionist streams of Judaism or civilly find themselves unable to gain official state recognition of their marriages because the orthodox rabbinate does not recognize these marriages. Jews wishing to marry outside of the orthodox tradition must marry outside of Israel. See Michael Corinaldi, Protecting Minority Cultures and Religions in Matters of Personal Status both within State Boundaries and beyond State Frontiers—the Israeli System, in Families Across Frontiers 385–94 (Nigel Lowe & Gillian Douglas eds., 1996) (describing the legal status of religion in Israel particularly the personal status of internal Jewish minorities). See also Melanie D. Reed, Western Democracy and Islamic Tradition: The Application of Shari’a in a Modern World, 19 Am. U. Int’L L. Rev. 485, 497–503 (2004) (discussing the jurisdiction of religious courts in Israel).

119. See generally Estin, supra note 55.
of its citizens. In the legislatures, New York has taken the lead in passing an innovative yet controversial law, predominantly accommodating the needs of its Jewish residents to obtain a divorce, but also able to serve the needs of Muslims and those of other faiths. Additionally, as in England, the Muslim community has used creativity and pragmatism to develop its own mechanisms for balancing religious and secular law.

The New York Get Law, as it is known because of its intent to remedy the intentional withholding of Jewish religious divorces by husbands, accommodates religious tradition while also protecting individual liberties. Jewish law requires a husband to serve a document, the get, to his wife in order for the marriage to be dissolved. With a civil decree and no get, a Jewish woman faces a limping marriage, unrecognized by the

120. One regularly cited case is Odatalla v. Odatalla, 810 A.2d 93 (N.J. Super. Ct. Ch. Div. 2002) where a Muslim marriage contract was treated like any other contract and the court required the husband to pay the wife the dowry owed her. See discussion of case in Estin, supra note 55, at 573 and Asifa Quraishi & Najeeba Syeed-Miller, No Altars: A Survey of Islamic Family Law in the United States, in WOMEN’S RIGHTS & ISLAMIC FAMILY LAW 201 (Lynn Welchman ed., 2004). In Habibi-Fahnrich v. Fahnrich, 1995 WL 507388 (N.Y. Sup. Ct. 1995), the court acknowledged the existence of Muslim marriage contract but refused to enforce it because of vagueness not because it was a religious agreement. Id. at 203.

121. N.Y. DOM. REL. LAW § 253 (McKinney 1999). It has been argued that this law is unconstitutional because it violates the protections of the First Amendment to the U.S. Constitution, and while it has been found unconstitutional as applied in a New York trial court, see Chambers v. Chambers, 471 N.Y.S.2d 958 (N.Y. Sup. Ct. 1983), it has not yet been found to violate the U.S. Constitution. While it is beyond the scope of this Note to consider the constitutional questions surrounding this legislation, this Note offers the legislation as a practical compromise between religious and civil law. For an analysis of the First Amendment issues implicated by this legislation see Kent Greenawalt, Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance, 71 S. CAL. L. REV. 781 (arguing that the New York Get Law is constitutional); cf. Patti A. Scott, Comment, New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws, 6 SETON HALL CONST. L.J. 1117 (1996) (arguing that the New York Get Law is unconstitutional).

122. Because of the similarities between Jewish and Islamic divorce, particularly between the get and talaq, the New York Get Law is easily applicable to protect Muslims. See Wegner, supra note 116; Bernard Berkovits, Get and Talaq in English Law: Reflections on Law and Policy 119–25 in ISLAMIC FAMILY LAW (Chibli Mallat & Jane Connors eds., 1990).


124. See N.Y. DOM. REL. LAW § 253 (McKinney 1999).

125. See ISAAC KLEIN, A GUIDE TO JEWISH RELIGIOUS PRACTICE (2d ed. 1992).
Jewish community. The New York Get Law requires a party married by any clergy seeking a divorce to verify that no barriers to the defendant’s remarriage exist “to the best of his or her knowledge” by the time final judgment is entered by the court. The law does not involve the clergy in the divorce proceedings. Rather, it is the plaintiff who attests that a barrier to remarriage does not exist. The verification is made by a sworn statement, and a party knowingly making a false statement can be prosecuted under the penal law. Under Jewish law, a get must be given voluntarily and a get given under coercion or duress will be deemed inadequate. To oblige this religious requirement, the Get Law defines a “barrier to remarriage” as only those things that can be rectified voluntarily by the spouse. A drawback of the legislation is that it is only the plaintiff who must swear there is no barrier to the defendant’s remarriage. In practical terms, the law works as it should when the husband attempts to extort the wife by seeking a civil divorce and refuses to deliver the get, but does not work when the wife seeks a civil divorce and the husband refuses to deliver the get. However, this is something that could be remedied through further amendments.

Despite the controversial nature of the New York Get Law, it serves as an apt illustration of a compromise between competing religious and civil interests. The law recognizes the indispensability of religious law for some persons while preserving the state’s interest in marriage and the ability of adults to marry freely. It acknowledges the centrality of matrimonial issues to religious life and the tension facing religious individuals when trying to harmonize religious and secular law. At the same time,

126. For a brief description of the get procedure including the historical basis see Berkovits, supra note 122, at 119–25. For additional brief descriptions see also Wegner, supra note 116; Michael Freeman, Law, Religion and the State, in FAMILIES ACROSS FRONTIERS 361 (Nigel Lowe & Gillian Douglas eds., 1996).

127. N.Y. DOM. REL. LAW § 253 (McKinney 1999). Because the law does not specifically refer to any religious group, it has the ability to include Islamic divorce as well as any other religious divorces. Id.

128. See Greewaalt, supra note 121, at 799 (discussing the constitutional implications of entanglement when religious officials become involved with a legislative scheme in the context of kosher laws).

129. N.Y. DOM. REL. LAW § 253 (McKinney 1999).

130. Id. This greatly assisted in helping the law be accepted by the orthodox Jewish Community. Id.

131. Id.

132. Amendments made thus far to the law include a 1984 amendment eliminating the requirement that a spouse consult with clergy for an opinion on whether a “barrier to remarriage” existed. Id.

133. See Shachar, supra note 4, at 78. Such laws as the New York Get Law actually have “expanded the power of state law over minority cultures by creating a formal link
it provides a civil protection for women who may find themselves at the mercy of religious law when a husband refuses to serve a *get* upon his wife. It both protects the free exercise of religion while protecting against the abuse of a religious law that can infringe fundamental individual liberties.

In addition to encouraging courts to take into account religious law and practice, the American Muslim community has used its initiative to incorporate and balance its religious law with the secular laws of the United States. Some Muslims have encouraged the use of expanded marriage contracts to include certain religious obligations. Like Muslims in England and Canada, some American Muslims have considered the idea of establishing alternative dispute resolution fora for Muslims. The initiatives in the United States, however, have considered utilizing a more egalitarian approach than has been implemented in England. In the United States, the emphasis might focus not so much on the arbitrator’s decision, but rather on conflict resolution through greater involvement of

between the civil proceedings of divorce and the removal of all religious or customary barriers to remarriage” but such laws are “nevertheless . . . important because [they provide] formal recognition of certain aspects of minority communities’ family law traditions.”


136. Among them is lawyer, professor, and founder of the civil rights advocacy group, Karamah: Muslim Women Lawyers for Human Rights, Azzah Al-Hibri, who advocates the use of marriage contracts and asserts that principles of Muslim marriage law have been misinterpreted and actually serve to promote and protect women’s rights. Id. at 184. See generally http://www.karamah.org (last visited Oct. 9, 2005) (describing the work and initiatives of Azzah Al-Hibri and Karamah).

137. Quraishi & Syeed-Miller, *supra* note 120, at 214–15. The alternative dispute resolution forum, the *beit din*, utilized by the orthodox Jewish community, has influenced these initiatives. Id. at 215.
the parties and community members. In addition, some states have enacted laws that include clergy on lists of available mediators and family counselors. Despite recent setbacks, most notably through assaults on their communities post-September 11th, 2001, the experience of Muslims in America has been positive and has included, quite vocally, the voices of women along with men. This community has and will continue to use the tools of democratic society to organize and move forward, unhindered by the narrow, male-dominated interpretations of Islam that prevailed in the past.

III. THE MEANING OF RELIGIOUS FREEDOM IN CANADA

In 1970, Canada’s multiculturalism policy shifted and it began favoring ‘polyethnicty’ over assimilation for immigrants. However, it was not until 1982 that the Charter of Rights and Freedoms not only codified fundamental freedoms but also adopted a rule that required the newly drafted Charter to be interpreted in accordance with the multicultural heritage of Canadians. Since the Charter’s adoption, the Supreme Court of Canada has had a few occasions to consider the meaning of freedom of religion as laid out in the Charter.

138. Id. Quraishi and Syeed-Miller suggest that the existence of established arbiters might be welcomed by some courts and cite a case from California in which the parties agreed to consult two religious scholars who made a recommendation that was then used by the judge to allocate the spouses’ property. Id.
139. Id.
141. Quraishi & Syeed-Miller, supra note 120, at 217.
142. See id.
143. See KYMLICKA, supra note 1, at 17. Kymlicka defines “polyethnicty” as “group-specific measures . . . intended to help ethnic groups and religious minorities express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society.” Id. at 31.
144. A policy of polyethnicty prefers integration over self-government. Id. at 31.
146. For a critique of the Canadian Supreme Court’s interpretation of religious freedom, see John Von Heyking, The Harmonization of Heaven and Earth? Religion, Politics, and Law in Canada, 33 U.B.C. L. Rev. 663–97 (2000) (arguing that the Court has confused religious pluralism with secularism).
The Canadian Charter of Rights and Freedoms recognizes “freedom of conscience and religion” as among the fundamental freedoms, but even these fundamental freedoms are subject to reasonable limits. Unlike the First Amendment of the United States Constitution, the Canadian Charter does not include an establishment clause. The Charter provides for free exercise for individuals without prohibiting the government’s actions. Thus, the Charter does not prohibit selective funding of religious schools. Additionally, the Charter has other provisions to be considered in conjunction with freedom of religion. These include the preamble’s reference to the supremacy of God and Section 27, which requires the Charter to be interpreted in a multicultural manner.

The Supreme Court of Canada interpreted the Charter’s meaning of religious freedom in *R. v. Big M Drug Mart Ltd.*, a case about a law that enforced a Christian day of rest. In declaring the Lord’s Day Act unconstitutional, the Court found that the coercive law was antithetical to

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147. Charter, pt. I, § 2 (“2. Fundamental Freedoms. Everyone has the following fundamental freedoms: a) freedom of conscience and religion; b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; c) freedom of peaceful assembly; and d) freedom of association.”).

148. Id. pt. I, § 1 (“1. Rights and freedoms in Canada. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”). See also Paul Horwitz, *The Source and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U.T. Fac. L. Rev. 1 (1996) (arguing that religious freedom allows for the practice of essential religious practices and those practices considered unessential may not be protected under the Charter).


150. Id. at 583. See also R. v. Big M Drug Mart Ltd., [1984] 1 S.C.R. 295, 303 (“Section 29 preserves the rights of denominational schools guaranteed under s. 93 of the Constitution Act, 1867: 29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under this Constitution of Canada in respect of denominational, separate or dissentient schools.”). See also Horwitz, supra note 148 (discussing the lack of a “firm wall” between church and state in Canada).


152. Id. pt. I, § 27. See also Big M Drug Mart, [1984] 1 S.C.R. at 302 (“Section 27 makes the multicultural heritage of Canada an interpretive guideline for the Charter.”).

153. See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* 7 (1995) (arguing that the adoption of the Canadian Charter of Rights and Freedoms has actually encouraged discord and that so-called “culture-blind liberal constitutionalism” is not the solution for meeting the needs of cultural diversity).

154. Big M Drug Mart, [1984] 1 S.C.R. 295. In this case, Big M was charged with violating the Lord’s Day Act. The Lord’s Day Act prohibited work on Sundays and punished a violation as a criminal offense. Id.
the demands of a free society. The Court listed the principles essential to freedom of religion, including the rights to entertain, declare, and manifest religious beliefs. These freedoms are limited by the state’s interest in protecting the public, including the guarantee that one person’s freedom will not infringe on another’s. Besides creating an unwelcoming environment for non-Christians and infringing upon the right to engage in otherwise lawful activity, the Court recognized the inconsistency of the Lord’s Day Act with Section 27 of the Charter by “[compelling a] universal observance of the day of rest preferred by one religion.” In response to the Government’s argument that the Charter, unlike the U.S. Constitution, does not have an anti-establishment principle, the Court found that the guarantee of Section 2(a) does not depend upon such a principle and required that laws alleged to interfere with the freedom of religion would be judged on a case-by-case basis.

IV. COURT REFORM IN CANADA AND THE POSSIBILITY OF RELIGIOUS ALTERNATIVE DISPUTE RESOLUTION

A. Court Reform Recommendations & Alternative Dispute Resolution

In 1987, the Ontario Courts Inquiry, presided over by the Honorable Thomas G. Zuber, sought to recommend changes to the civil court sys-

154. Id. “Freedom can primarily be characterized by the absence of coercion or constraint.” Id. at 336.
155. Id.
156. Id. at 336–37.
157. Mordechai Wasserman describes the rights and freedoms in the Charter as negative rights, which place limits on government, and quotes Justice L’Heureux-Dubé in Young v. Young, who wrote that the purpose of the Charter is “to provide a measure of protection from the coercive power of the state and a mechanism of review to persons who find themselves unjustly burdened or affected by the actions of government.” Wasserman says that section 27 “is an interpretive section that gives direction to courts for interpreting the rights and freedoms in the Charter, and does not mandate anything about the role of the state.” Mordechai Wasserman, Review of J. Syrtash, Religion and Culture in Canadian Family Law, 12 CAN. J. FAM. L. 215 (1994) (reviewing JOHN TIBOR SYRTASH, RELIGION AND CULTURE IN CANADIAN FAMILY LAW (1992)).
159. Id. at 341. See also Sedler, supra note 149, at 582–83 (arguing that the expansive meaning given freedom of religion in this case shows that the Canadian government must remain neutral toward religion). Sedler also discusses R. v. Edwards and Books and Art, Ltd., [1986] 2 S.C.R. 744–47, where a Sunday closing law was upheld because of its secular purpose, similar to the U.S. Supreme Court’s decision in Braunfeld v. Brown, 366 U.S. 599 (1961). Id. at 587.
tem in Ontario due to the increasing workload the system faced. The Zuber Commission, as the Inquiry came to be known, was the precursor to the Ontario Civil Justice Review. Recommendations of this commission included establishing a permanent and separate family court in Ontario and incorporating more ADR into the overburdened court system. With respect to family law cases, it suggested that the court give spouses the opportunity to request mediation at the very beginning of the court dispute. It did not mention the incorporation of Muslim personal law.

In April 1994, the then Chief Justice of the Ontario Court of Justice and the then Attorney General of Ontario established a commission called the Civil Justice Review to once again review the problems facing the civil justice system in Ontario. The Civil Justice Review’s First Report described the Ontario justice system as “an administrative monster that muddles along at best” and one in which the public is demanding greater participation. One of the commission’s recommendations sought to create a vision of the courts as a “dispute resolution centre” utilizing a multi-door approach. The multi-door approach would allow disputants to choose from a variety of dispute resolution mechanisms that would be geared toward their particular circumstances while

160. HON. T.G. ZUBER, REPORT OF THE ONTARIO COURTS INQUIRY 1–7 (1987) [hereinafter ZUBER COMMISSION]. The Commission mandated:

[T]he Honourable Thomas George Zuber . . . be authorized to inquire into and requested to report by April 1, 1987 on the jurisdiction, structure, organization, sittings, case scheduling and workload of all of the courts of Ontario, and any other matter affecting the accessibility of and the service to the public provided by the courts of Ontario, and to make recommendations to the Attorney General concerning the provision of a simpler, more convenient more expeditious and less costly system of courts for the benefit of the people of Ontario.

Id. at 2.

161. Id. § 12.2, Summary of Recommendations.

162. Id. at 289.

163. See CIVIL JUSTICE REVIEW, FIRST REPORT 3 (March 1995) [hereinafter FIRST REPORT]. The mandate of the Civil Justice Review is “to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice.” Id.

164. Id. at 99.

165. Id. at 102.

166. Id. at 7. Similarly, in the realm of family law, the Children of Separation & Divorce Center (COSD), a non-profit organization in Maryland, has referred to the approach of their dispute resolution center as a “cafeteria-style” approach including access to services such as case evaluation, community referral, counseling, child access planning, expert consultation, property and support mediation, and arbitration. Patricia Garity, ADR and Collaborative Lawyering in Family Law, 35 MD. B.J., June 2002, at 2, 6.
assuring that the mechanisms would remain “impartial and fair” and resolve disputes in a binding manner. The commission emphasized that although ADR techniques present alternatives to disputants, they are not intended to replace the court system. In reviewing the types of ADR, binding arbitration is suggested among the possible alternatives. The commission recommended that access to ADR be court-connected because the state has an obligation to make dispute resolution available to the public and because ADR fits within the commission’s goal of more effective caseflow management. A court-connected ADR pilot project was launched in Ontario in October 1994.

After the implementation of the ADR pilot project, the Supplementary Report of the Civil Justice Review reaffirmed its commitment to court-connected ADR. One evaluation of the pilot project suggested that the positive responses to the project were a result of the project’s court-connectedness, ensuring that supervision by the Court enhances ADR’s credibility in the eyes of the public. In the area of family law, the

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167. First Report, supra note 163, at 8.
168. Id. at 210.
169. Id. at 213–14. The Law Society of Upper Canada published the Glossary of Dispute Resolution Processes that sets forth definitions of various ADR terms. The Glossary defines “arbitration” as:

Any of the forms of dispute resolution involving a mutually acceptable, neutral third party making a decision on the merits of the case, after an informal hearing which usually includes the presentation of evidence and oral argument. The process has four main variations (creating numerous permutations): binding or non-binding; voluntary or compulsory; private, statute-authorized, court annexed (alternatively termed court-connected); one arbitrator or a panel.

170. See First Report, supra note 163, at 214. “Court-connected” meaning that ADR facilities should be available to the public as part of the ‘court’ system.” Id.
171. Id. at 215 (“Caseflow management” is “a case-processing mechanism which manages the time and events of a lawsuit as it passes through the justice system.”). A court-connected ADR pilot project was launched in Ontario in October 1994. The pilot project excluded family law matters. Id. at 216.
172. Id. at 216.
174. Id. at 61–62.
commission recognized that family disputes might be ripe for the use of ADR, but also recognized that in some circumstances family disputes could create an imbalance in the process and preclude those particular disputes from utilizing ADR.\textsuperscript{175} Considering the potential for such imbalances, the commission recommended two modified opportunities for ADR in the context of family law.\textsuperscript{176} The first involved the creation of centers to educate the public about court proceedings and ADR resources available in the area of family law.\textsuperscript{177} The second involved family law case conferences held before a judge shortly after the filing of a claim.\textsuperscript{178} These conferences would establish a strategy for case management and consider whether mediation, not arbitration, might help resolve the dispute. The judge would play a greater supervisory role because of the “heightened importance” of the legal rights involved in family disputes and the potential impact of decisions on children.\textsuperscript{179}

B. ADR and Family Law: Practical Concerns

The elevated concern that the Civil Justice Review had for the application of ADR to family disputes is not surprising considering that family law serves several important social functions\textsuperscript{180} and that the concerns expressed by the Civil Justice Review regarding the gravity of family disputes has been considered by practitioners and scholars of family law alike. While both practitioners and scholars have concerns about the impact of ADR on family disputes, in particular those involving custody and domestic violence, most do not rule out the use of ADR in family disputes. Many recognize that the traditional adversarial model of litigation may actually do more harm than good to the children involved in

\textsuperscript{175} Id. at 77. These situations include cases of “acrimony between the parties, and the presence of spousal abuse problems and power imbalances.” Id.

\textsuperscript{176} Id. at 77–78.

\textsuperscript{177} Id. at 77.

\textsuperscript{178} Id. at 78.

\textsuperscript{179} Id.

\textsuperscript{180} See generally Carl E. Schneider, The Channeling Function in Family Law, 20 Hofstra L. Rev. 495 (1992). Professor Schneider sees Family Law as serving five main functions in society: the protective function, the facilitative function, the arbitral function, the expressive function, and the channeling function. The channeling function “creates or (more often) supports social institutions which are thought to serve desirable ends.” Id. at 498. Examples given by Schneider are marriage and parenthood. The channeling function serves the other functions of family law and while it may have both positive and negative effects on society, Schneider concludes that it will not disappear because society will continue to create, depend upon, and improve social institutions. Id.
these disputes. Proponents of the use of ADR for resolving family disputes do not necessarily advocate, however, that ADR for family disputes be relegated to the private sphere without the scrutiny of the public system. While family law deals with issues of heightened importance like custody and domestic violence, it also serves important social functions for various groups. For minority groups, such as Muslims living in Canada, family law, governing many personal status issues, plays a key role in determining identity. 184 It is through family law that one’s membership in the community is decided. 185 While determining membership is directly related to a group’s survival, public policy concerns, such as women’s equality, challenge the degree to which secular states are willing to delegate such matters. 186 In the development of collective identities, while women have on the one hand been revered, their reverence has also given way to “gender-biased norms and practices that often subordinate women.” 187 Accommodation of cultural differences in the realm of family law can help protect the survival of minority communities, but it can also reinforce discriminatory cultural practices that impact those minorities within the minority, such as women. 188 Viable ways to incorporate

181. See generally Eileen Pruett & Cynthia Savage, Statewide Initiatives to Encourage Alternative Dispute Resolution and Enhance Collaborative Approaches to Resolving Family Issues, 42 FAM. CT. REV. 232 (2004); Garity, supra note 166; Gregory Firestone & Janet Weinstein, In the Best Interests of Children: A Proposal to Transform the Adversarial System, 42 FAM. CT. REV. 203 (2004).
182. See Julien D. Payne, Professor, Presentation to students in the Faculty of Law, University of Saskatchewan, Family Conflict Management and Family Dispute Resolution on Marriage Breakdown and Divorce: Diverse Options (Feb. 10, 1997), available at http://www.quicklaw.com.
183. See, e.g., Alia Hogben, Should Ontario Allow Sharia Law?, TORONTO STAR, June 1, 2004, at A19 (arguing that family matters should be excluded from the Ontario Arbitration Act to ensure the safeguards of public scrutiny).
184. See Shachar, supra note 4, at 45–46 (2001). Shachar calls this the “gatekeeping function” of family law. Id. at 46.
186. Shachar, supra note 4, at 46.
187. Id. at 50. The same traditions that may determine cultural membership may be the same traditions which subordinate women. Id. For example, Muslim women may not marry outside of the faith whereas Muslim men are permitted to marry Jews and Christians, the so-called People of the Book. Esposito & DeLong-Bas, supra note 15, at 19.
188. Canadian Muslim women account for just under half of the total Canadian Muslim population. Daoed Hamdani, Canadian Council of Muslim Women, Muslim Women: Beyond the Perceptions iii (2004), available at http://www.ccmw.com/publi
ADR into family disputes must involve protections for vulnerable individuals and at the same time protect the rights of minority groups to preserve their identity.

C. The Plan to Establish Muslim Arbitration Tribunals

Like his predecessor Dr. Baig, Mumtaz Ali took the occasion of the Civil Justice Review as a chance to express the concerns of his organization and made recommendations for the implementation of Muslim family law. He submitted a brief to the Civil Justice Review discussing the issues raised in *Oh! Canada! Whose Land? Whose Dream?* and making recommendations for how some of the ideas in the 1991 report could be incorporated into the Ontario civil justice system. The central and most concrete recommendation made by Mumtaz Ali in this brief was to create a “Court Annexed Arbitration Board System” to settle disputes using Muslim family law. Mumtaz Ali made several recommendations for implementing such a system based on the Zuber Report. The brief suggests the Arbitration Board System be established through the ADR pilot project. The roster of ADR service providers would include private arbitrators and, in particular, include specialists in Muslim family law who would preside over Muslim family disputes.193 Mumtaz Ali’s

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189. Review of the Ontario Civil Justice System, supra note 44.
190. Id. at 37.
191. Id. at 37–38.
192. Id. at 38.
193. Id. Because there are several schools of Islamic law, Mumtaz Ali promises that a variety of representatives would represent all the major schools and would apply the school of thought subscribed to by the parties. Syed Mumtaz Ali, *An Update on the Islamic Institute of Civil Justice*, (Aug. 2004), http://muslim-canada.org/news04.html.
plans would no longer require parties to submit a statement of defense and the parties would no longer hold a settlement conference before proceeding to arbitration.\textsuperscript{194} An arbitration award under this system would be filed with the Court and deemed an appealable court judgment. Parties would not have the option of proceeding to trial because the award would be final and binding.\textsuperscript{195} An independent adjudicative mechanism would be established, modeled after the Trinidad and Tobago Muslim Marriage and Divorce Act,\textsuperscript{196} to issue divorce decrees and to determine matters of child support and custody.\textsuperscript{197} The Muslim Arbitration Boards would only have jurisdiction over those who registered with the Boards.\textsuperscript{198}

Mumtaz Ali emphasizes the need for arbitration rather than mediation.\textsuperscript{199} He gives two reasons for this preference. First, utilizing arbitration would allow the Muslim community to decide family law matters using Muslim family law, and arbitration decisions would be final with-
out requiring “formal court approval.” Second, arbitration awards would be filed with the court and “would enable one to use the judicial/court administrative machinery for enforcement and implementation.” Since that submission, Mumtaz Ali has taken an alternate route towards gaining recognition for Muslim family law by establishing a private Muslim arbitration tribunal called the Islamic Institute of Civil Justice, or Darul-Qada, under the auspices of the Ontario Arbitration Act. Despite the difference in terminology, from court-connected to private, these tribunals retain the capacity to issue judgments enforceable by the civil courts since they are governed by the Arbitration Act.

The Darul-Qada has attracted much attention and criticism both from within and without the Muslim community. In response to the growing controversy, Attorney General Michael Bryant and Women’s Issues Minister Sandra Pupatello appointed Marion Boyd to review the effects of religious arbitration tribunals on Canadian society, in particular women, and make recommendations for the future. On December 20, 2004, Marion Boyd delivered her report to the Attorney General. This report recommended that family law remain within the Arbitration Act and continue to allow parties to consent to the use of religious law. However, the report recommended several safeguards be implemented to

200. See Review of the Ontario Civil Justice System, supra note 44, at 3. See also Syed Mumtaz Ali, The Good Muslim/Bad Muslim Puzzle, The Canadian Society of Muslims, June 14, 2004, http://muslim-canada.org/goodbad.html (last visited Aug. 31, 2005) (arguing that while Muslim arbitration tribunals are technically voluntary, Muslims are obligated to submit to this religious authority because they are required to live according to Islamic law).

201. See Darul Qada, supra note 8.

202. Id. (pointing out the finality of arbitration awards in almost all cases with the assistance of the Ontario justice system).


206. Id. at 133.
ensure the protection of vulnerable groups. Among the safeguards proposed are regulations established to require that arbitration agreements governing family law are in writing and stipulate that certain requirements have been met. The report also recommends regulations that govern arbitrators and that approved arbitrators develop a statement of principles for faith-based arbitration. The report further recommends safeguards for screening parties that include screening for domestic violence issues and requiring parties to receive independent legal advice. Boyd also recommends that the Government of Ontario undertake extensive education initiatives designed to reach diverse communities, that appropriate oversight regulations be established, and that continuing policy analysis be conducted on the use of arbitration in matters of family law. The Ontario government spent the next eight months considering this proposal.

V. THE LEGALITY OF MUMTAZ ALI’S PLAN AND PUBLIC POLICY CONCERNS

A. The Legal Basis for the Tribunals—The Ontario Arbitration Act

Ontario’s Arbitration Act allows for the implementation of these Muslim arbitration tribunals and requires that parties consent to arbitration. Arbitrators must not show bias to any side and therefore may not use specialized knowledge of Islamic jurisprudence, for example, to decide a matter without allowing the parties to first present their case.

207. Id.
208. Id. at 135. The agreements should declare that the parties have received a “statement of principles of faith-based arbitration” prior to consenting, details of any waiver of rights or remedies, a statement recognizing that “the judicial oversight of children’s issues cannot be waived,” and that sections 33 and 56 (governing children) of the Family Law Act continue to apply. Id.
209. Id. at 136.
210. Id. at 137.
211. Id. at 138–42.
214. See NELSON, supra note 213, at 145.
the Arbitration Act is based on commercial arbitration statutes, it has the ability to govern non-commercial disputes.\textsuperscript{215} Under the Act, arbitrators have broad powers and courts hesitate to interfere with their decisions.\textsuperscript{216}

The authorization of the Muslim arbitration tribunals begins with Section 32 of the Act.\textsuperscript{217} Section 32, in allowing the parties to designate the rules of law to be applied by the arbitrator, gives the arbitrator the power under Section 31 to decide the dispute at hand in accordance with the law chosen by the parties.\textsuperscript{218} The Act does not exclude particular rules of law but sets guidelines for conduct and procedure.\textsuperscript{219} After the parties have agreed to submit to arbitration, the broad guidelines of the Act begin with the appointment of arbitrators.\textsuperscript{220} Section 11 requires arbitrators to be independent and impartial\textsuperscript{221} and demands they be forthright about anything in their background that could reasonably lead to bias.\textsuperscript{222} The

\textsuperscript{215} Id. at 147. While the Act has the ability to govern non-commercial disputes, Nelson writes that some subject matters should be excluded from arbitration to protect the public interest, including marriage and divorce. Id. at 143. See also John Tibor Syrtash, \textit{Ontario Has Nothing to Fear}, \textit{National Post}, Sept. 21, 2004, at A17 (pointing out that judicial enforcement of arbitration agreements, including by religious authorities, is nothing new and has existed by statute in Canada since 1889; that the Arbitration Act simply codified certain procedures to make them more fair; and that the Charter guarantees that rulings involving parties that have been treated unequally will not be enforced by the courts).

\textsuperscript{216} See \textit{Nelson}, supra note 213, at 148. Nelson describes the consequences of parties’ consent to arbitration:

The Arbitration Act, 1991 imposes what is tantamount to a mandatory stay of court proceedings, with certain limited exceptions, in circumstances where the parties have agreed to submit their dispute to arbitration . . . . [T]he court must stay the court proceeding and allow the arbitration to go ahead unless the matter either falls within one of the limited exceptions or is not a matter which the parties have agreed to submit to arbitration.


\textsuperscript{217} Arbitration Act 1991, S.O. 1991, c. 17, § 32(1) (Can.), \textit{available at} http://www.e-laws.gov.on.ca/tocBrowseCL_E.asp?lang=en (“In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances.”).

\textsuperscript{218} Id. § 31 (“An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.”).

\textsuperscript{219} See generally id. §§ 6–30.

\textsuperscript{220} Id. §§ 9–16.

\textsuperscript{221} Id. § 11 (“An arbitrator shall be independent of the parties and shall act impartially.”).

\textsuperscript{222} Id. § 11(2) (“Before accepting an appointment as arbitrator, a person shall disclose to all parties to the arbitration any circumstances of which he or she is aware that may give rise to a reasonable apprehension of bias.”).
sections outlining appointment of arbitrators include provisions for challenging arbitrators and the procedures for removal. 223 If the parties in conjunction with the arbitral tribunal cannot resolve the challenge, Section 13 allows parties to seek the assistance of the court. 224

Section 19 presents some obstacles. Section 19 requires that parties be treated “equally and fairly” 225 and have the opportunity to present their case and respond to the other side. 226 However, this does not necessarily mean that a party has been treated “equally and fairly.” Sections 19(1) and (2) set forth two separate requirements. 227 The Muslim arbitration tribunals would presumably meet the requirement of Section 19(2) by allowing each party to present their case in the tribunal, even though the plan suggests it would not require defendants to submit a statement of defense as suggested by Section 25. 228 Whether the Muslim arbitration tribunals would meet the requirement of Section 19(1) is unclear. Some rules of Muslim family law provide for differing treatment of men and women; in areas of divorce and inheritance, 229 for example, both genders would not be treated equally. 230 One could argue from a religious viewpoint that this differing treatment based on gender does not mean that the parties would be treated unfairly, 231 but from an objective viewpoint dis-

223. See generally id. §§ 13–16.
224. Id. § 13(6) (“Within ten days of being notified of the arbitral tribunal’s decision, a party may make an application to the court to decide the issue and, in the case of the challenging party, to remove the arbitrator.”).
225. Id. § 19(1) (“In an arbitration, the parties shall be treated equally and fairly.”).
226. Section 19(2) reads, “Each party shall be given an opportunity to present a case and to respond to the other parties’ cases.” Id.
227. See NELSON, supra note 213, at 159.
229. Although the Quran introduced progressive inheritance reforms that included women among possible heirs, Islamic inheritance law continues to favor male relatives. For example, in most interpretations of Islamic law, male children generally receive twice the amount that female children receive. See WAINES, supra note 15, at 96.
230. See Marianne Meed Ward, supra note 203 (arguing that even if parties voluntarily agree to be bound by religious laws that treat women unequally they would per se violate the Canadian Charter).
231. See Syed Muntaz Ali, Are Muslim Women’s Rights Adversely Affected by Shariat Tribunals?, http://muslim-canada.org/darulqadawomen.html (arguing that women are granted more rights under Islamic law than under Canadian secular law); Ouahida Bendjedou, The Unexpected Protection of Human Rights Under Shari’a, LAWYERS WEEKLY, vol. 24, no. 14, Aug. 20, 2004 (Lexis) (arguing that Shari’a provides protections for women and the controversy in Ontario is more indicative of a misunderstanding
tinction made on the basis of gender would clearly not be equal. Additionally, Section 19 falls under the auspices of Section 3 which allows parties to vary or exclude provisions of the Act except for six sections including Section 19’s requirement of equality and fairness.232

The inability to vary or exclude the equality and fairness provisions, however, does not make contracting out of these provisions impossible. Because the tribunals would be established on a private contractual basis governed by the principles of contract law233 and thus outside of the purview of the public courts, they would allow parties to consent to relinquishing some of their rights in order to be bound by gender-differential Muslim family law.234 These arbitral contracts would not be subject to review unless relief was sought before a civil court and fell within one of the exceptions of the Act that allow for appeal.235 These exceptions leave great discretion to the reviewing court to determine if an appeal should be granted.236 In addition to a potential appeal, the Act also allows a party to seek to have an arbitral award set aside on several grounds including legal incapacity and the failure of the tribunal to treat the party “equally and fairly.”237 However, these provisions depend upon the dis-
satisfied party to seek relief in the public courts and to do so within thirty
days, and do not require the arbitral tribunal to inform the party of their
rights. 238 If a dissatisfied party did seek relief in the courts, a court may
very well find such provisions antithetical to public policy and refuse to
enforce a tribunal’s judgment even though the Act does not specifically
include such a provision. Courts could enforce awards that discriminate
against women if they found arbitral agreements were contractually
sound. 239

B. Beyond Legality—Public Policy Concerns

The critics of the tribunals, including Muslim women’s groups, reject
the idea of private tribunals because they fear their potential adverse ef-
fects on women. 240 They believe the voluntary nature of such tribunals is
a fallacy and that the tribunals would coerce many women, especially
immigrant women, into participation. 241 They favor excluding family law

opportunity to present a case or to respond to another party’s case, or was not given
proper notice of the arbitration or of the appointment of an arbitrator.”).

e-laws.gov.on.ca/tocBrowseCL_E.asp?lang=en. See also Bakht, supra note 234, at 8–9
(quoting a letter to the Canadian Council of Muslim Women from the Ontario Attorney
General pointing that unjust arbitral awards cannot be dealt with unless they are brought
to the attention of the courts).

239. Bakht, supra note 234, at 4–5. Bakht describes the consequences of consent to
arbitral agreements,

Where . . . parties sign an agreement to abide by a ruling and consent is found
to be voluntary, the courts will likely impute knowledge of the system of laws
one is submitting to. It is unlikely an argument that one didn’t realize or under-
stand the impact of a particular set of rules would be successful particularly,
where an attempt to contest the ruling is based on a dislike of the outcome.

Bakht, supra note 234, at 14.

240. See, e.g., Canadian Council of Muslim Women, Concerned About Traditional
(arguing that Islam does not require one to abide by Islamic jurisprudence, which is the
creation of male jurists living after the time of Prophet Muhammad; that it varies greatly
throughout the world; and that it is based on a patriarchal model that discriminates
against women).

241. The Canadian Council of Muslim Women voiced their concerns to Marion Boyd,

Our concern is not with those women who are ‘comfortable’ and knowledg-
able about rights in Canada, and who are unlikely to pursue the arbitration
process using Sharia/Muslim family law. Our concern is for those of use who
are newer immigrants, somewhat excluded due to language or customs, who
turn to their traditional sources such as males, and the Islamic Centre or
mosque and may not be exposed to mainstream media. These women will be
persuaded to try the Sharia route because that is what they know in their coun-
from the Arbitration Act and thereby making the judgments issued by the
tribunals unenforceable in the civil courts. Although this fails to rec-
ognize that the Islamic Institute of Civil Justice or any other private reli-
gious tribunals will continue operating nonetheless, they make an impor-
tant point. Parties will continue to resolve disputes privately based on
contractual agreements and many of the judgments will never be dis-
puted in the civil courts. However, the exclusion of family law from the
Act would deny the enforceability of many more judgments in the civil
courts by removing the presumption of legality afforded by the Act. Dis-
putes that would find their way into the civil courts could still be en-
forced if a court found that the requisite elements of a contract were es-

tablished. As an alternative, disputes brought directly before the civil
courts could be referred to arbitration and mediation that included reli-
gious clergy with appropriate judicial oversight. Religious arbitration
of family disputes has gone on for millennia and will continue to do so
but such decisions need not be given the rubber stamp of the Ontario
court system.

tries of origin and that is what is presented to them as part of the religion. If the
arbitration process is private and legally binding and this is explained to the
women as approved by Ontario and Canadian law, why wouldn’t a woman be
persuaded to go this route? How would anyone ever hear of any abuse of
women’s rights?

Marilou McPhedran & Amina Sherazee, Submission, Review of the Ontario Arbitration
Act and Arbitration Processes, Specifically in Matters of Family Law, Canadian Council
of Muslim Women (July 30, 2004), http://www.ccmw.com (follow “Muslim Family
Law” hyperlink; then follow “Marion Boyd” hyperlink).

242. See Resolution 04-11-01, To Remove Family Law from the Arbitration Act of

243. See Syrtash, supra note 215.

244. It is highly unlikely that a court would ever order specific performance as a rem-
edy for a broken marriage contract because it could potentially bind a woman in marriage
against her will and therefore be against public policy; a court could conceivably order a
woman to sacrifice her dowry in order to secure a divorce based on a valid prenuptial
agreement. See generally Estin, supra note 55.

245. This has been in done in some United States jurisdictions. See Quraishi & Syeed-
Miller, supra note 120.

246. It is worth emphasizing that even Muslim women’s groups who oppose the Is-
lamic Institute of Civil Justice do not reject Islam but rather particular male-dominated
interpretations of it. They do not view Islam as incompatible with the ideals of liberal
democracy but rather as a religion that requires its adherents to strive for justice and
equality in their daily lives. For a discussion of Islam and feminism see Sa’diya Shaikh,
Transforming Feminism: Islam, Women, and Gender Justice, in PROGRESSIVE MUSLIMS
VI. MODELS FOR Reform

The model of private tribunals allowed for under the Ontario Arbitration Act is a close cousin of the multicultural approach, called the religious particularist model by multicultural theorist and pragmatist, Ayelet Shachar.\textsuperscript{247} Under the pure form of this model, personal law is delegated completely to the Muslim community and Muslim personal law would govern Muslims who choose to opt into the system, providing them little alternative for opting out.\textsuperscript{248} Based on a strong multiculturalist archetype,\textsuperscript{249} this gives the Muslim community complete sovereignty over their affairs in this area.\textsuperscript{250} An approach delegating complete sovereignty to a religious community without reserving protection for individual rights, the approach ultimately sought by Mumtaz Ali, is not optimal for Ontario or any liberal democracy.\textsuperscript{251}

Currently, the Ontario Arbitration Act, although not creating a total religious particularist system, comes close to this approach. Under Ontario’s Arbitration Act, individuals must first consent to the tribunal’s jurisdiction\textsuperscript{252} but are then bound by its ruling unless they dispute it in civil court.\textsuperscript{253} Rulings by the Muslim tribunal would only be overturned or modified in cases of invalid contractual agreements or gross violations of public policy.\textsuperscript{254} Allowing individuals to privately legislate and adjudicate matters of family law would remove vulnerable groups, like immigrant women and children, from the specter of the public court system.\textsuperscript{255} Marion Boyd’s recommendations seek to expand the circumstances under which the decisions issued by the tribunals could be appealed and implement a system that would provide independent legal advice to parties. However, they fail to realize that the independent legal

\textsuperscript{247} The opposite of the religious particularist model would be the secular absolutist model which gives complete power to the state in matters of family law and excludes religion entirely from the public sphere. Under this model, a religious authority presiding over a marriage ceremony has only symbolic value. Shachar, supra note 4, at 72–78.

\textsuperscript{248} An example of this is the delegation of personal law to religious communities used by Israel today, a country with a diverse religious population, whose laws are otherwise secular. See supra note 118 for further explanation.

\textsuperscript{249} A strong multicultural model favors a great deal of accommodation and independence for minority groups. Shachar, supra note 4, at 28–32.

\textsuperscript{250} This is the opposite of the secular absolutist model which strictly forbids delegation to religious groups. Id. at 72–78.

\textsuperscript{251} See generally Oh! Canada!, supra note 6.


\textsuperscript{253} Id. § 37.

\textsuperscript{254} Id. § 45.

\textsuperscript{255} See Bakht, supra note 234, at 26–28.
advice an immigrant woman receives would likely be from a lawyer in her respective community who may approve of skewed interpretations of Islam. It also overlooks the idea that arbitration tribunals established through a provincial statute should receive sufficient governmental oversight such as the kind grounded in a public institution like the Ontario courts.

Decisions issued by the tribunals would have a presumption of legitimacy in the Ontario court system when challenged by dissatisfied Muslims. While the courts should have an obligation to take into account the religious circumstances of the parties, a religious judgment should not automatically gain the rubber stamp of the civil court. Additionally, Canada would give formal recognition to judgments issued by an Islamic organization that in no way represents the Canadian Muslim community. Because of its establishment under the Arbitration Act, judgments issued by the Islamic Institute of Civil Justice would have not only a presumption of legitimacy in the courts but would gain recognition as authoritative decisions of the Muslim community. A determined minority of Canadians, who practice Islam, a religion with no central hierarchy, could be viewed as the legitimate voice of all Canadian Muslims.

Groups who choose not to participate in the Islamic Institute of Civil Justice or form their own tribunals could be viewed as fringe groups when in fact they actually represent the majority of Canadian Muslims. Rather than mistakenly entrust the whole gamut of personal law to private legislation, Ontario must find a way to accommodate religious needs with the individual protections that make religious freedoms possible.

256. See Faisal Kutty & Ahmad Kutty, *Shariah Courts in Canada, Myth and Reality*, 2004, http://muslim-canada.org/kutty.html (arguing that the most difficult questions surrounding the establishment of the tribunals is what interpretation of Islam will govern and that those interpretations influenced by tribal and cultural practices that discriminate against women must be excised). See generally *NASIR*, supra note 15; *ESPOSITO & DELONG-BAS*, supra note 15; *DENNY*, supra note 2.

257. It is difficult to ascertain the number of members of the Canadian Society of Muslims and of those members how many support the Islamic Institute of Civil Justice.

258. See *DENNY*, supra note 2, at 199–200.

259. In his discussion of the interaction between law and religion, Peter W. Edge points out that the critics of giving legal consideration to religion believe it to be unnecessary. They believe it unnecessary because the individual interest in performing religious dictates is already considered through the government’s general interest in assuring individual autonomy. This criticism, however, fails to perceive that religious practice for many is not an individual affair but rather is based on communal notions of identity. See *EDGE*, supra note 110, at 17. There are several arguments for giving religion legal consideration. One is based on the importance of religion in the faithful’s life. Edge quotes D.O. Conkle,
Applying a joint governance model\textsuperscript{260} would stray from an “either-or”\textsuperscript{261} approach and would recognize that individuals have allegiances to more than just the state while also recognizing that discrimination occurs within religious groups and that vulnerable minorities within the minority must be protected.\textsuperscript{262} There is no perfect example of the joint governance model, but its underlying principles serve as a guide to approach the dilemma facing Ontario. Among the strongest versions of the joint governance approach is the model of transformative accommodation.\textsuperscript{263} The

Religious beliefs . . . form a central part of a person’s belief structure, his inner self. They define a person’s very being—his sense of who he is, why he exists, and how he should relate to the world around him. A person’s religious beliefs cannot meaningfully be separated from the person himself: they are who he is.

\textit{Id.} at 18 (quoting D.O. Conkle, \textit{Toward a General Theory of the Establishment Clause}, 82 NW. U. L. Rev. 1113, 1164–65 (1988). There are other reasons for giving legal consideration to religion. A second argues that because religion is given unique consideration in international law it should be given the same in domestic law. A third argues that the religious adherent “suffers a special harm” when her practices contradict with secular law. A fourth argues that there is a link between collective interests and religion and giving recognition will help contribute to pluralism. A fifth argues that religious communities “benefit society as a whole” and so should be protected. \textit{Id.} at 17–19. Edge concludes that each of the arguments has merit but a flexible approach should be adopted. He writes,

[t]he religious interest should always be considered, because of the strong coincidence of the religious interest and the elements [of the various arguments]. The extent to which it should be considered, however, will depend upon how far particular factors can be identified in the case which strengthen or weaken the assumptions upon which those elements depend.

\textit{Id.} at 21.

\textsuperscript{260} SHACHAR, \textit{supra} note 4, at 88–116. This approach of multicultural accommodation “strives for the reduction of injustices between groups as well as the enhancement of rights within them.” \textit{Id.} at 87.

\textsuperscript{261} Id. at 85. The either-or approach insists that an individual must either be primarily a citizen or primarily a religious person. \textit{Id.} at 86.

\textsuperscript{262} Shachar has frequently spoken of the paradox of multicultural vulnerability, which recognizes the problems created by multicultural accommodation when power is delegated to minority groups. This creates “the minority within the minority” which may be discriminated against within the group. \textit{See, e.g.}, Ayelet Shachar, \textit{Reshaping the Multicultural Model: Group Accommodation and Individual Rights}, 8 WINDSOR REV. LEGAL & SOC. ISSUES 83 (1998); Shachar, \textit{supra} note 38; SHACHAR, \textit{supra} note 4.

\textsuperscript{263} SHACHAR, \textit{supra} note 4, at 117–45. Another possible variation of the joint governance model is the “consensual accommodation” approach, which works like the Trinidad Muslim Marriage and Divorce Act. The Trinidad and Tobago Act delegates the regulation of Muslim marriage and divorce to the Muslim community but retains a secular option. An individual consents to the jurisdiction of this Act by marrying according to its regulations and once that choice is made the individual is bound to divorce by the Act as
first of its underlying principles requires that no single arena be delegated entirely to a religious community but rather that shares of that arena are delegated.264 The second requires that neither the state nor the religious group ever gain exclusive jurisdiction over areas of contention but must instead create an environment where the state and the group compete for the allegiance of the individual.265 In such an arrangement, the state could retain ultimate jurisdiction over custody while the religious group could retain ultimate jurisdiction over the rules of marriage and group membership. The third principle requires that the individual always maintain a choice between the competing options.266 When group members, whether they are in their citizen capacity or religious capacity, retain the right to ultimately opt-out of either, the group is encouraged to pay attention to its constituency. In order to make the system viable, opting-out would be justified only when the group has failed to provide an adequate remedy to an individual within its governance seeking a solution.267 In seeking to establish a model of joint governance the delegation of some powers to a religious group can spark an internal debate and hopefully transformation.268

VII. CONCLUSION

There is support for the idea that Canada has already begun to apply a joint governance model. The possibility that private Islamic tribunals will issue court-enforceable judgments has led to a lively debate both within the Canadian Muslim community and within Canadian society as a whole.269 It has brought the reality of private family arbitration to the forefront of public discussion. The willingness of the Ontario government to consider the implications for Muslim women, the minority within the minority, shows an increasing willingness to recognize that Canadian citizens may have multiple allegiances. Marion Boyd’s report takes seriously the concerns of proponents and opponents of the tribunals and has made recommendations that will increase discourse in the com-

264. Shachar, supra note 4, at 119.
265. Id. at 120–21 (Shachar refers to this as the “no-monopoly rule.”).
266. Id. at 122.
267. Id.
268. Id. at 118.
269. See supra note 203.
community. Such a model is establishing “an ongoing dialogue between different sources of authority as a means of eventually improving the situation of traditionally vulnerable group members.”

On September 11, 2005, Ontario Premier Dalton McGuinty announced that Ontario would outlaw religious arbitration entirely. Responding to political pressure, McGuinty promised to introduce legislation, but at this time, it is unclear what form the legislation will take. Amending the Arbitration Act to exclude court enforceability of religious judgments is advisable. In his response, however, McGuinty should not stifle the debate altogether. Religious tribunals will continue privately and the issues of religious accommodation will not disappear.

In its continuing dialogue, Ontario should look to the examples of England, Australia, and the United States. The themes running through these nations’ attempts at reconciling religious and secular law will assist Ontario and other liberal democracies in their own efforts at reform. The judiciary and legislatures must be willing to consider parties’ religious affiliations, particularly in family disputes. The small number of judges already considering these affiliations must encourage the expansion of their approach. Legislatures must tackle the legal dilemmas facing religious communities and take bold steps to accommodate their needs, as has been seen in New York and England. Initiatives must take religious concerns seriously while protecting the individual’s right to opt-out of the system. Most importantly, members of the Muslim community must be willing and eager participants in both the Muslim community and the democratic public sphere. They must expose new immigrants not only to the resources of the Muslim community but educate them about the legal tools available in their adopted homeland, with equal responsibility borne by the government as well.

Canada must embrace a model that recognizes that individuals do not have an either-or allegiance to the state versus their religious community and that the state cannot endorse a model giving exclusive, court-enforceable decision making power to one segment of the Muslim community. While individuals will retain the right to submit their disputes to...

270. See Boyd, supra note 205.
271. Shachar, supra note 4, at 118.
273. Id.
274. See supra note 88.
275. See N.Y. DOM. REL. LAW § 253 (McKinney 1999); Divorce (Religious Marriages) Act, 2002, c. 27 (Eng.).
a private religious tribunal and reserve the possibility that the civil courts will enforce such private contractual agreements, issues of family law should be excluded from the Arbitration Act. The alternatives explored by England, Australia, and the United States have begun to find ways to accommodate Muslim family law, perhaps not perfectly, but with an ever growing emphasis on awareness, integration, and respect. These approaches provide practical alternatives to Muslim tribunals established under the Arbitration Act in Ontario. These alternatives do not appease the religious community—rather, they include them. They are pragmatic attempts to begin a dialogue between and within communities and among society as a whole. This dialogue seeks to develop modes of cultural accommodation that recognize that the majority approach can be inherently biased while the minority approach can infringe upon individual rights. Change, of course, is not easy, and while these approaches still need revision, they are most importantly a foundation upon which to build meaningful transformation.

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THE ANGKOR SITES OF CAMBODIA: THE CONFLICTING VALUES OF SUSTAINABLE TOURISM AND STATE SOVEREIGNTY

I. INTRODUCTION

The Angkor civilization is recognized among the major world civilizations, equaling those that gave birth to the pyramids in Egypt, the temples of India and the pagodas of China.1 The Angkor sites2 are not as well known as any of these monuments, which is unsurprising given the political turmoil that had isolated Cambodia in the last few centuries.3 The vision of lost temples slowly and irreversibly being engulfed by rampant tropical vegetation has spurred the international community into action—in 1992, the Angkor sites were provisionally inscribed into the United Nations Educational, Scientific and Cultural Organization’s (UNESCO) World Heritage Sites as well as in the List of World Heritage in Danger.4

More than ten years later, the World Heritage Committee (WHC) applauded the efforts of Cambodia and the international community in the conservation, protection and management of the Angkor sites, hailing it a


2. For the purposes of this Note, the Angkor sites refer to the archaeological sites of Angkor, Roluos and Bantay Srei. Collectively, they comprise ancient Hindu and Buddhist-inspired temples and monuments built in northwestern Cambodia from 900 AD to 1200 AD. For further description of these sites, see infra, Part II.A.

3. Cambodia’s contentious political history included ongoing border wars with the Thais and Chams (Vietnamese) for two centuries. Internal power struggles between different local political groups in 1945 led to the ascendancy of the Khmer Rouge in the 1970s. The notorious Khmer Rouge regime, as well as the post-war occupation by Vietnam, ensured that Cambodia was closed off to most foreigners until the mid-1990s. For a more comprehensive background of Cambodia’s political history, see infra Part II.A.

4. U.N. Educ., Scientific & Cultural Org. [UNESCO], World Heritage Committee, Report of the Sixteenth Session, Santa Fe, 1992, WHC-92/CONF.002/12 (Dec. 14, 1992). World Heritage Site designation is an international mechanism through which UNESCO, via the World Heritage Committee, aims to promote the identification, study and protection of natural and cultural property of international significance. Famous cultural sites within the list include the Great Wall of China, the pyramids of Giza in Egypt and Taj Mahal in India. Presently, there are 812 properties on the list. UNESCO World Heritage Center, World Heritage List (2005), http://whc.unesco.org/pg.cfm?cid=31 (last visited Aug. 29, 2005). The World Heritage in Danger sites, as the name suggests, are granted priority attention due to the more imminent threats to cultural and natural property. See infra notes 55–58 and accompanying text.
success. Recently, in 2004, the Angkor sites were finally removed from the endangered heritage list. However, work still remains to be done. It is estimated that at least twenty-five more years are needed to complete the restoration at the Angkor sites. In the meantime, the WHC has identified several target areas for the Cambodian government to address: developing plans for sustainable tourism, employing government initiatives to decrease poverty, and appealing to other countries to address the widespread looting and smuggling of artifacts from other Cambodian sites.

The initiative of sustainable tourism is a laudable goal, but some critics find the initiative unrealistic when applied to very impoverished countries. In Cambodia’s case, local authorities see mass tourism as a way of jumpstarting the flagging economy, which conflicts with sustainable tourism’s ideal of high-quality “cultural” tourism in controlled numbers. Moreover, disagreement has arisen on how to best develop the sites, with the international community seeking minimal development within the critical archaeological areas, while others see greater development as the

5. The Angkor conservation efforts were deemed effective in halting the imminent destructive threats facing the Angkor structures. Its participants included mostly international archaeological teams and non-governmental organizations which were later invited to document their conservation methodologies for application in other endangered World Heritage sites such as in Afghanistan and Iraq. UNESCO, *Paris Declaration, Safeguarding the Development of Angkor* [hereinafter *Paris Declaration*] (adopted Nov. 15, 2003), http://portal.unesco.org (type in *Paris Declaration, Safeguarding the Development of Angkor*) (last visited Aug. 29, 2005).


8. The concept of sustainable tourism has its roots in the idea that cultural heritage is a nonrenewable resource that can be depleted if not managed wisely. One definition describes sustainable tourism as comprising several key elements: (1) maintaining the current resource base for future generations, (2) maintaining the productivity of the resource base, (3) maintaining biodiversity and avoiding irreversible environmental damage, and (4) ensuring equity both within and between generations. Tony Griffin & Nicolette Boele, *Alternative Paths to Sustainable Tourism: Problems, Prospects, Panaceas and Pipe-dreams, in Tourism and Economic Development in Asia & Australia* 322–23 (Frank M. Go & Carson L. Jenkins eds., 1997).


10. See generally Lindsay French, *Hierarchies of Value at Angkor Wat*, 64 ETHNOS (France) 170 (1999) (arguing that the extreme hardship and poverty characterizing the local Cambodian economy distorts traditional value systems such that the Angkor sites remain vulnerable to conflicting value systems, including: conservation and exploitation, scholarship and commerce, and preservation and development).
key to the creation of jobs and business opportunities. This Note will explore the difficulties in applying an international treaty to a domestic scenario when the international community’s ideal of protection and preservation may not exactly mesh with the host state’s vision of developing a World Heritage Site. In addressing this issue, the author advocates for greater deference to the host country’s sovereignty in the management of its cultural heritage.

Part II provides an overview of the civilization behind the Angkor sites and its context within the current economic and political climate of Cambodia. Part III describes the World Heritage Convention (Convention) and the cooperative effort between Cambodia and the international community in restoring and maintaining the Angkor sites. Part IV highlights the conflicting values of state sovereignty and world heritage protection. In particular, the Note utilizes the cultural nationalism/cultural internationalism dichotomy11 in analyzing these tensions. In Part V, the Note takes a closer look at one of the consequences of successful preservation efforts, which is the rise in tourism and the hazards that it brings. It also provides a description of the tourism policies advocated by the WHC and the international community. A discussion of the pros and cons of sustainable tourism follows. Finally, in Part VI, the Note considers the impracticability of applying sustainable tourism concepts in situations where they conflict with the needs and expectations of the state’s people. The author offers the prescription that for the management of World Heritage properties, the requirement of sustainable tourism should be flexibly applied such that the state sovereign retains the ultimate decision-making authority while the local community enjoys active participation in the decision-making process.

II. CAMBODIA: PAST AND PRESENT

A. The Khmer Legacy

The earliest evidence of human settlement in Cambodia is estimated to date back six thousand years.12 The rise of the Khmer Empire started in ninth century AD when Jayavarman II, the leader of the Khmer people, united the two states that make up modern-day Cambodia.13 At its peak,
the Khmer kingdom stretched from Burma (now Myanmar) to Indochina (now Vietnam) and from parts of China to Malaysia.\footnote{14}

The Khmers displayed a sophisticated understanding of hydrology and architecture and were able to harness the abundant tropical rainfall for their agricultural needs.\footnote{15} Indravarman I built the first city complex at the pre-Angkorian capital of Hariharalaya, now known as Roluos.\footnote{16} Successive rulers followed Indravarman I’s practice and constructed increasingly larger and more elaborate city complexes, palaces and temples at Angkor until 1200 AD.\footnote{17} After five centuries of prosperity, the Khmer Empire fell into decline.\footnote{18} Once abandoned by the Khmers, Angkor was never to retain its earlier glory.\footnote{19}


15. Water played a major role in the daily lives of the ancient Khmers and directly contributed to the growth of the Khmer empire. A complex system of artificial lakes, pools, canals and reservoirs (barays) were integral elements of their city complexes, serving both as means of transportation and as storage facilities for irrigation. Successful water management allowed the Khmers to prosper, as they were able to harvest rice several times a year when other societies at the time had a single growing season per year. \textit{Id.} at 536–37. Water also played a major role in traditional Khmer religion. According to Khmer mythology, the Khmers are descendants of an Indian god who was exiled to Cambodia and later married a \textit{nagini}, or water-princess. The king of the \textit{nagas}, or water-gods, drank the waters that covered the land and gave the country to the newlywed couple and named it Kambuja. ROONEY, \textit{supra} note 12, at 22.

16. The layout of the Khmer city complexes followed a similar pattern. The middle of the compound contained the state temple. A wooden palace and defensive moat were also common features. Leading dignitaries also constructed temples dedicated to Hindu deities both within and outside the compound. ICOMOS, \textit{Nomination of the Archaeological Parks of Angkor, Roluos, and Bantay Srei to the World Heritage List}, dated Sept. 22, 1992, at 1, available at http://whc.unesco.org/archive/advisory_body_evaluation/668.pdf (last visited Aug. 30, 2005). Mahayana Buddhism and Hinduism, the predominant religions at the time, influenced the Khmer practice of building temples that signify the king’s power as a direct descendant of the gods. Thus, the larger the city complex was built, the greater the king’s power was believed to be. ROONEY, \textit{supra} note 12, at 84.

17. For a more detailed view of the Angkor period, see ROONEY, \textit{supra} note 12, at 24–32.

18. Historians have advanced different theories to explain the fall of the Khmer Empire. One is that the encroaching Thai army from the north repeatedly raided Angkor and necessitated the retreat of the capital to the south of Cambodia (Phnom Phen). Another is that the water system, already affected by droughts, was neglected because of constant wars with the Thais and eventually contributed to the collapse of Khmer agriculture. There was also a shift away from Mahayana Buddhism and towards Theravada Buddhism, which de-emphasized the royalty-divinity connection along with the practice of unrestrained temple building. Finally, there is also evidence that the Khmers revolted against the unrestrained erection of temples and monuments, which drained the king-
The legacy of temple- and palace-building of the Khmer monarchy has produced a rich collection of historical monuments scattered over north-western Cambodia.\(^{20}\) The Angkor sites are acknowledged as the largest archaeological working site in the world, with the protected area covering four hundred square kilometers, including forested area.\(^{21}\) Angkor Wat, the largest temple, is part of a religious structure that is roughly three times the size of Manhattan.\(^{22}\) Angkor Wat was started in the twelfth century and took thirty-seven years to complete.\(^{23}\) Millions of tons of sandstone were quarried from mines twenty-five miles from the site to build a structure that is described both as the largest stone monument in the world, as well as the largest religious building in the world.\(^{24}\) This temple complex is best known for its intricate bas-relief carvings that vividly portray the epic Indian poems of the Mahabharata and the Ramayana.\(^{25}\) The other major sites are equally unique, with the Hindu-inspired Rolous group of temples demonstrating the beginnings of the classic period of Khmer art, and Bantay Srei displaying the finest example of Indian tapestry-style carvings.\(^{26}\)
Despite the abandonment of Angkor by the Khmers, Buddhist monks maintained some of its temples. Their efforts, however, were insufficient to keep the sites from falling into disrepair and obscurity. Deterioration from natural causes affected all of the wooden structures, which have long since rotted away. Stone structures as well were vulnerable to aging. Furthermore, the robust tropical vegetation was an omnipresent threat, particularly the invasive ficus trees that rooted and grew through the seams and cracks of the sandstone blocks.

In the 1850s, Henri Mouhot, a French explorer, “rediscovered” the lost city of Angkor and triggered excitement in the European imagination. Later expeditions by other groups uncovered further sites, with the French undertaking to further study these wondrous creations. Realizing the significance of the Angkor sites, France established École Française d’Extrême-Orient (EFEO) in 1898 to study and restore the monu-

27. Id. at 32.
29. The temples were naturally subject to weathering conditions that lead to “contour scaling,” or the surface peeling of stone, which is very destructive to the temples’ bas-relief carvings. Several factors contribute to contour scaling. First, moisture and temperature fluctuations cause internal shear forces that lead to decay. Second, the contamination of the carvings with soluble salts from bat droppings produces harmful mechanical stresses to stone. Finally, microbiological activity also contributes to the damaging effects on stone. Hans Leisen, Contour Scaling: The Disfiguring Disease of Angkor Wat Reliefs, 54 MUSEUM INT’L 85, 87–91 (2002).
30. At some temples, the trees and the stone structures were so intertwined that restorers could not determine whether the structures were holding the trees in place, or if the trees were keeping the structures together. Leaving the trees in place ensures that some of the structures would eventually collapse, either by the trees forcing the stones apart, by falling on fragile structures, or by swaying in the wind and weakening the buildings. However, removing the trees also risked the temples collapsing. Seth Mydans, Cambodia’s Temple-Embracing Trees are both Friend and Foe, SEATTLE TIMES, Aug. 19, 2001, at A8 [hereinafter Mydans, Cambodia’s Temple-Embracing Trees].
31. Other foreigners, hearing of the fabled city of Angkor in their travels, journeyed to Cambodia from as early as the sixteenth century, although their writings have received little attention. It was not until after Mouhot’s death, when his letters and detailed sketches of Angkor were presented to the Royal Geographical Society of France in 1862 that Angkor started to gain great international interest. BRUNO DAGENS, ANGKOR: HEART OF AN ASIAN EMPIRE 22–42 (trans. Harry N. Abrams Inc. 1995); see also French, supra note 10, at 174.
32. The French academic interest in the protection of the sites was not entirely munificent. Some scholars possessed colonial ideals of acquisition, i.e., that exemplary works of art should be “rescued” from their birthplaces of neglect and placed in museums for protection and academic study alongside other outstanding pieces of art from other places and eras. French, supra note 10, at 175.
ments. Work commenced in the early 1900s and came to a complete standstill during the Khmer Rouge regime in 1972.

The Khmer Rouge imposed an extreme version of Stalinist Communism and caused total upheaval of Cambodian society. Although some reports have indicated that the looting of Angkor accelerated during this time, experts have disputed this. The Khmer Rouge had indeed destroyed some statues but in general had left the monuments alone. It has been said that the greatest harm to Angkor during this time was the murder of all the Cambodian archaeological experts and the permanent loss of historical knowledge that should have been passed down to the next generation.

In 1978, neighboring Vietnam invaded Cambodia, ending the Khmer Rouge atrocities but igniting a civil war that lasted almost thirteen years. Vietnam withdrew from Cambodia in 1989 under pressure from

33. Id. at 176. Internecine warfare between Cambodia and Vietnam from the seventeenth to the nineteenth centuries greatly weakened Cambodia; in 1863 King Norodom asked for French protection against Vietnam’s claim to Cambodian territories. Cambodia thereafter became a de facto colony (although it was termed as a protectorate) of France until 1954. Henry Kamm, Cambodia: Report from a Stricken Land 23–28 (1998).

34. Rooney, supra note 12, at 38–39.

35. Elizabeth Becker, When the War Was Over: The Voices of Cambodia’s Revolution and Its People 200–01 (1986). The Khmer Rouge completely abolished the Cambodian monarchy system, the practice of Buddhism, the education system, private property ownership, and even family ties. All Cambodians were classified as “workers, peasants, or soldiers” whose duties were to work and defend the country. Id. at 218. 223. Massive relocations from the cities to the countryside were implemented. Ben Kiernan, The Pol Pot Regime: Race, Power and Genocide in Cambodia Under the Khmer Rouge, 1975–79, at 55–64 (1996). The skilled and educated stratum of the Cambodian population was systematically tortured and executed. Kamm, supra note 33, at 173. See also French, supra note 10, at 179. It is estimated that 1.5 million Cambodians, or one-fifth of the population, perished during this period due to genocide, starvation and disease. Kiernan, supra, at 457.


37. Id. at 139. The Khmer Rouge revolution was an attempt to free Cambodia from all Western influences and to embrace Khmer culture. As the Angkor monuments represented a pinnacle of Khmer achievement, they were deliberately left alone. French, supra note 10, at 179. Additionally, the Khmer mining throughout the region also heavily discouraged looting. Seth Mydans, On the Verge: The Overwhelming of Angkor, N.Y. Times, Sophisticated Traveler Mag., Mar. 4, 2001, at 26 [hereinafter Mydans, On the Verge].

38. After the fall of the Khmer Rouge, almost every Cambodian who had worked in the restoration of the temples had either been killed during the Khmer Rouge regime, or had already fled the country to avoid persecution. French, supra note 10, at 181.

the United Nations (UN) and Vietnam’s Soviet supporters.\textsuperscript{40} The Archaeological Society of India (ASI) was the first archaeological group to return to Cambodia to resume restoration work in 1986.\textsuperscript{41} Increased attention to preservation of the Angkor monuments was led by UNESCO through the inscription of Angkor on the World Heritage List, discussed later in Part III.

\textbf{B. Modern Cambodia}

The consequences of the Khmer Rouge’s systematic eradication of the academic and professional segments of its society still reverberate today. Cambodian human capital has been severely decimated, as evidenced by the low levels of education and extreme poverty that characterize the local economic landscape.\textsuperscript{42} Per capita income of Cambodians is $280 per annum.\textsuperscript{43} Agriculture employs 75 percent of the labor force and 36 percent of the population is below the poverty line.\textsuperscript{44} Roughly 60 percent of the population is twenty years old or younger and most are expected to swell the workforce in the next ten years.\textsuperscript{45}

With its abundant and cheap labor supply, Cambodia should be an attractive country for foreign investment. However, international investors continue to be wary of the economy due to a “dysfunctional legal system coupled with government corruption.”\textsuperscript{46} Cambodia is also heavily reliant on international aid: in 2002, it received about $500 million from international donors, which made up 75 percent of government expenditures.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{40} Kam, supra note 33, at xxi.
\item \textsuperscript{41} Ciochon & James, supra note 23, at 42 ("India was the first non-Communist country to recognize the government installed by Vietnam, and the invitation to [restore the monuments] was politically motivated."). India adopted Angkor Wat as its pet project for conservation and contributed both funds and technical expertise. Restoration materials and equipment, not available in Cambodia at the time, were shipped from India. ASI also had to deal with training unskilled workers, the rampant inflation of the local currency, as well as being under fire from remaining Khmer Rouge troops. In spite of these challenges, ASI was able to complete their project ahead of schedule, in 1993. B. Narasimhaiah, Angkor Wat: India’s Contribution in Conservation, 1986–1993, at 82–84 (1994).
\item \textsuperscript{42} CIA, supra note 39.
\item \textsuperscript{43} Seth Mydans, Cambodia’s New King Dances Into a Land of the Absurd, N.Y. Times, Oct. 23, 2004, at A9 [hereinafter Mydans, Cambodia’s New King].
\item \textsuperscript{44} CIA, supra note 39.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. A World Bank survey of Cambodian residents showed that four-fifths of the public sector believed that bribes were part of the economy, and 71 percent of large firms made frequent payments. Mydans, Cambodia’s New King, supra note 43, at A9.
\item \textsuperscript{47} CIA, supra note 39.
\end{itemize}
Tourism plays a major role in Cambodia’s economy, providing up to one-third of its foreign currency. From being virtually isolated from foreigners during the latter half of the twentieth century, in 2000, foreign tourist arrivals reached 466,365 and were estimated to have surpassed one million visits in 2003. Domestic tourism by local Cambodians adds another 200,000 to 400,000 visits. Tourism has created a population influx in the nearby town of Siem Reap, eight kilometers away from Angkor; it is expected that by 2005 the population would have reached as high as 177,000, up from 41,000 inhabitants in 1992. Conservationists fear that these increases would have detrimental effects on the protected sites and possibly even undo some of what has been accomplished. Besides the impact on the preservation efforts, some perceive the population and tourism boom to place a great strain on the natural resources available.

General sentiment from scholars, visitors and conservationists alike reflect growing dismay that Angkor will soon become commercialized and overexploited. Consequently, they invoke Cambodia’s responsibilities under the World Heritage Convention to address these difficulties.

52. Among the threats posed by the rise in tourist visits include unregulated visiting of monuments, the build-up of traffic, increases in unauthorized and unsightly hawking of tourist souvenirs, and graffiti and trash left by tourists. Durand, supra note 50, at 132; Denis D. Gray, Tourist Development Threatens Angkor; Fight is on to Protect Ancient Cambodian Treasure from Exploitation, FRESNO BEE, Mar. 2, 1996, at C6 [hereinafter Gray, Tourist Development].
53. There is concern that the environment may not be able to meet the burgeoning population’s needs. Agricultural yield from family farms remains too low for the rising demand. See Barré, supra note 49, at 129. Similarly, the population’s reliance on fisheries and forest products may contribute to environmental degradation. Wager, supra note 28, at 423. UNESCO also estimates that a single tourist produces on average one kilogram of waste and consumes up to 200 liters of water a day. Anne Lemaistre & Sébastien Cavalier, Analyses and Management Prospects of the International Angkor Program, 54 MUSEUM INT’L 117, 124 (2002).
III. THE WORLD HERITAGE CONVENTION

In response to the natural and manmade threats to cultural and natural heritage occurring throughout the world, UNESCO adopted the World Heritage Convention in 1972. States that are parties to the Convention are responsible for identifying and protecting the cultural and natural heritage within their territories that fit the Convention’s description. The Convention also established the WHC to consider nominees for the World Heritage List. The WHC is also responsible for identifying properties for the List of World Heritage in Danger. To support its operations, the Convention requires membership dues, as well as international contributions of financial and technical support, to assist in the

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- **monuments**: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

- **groups of buildings**: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

- **sites**: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.

*Id.* art. 1. Natural heritage, on the other hand, are natural features of outstanding scientific or aesthetic value as well as biodiversity “hotspots” that shelter endangered species. *Id.* art. 2.

56. *Id.* art. 4.

57. The World Heritage List is a list of cultural and natural heritage with “outstanding universal value.” *Id.* art. 11, paras.1–2.

58. The World Heritage in Danger List includes those properties that are:

- threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides, volcanic eruptions; changes in water level, floods and tidal waves.

*Id.* art. 11, para. 4.
preservation of the sites within the World Heritage List.\textsuperscript{59} Priority funding goes to endangered properties.\textsuperscript{60} Inscription onto the World Heritage List also provides other benefits, such as increased global awareness of the site, as well as a means of obtaining additional aid from developed countries and non-governmental organizations.\textsuperscript{61}

Cambodia ratified the Convention in 1991.\textsuperscript{62} In 1992, the International Council on Monuments and Sites (ICOMOS)\textsuperscript{63} found that the Angkor sites satisfied the four criteria required for World Heritage inscription,\textsuperscript{64} but recommended that final inscription be deferred due to the uncertain political climate of Cambodia, as well as the lack of any domestic cultural property laws.\textsuperscript{65} The ICOMOS report detailed the many threats to the Angkor sites, including the instability of the subsoil beneath the tem-

\begin{itemize}
  \item[59.] Id. art. 15. The World Heritage Fund results from the membership dues of states that are party to the World Heritage Convention, which is in the form of one percent of their UNESCO contributions. About $3 million is available yearly; the funds usually go to developing countries. Henry Cleere, The Uneasy Bedfellows: Universality and Cultural Heritage, in Destruction and Conservation of Cultural Property 28 (Robert Layton et al. eds., 2001).
  \item[60.] Id.
  \item[61.] Cleere, supra note 59, at 28.
  \item[63.] ICOMOS was founded in 1965 “in order to promote the doctrine and techniques of conservation. ICOMOS provides the World Heritage Committee with evaluations of cultural properties proposed for inscriptions on the World Heritage List, as well as with comparative studies, technical assistance, and reports on the state of conservation of inscribed parties.” UNESCO, Who’s Who, http://whc.unesco.org/whoswho.htm (last visited Oct. 4, 2005).
  \item[64.] These four criteria included:
    \begin{itemize}
      \item [a] \textsuperscript{[the site represented]} a unique artistic achievement, a masterpiece of the human creative spirit;
      \item [b] \textsuperscript{[it has]} exerted considerable influence during a given period, within a given cultural area, on the development of architecture, the monumental arts and spatial organization;
      \item [c] \textsuperscript{[it] left a singular vestige of a vanished civilization; and}
      \item [d] \textsuperscript{[it constituted]} an outstanding ensemble of a type of building or architecture that illustrates a significant historical period.
    \end{itemize}
  \item[65.] ICOMOS, supra note 16, at 4, 9. Cultural property laws include protective legislation on the discovery, ownership, and transfer of cultural property. See id. at 4.
\end{itemize}
Because of the extent of the dangers threatening the existence of the Angkor sites, the World Heritage Committee took the controversial step of granting Cambodia probationary inscription into the World Heritage List for a three-year period (1993–1995). Angkor’s continued inscription after this period would then be contingent on Cambodia’s (1) development of effective cultural property laws, (2) establishment of an adequately staffed protection agency, (3) delineation of permanent protected boundaries, (4) definition of meaningful buffer zones, and (5) centralization and coordination of ongoing conservation projects. This impetus on Cambodia to take primary responsibility for the protection and management of the Angkor sites parallels the Convention’s stance that host states retain ultimate sovereignty over world heritage properties.

66. The ancient irrigation system had fallen into disrepair and caused greater fluctuations of the water table, causing the sandy subsoil to shift in some areas. Id. at 5.

67. ICOMOS, supra note 16, at 6. See also Leisen, supra note 29 and accompanying text.

68. ICOMOS, supra note 16, at 6. See Mydans, Cambodia’s Temple-Embracing Trees, supra note 30 and accompanying text.

69. Inadequate bonding of stone blocks contributed to cracking, which contributed to further “stone disease” and vegetational growth. ICOMOS, supra note 16, at 6.

70. The French conservation group EFEO used concrete to fill up gaps, which led to water seepage and further cracking. Id. It also used unsightly concrete pillars and rust-prone iron bands to support weakened structures. Meanwhile, the Indian conservation group ASI was criticized for using crude methods to clean structures, including vigorous scrubbing, which literally erased the details of some of the bas-reliefs. Coiochon & James, supra note 23, at 42, 46.

71. See, e.g., Coiochon & James, supra note 23, at 49 (describing how looters have become more organized, using military equipment to blast through the Conservation d’Angkor, where artworks were held for safekeeping. More brazen looters even present pictures of in situ carvings that they offer to steal for their customers).

72. UNESCO World Heritage Committee, supra note 4, at 35–36. Besides meeting the criteria for cultural and natural heritage, a candidate for inscription onto the World Heritage List must meet certain procedural requirements, including a stable political system and the existence of cultural protection laws. ICOMOS, supra note 16, at 4. According to Azedine Beschachouch, the 2002 chairman and senior member of the WHC, there was international concern that inscription of a site that had not met these procedural requirements may set harmful precedent. See Beschachouch, supra note 1, at 107–08. This concern was likely justified, since the imposition of the responsibilities for restoring and protecting cultural property on a weakened or disinterested government may result in misallocation of scarce resources available for conservation that can go towards equally deserving properties in need of aid.

73. Beschachouch, supra note 1, at 108.

74. Article 4 of the World Heritage Convention provides:
In response, the Cambodian government established APSARA, an administrative agency responsible for the protection and management of Angkor and the region of Siem Reap.75 The government also promulgated the Zoning and Environmental Management Plan for Angkor (ZEMP) recommendations by establishing protected areas and buffer zones.76 The government also passed cultural property laws that vested ownership of discovered artifacts to the state, imposed inventory requirements on cultural property, and provided for restrictions on the excavation, movement and export of cultural artifacts.77 In October 1993, the International Co-ordinating Committee for the Safeguarding and Development of the Historic Site of Angkor (ICC) was formed to monitor and coordinate international assistance relating to preservation and development of the Angkor sites.78

Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . situated on its territory, belongs primarily to that state. It will do all it can to this end, to the utmost of its resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

World Heritage Convention, supra note 55, art. 4 (emphasis added).


76. Royal Decree Establishing Protected Cultural Zones in the Siem Reap/Angkor Region and Guidelines for their Management, May 28, 1994, available at http://www.autoriteapsara.org/eng-0-laws/2-zoning-texte.htm (last visited Sept. 27, 2004). The protected areas are divided into five zones. Zone 1 includes monumental sites and is afforded the greatest level of protection. Zone 2 involves protected archaeological reserves, which are areas rich in archaeological remains that will act as buffer zones for Zone 1 sites and need protection from inappropriate development. Zone 3 covers protected cultural landscapes, which contribute to the cultural value or reflect traditional lifestyles and patterns of land use. Zone 4 encompasses sites of archaeological, anthropological or historic interest, which are areas that have some scientific interest but below the level of Zone 1 sites. Zone 5 areas contain the socio-economic and cultural development zone of the Siem Reap province, which includes the residential and commercial areas. Id. arts. 3–7. For a further description of the ZEMP study, see generally Wager, supra note 28.


In 1996, the World Heritage Committee reviewed Cambodia’s compliance with the World Heritage Site requirements and was very satisfied by Cambodia’s efforts. It lifted the Angkor sites’ probationary status and eight years later, the Angkor sites were de-listed from the World Heritage in Danger List. Since 1993, more than twenty different countries and private groups have contributed five million dollars to preservation efforts annually, and more than thirty international and non-governmental organizations have provided technical and research assistance. The WHC and inscription onto the World Heritage List, therefore, has had a successful application to the Angkor sites in terms of the conservation of its endangered structures. States who were parties complied with the terms of the treaty: Cambodia, through its development of legislative and executive infrastructure required to promote conservation efforts, and the other states and non-governmental organizations through their contributions of expertise, manpower, and financial contributions.

IV. THE COMPETING VALUES OF STATE SOVEREIGNTY AND WORLD HERITAGE PROTECTION

A. State Sovereignty and Cultural Nationalism

The concept of sovereignty is a basic principle underlying international law. A traditional definition of sovereignty provides: “Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.” Article 2(1) of the UN

The ICC continues to meet twice a year to follow-up the conservation status of the different archaeological teams and to review new project proposals. Id.

79. Paris Declaration, supra note 5.
80. UNESCO, Angkor Among the Three Properties, supra note 6.
81. Lemaistre & Cavalier, supra note 53, at 118. Concurrent with the Angkor preservation program, UNESCO also initiated community development programs designed to improve literacy levels, develop grass-roots employment programs, and promote AIDS awareness; for further detail on UNESCO’s activities in Cambodia, see generally UNESCO, REPORT ON THE ACTIVITIES, supra note 78.
82. Franz Xaver Perez, The Relationship Between “Permanent Sovereignty” and the Obligation not to Cause Transboundary Environmental Damage, 26 ENVTL. L. 1187, 1188 n.1 (1996) (giving several examples of the recognition of sovereignty as a basic concept of international law).
83. Arbitral Award Rendered in Conformity with the Special Agreement Concluded on January 23, 1925, Between the United States of America and the Netherlands Relating to the Arbitration of Differences Respecting Sovereignty over the Island of Palmas (or Miangas), 22 AM. J. INT’L L. 867, 875 (1928).
Charter specifically mentions sovereignty as its basis of existence, and is described by one scholar:

According to a widely shared view, sovereignty has two complementary and mutually dependent dimensions: within a State, a sovereign power makes law with the assertion that this law is supreme and ultimate, i.e. that its validity does not depend on the will of any another, or ‘higher’ authority [internal sovereignty]. Externally, a sovereign power obeys no other authority [external sovereignty].

As applied to cultural property, a state’s sovereign powers extend over cultural property located within its borders. “Cultural nationalism,” a term coined by Professor John Merryman, echoes this state-centric concept. Because cultural property is a part of a national cultural heritage,

84. UN Charter art. 2, para. 1 (“The Organization [the UN] is based on the principle of the sovereign equality of all its members.”). In addition, the UN Charter also alludes to the primacy of state sovereignty: “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 . . . .” Id. art. 2, para. 7.
86. Justice Story articulates this concept of territoriality:

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction.

87. See John Henry Merryman, Two Ways of Thinking About Cultural Property, 80 AM. J. INT’L L. 831, 842–45 (1986). Although later applications of Professor Merryman’s work have centered around the repatriation of illegally traded cultural objects, see, e.g., Stephanie O. Forbes, Comment, Securing the Future of Our Past: Current Efforts to Protect Cultural Property, 9 TRANSNAT’L L. 235 (1996); Claudia Caruthers, Comment, International Cultural Property: Another Tragedy of the Commons, 7 PAC. RIM L. & POL’Y 143 (1998); Anna Sljivic, Why do You Think it’s Yours? An Exposition of the Jurisprudence Underlying the Debate Between Cultural Nationalism and Cultural Internationalism, 31 GEO. WASH. J. INT’L L. & ECON. 393 (1998), and not the management of cultural property sites per se, his analysis is useful in illuminating the tensions between state sovereignty and the emergence of international law in this area.
sovereignty over these properties should remain with the state. Sup-
porters of cultural nationalism argue that sovereignty and possession re-
main with the state for the following reasons: (1) because cultural prop-
erty is an expression of a civilization that existed or is currently existing
within a state, its citizens thus have a stronger claim based on identifica-
tion and national pride; (2) retention of sovereignty provides the con-
text of cultural property; and (3) cultural property usually has utilitarian
qualities, including market value, that may be harnessed by the state and
its people.

It has also been argued that host states have every right to remain wary
of international intervention in light of the self-serving actions by past
conquerors in imposing their view of what is “ideal” property manage-
ment.

88. Merryman, supra note 87, at 832.
89. Vernon, supra note 86, at 449–52. Vernon, however, cautions that claims of cul-
tural nationalism are sometimes based on a piece of work that is merely physically pre-
sent on the claimant state, as opposed to its people having exclusive cultural or religious
attachment to it; this argument is not applicable in the instance of the Angkor sites as the
Khmers have exclusive contribution to its creation. Additionally, Vernon warns that na-
tional attachment to cultural property can be used as propaganda for despotic regimes.
This was certainly true during the Khmer Rouge government’s actions. See supra Part
II.A. On the other hand, a strong argument supporting state sovereignty is the fact that
Cambodians today remain deeply connected to the Angkor sites: its temples today are
still places of worship, and the moats and forests both within and surrounding the sites
are used by local Cambodians for everyday needs. Gittings, supra note 54, at 13.
90. This argument pertains mainly to repatriation of stolen antiquities. Scholars advo-
cating for repatriation contend that a cultural property’s significance and educational
importance derive from its relationship with its natural environment. It follows that the
removal of cultural properties from this meaningful milieu destroys some of its inherent
value. Merryman, supra note 87, at 843. An extension of this argument to the Angkor
sites raises the question addressed in Part IV of the Note: Should Cambodia retain sover-
eignty over the sites when its management policies, which are criticized as too mass tour-
ism-oriented, de-contextualizes and diminishes the aesthetic value of Angkor?
91. This argument is perceived as morally repugnant to internationalists; since cul-
tural property is considered as priceless and irreplaceable, there is something coercive
and unconscionable about allowing the trade of antiquities especially in exchange for
subsistence needs. Caruthers, supra note 87, at 161.
92. See, e.g., French, supra note 10, at 175; Lakshman Guruswamy, Jason C. Roberts
& Catina Drywater, Protecting the Cultural and Natural Heritage: Finding Common
Aborigines’ distrust towards archaeologists and museums because of the plunder and
offensive public display of religious objects and artifacts taken from sacred burial
grounds in the name of science and preservation).
B. International Culturalism and World Heritage

The resurgence of cultural internationalism coincides with the erosion of the concept of state sovereignty in the twentieth century. Contrasted with cultural nationalism, cultural internationalism views cultural property as belonging to the world’s peoples and not limited to the citizens of the state where the property is located. The concept of world heritage as described by the WHC echoes this sentiment: “[P]arts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole.”

Supporters of cultural internationalism, therefore, argue for greater international intervention rights for the protection of world heritage. They reason that because sovereign powers of a state are never absolute, foreign retention of cultural property may be permitted when state conditions threaten cultural property (e.g., because of political instability, the lack of resources for restoration and protection, or a state’s inattention)

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93. See Louis Henkin, That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 FORDHAM L. REV. 1, 3–4 (1999) (discussing how three “transformative developments” in the twentieth century have contributed to the wane of external sovereignty: the advent of two world wars and the development of nuclear technology; states’ increasing pursuit of cooperation through specialized agencies, e.g., the UN and the International Monetary Fund; and the rise of the international human rights movement). For another description of the rise and fall of the concept of external sovereignty, see generally Ronald A. Brand, External Sovereignty and International Law, 18 FORDHAM INT’L L.J. 1685 (1995).

94. Professor Merryman gives the example of the Elgin marbles that were taken from the Parthenon in Greece two hundred years ago by Lord Elgin, the English ambassador to the Ottoman Empire. The Elgin marbles are part of “the cultural heritage of all mankind.” It follows that the people who are not Greek or British have an interest in their preservation, integrity and availability for enjoyment and study. The perennial debate about the propriety of their removal from Greece . . . and the current proposals to return them to Athens become the business of others besides Greeks and Britons. As the smog of Athens eats away the marble fabric of the Parthenon, all of mankind loses something irreplaceable.

Merryman, supra note 87, at 837 (internal citations omitted).

95. World Heritage Convention, supra note 55, pmbl. The preamble also provides that the “deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world.” Id.

and neglect). As part of the common culture of mankind, cultural property plays an invaluable role in “improving understanding between nations” and must be made available to a global audience for study and deliberation, anything less would be a “cultural impoverishment of people in other parts of the world.”

Cultural internationalists further criticize that a state’s indiscriminate retention and prohibition of the trade of cultural objects, when it already has multiple examples of a similar piece and hoards them “beyond any conceivable domestic need,” drives the black market in antiquities. Looting to feed the international demand of cultural artifacts in turn contributes to the irreplaceable loss of archaeological knowledge.

97. Professor Merryman explains, “To a cultural internationalist, the export of threatened artifacts from [a state] to some safer environment would be clearly preferable to their destruction through neglect if retained.” Merryman, supra note 87, at 846. Although this argument addresses the issue of repatriation of cultural artifacts to the state of origin, the question of whether the risk of “destructive retention” or “covetous neglect” from a state’s actions or inaction is preferable to international intervention may also apply to the state’s management of immovable cultural property.


99. One author points out the confusing nature of this argument since major museums hoard, and deny access to, multitudes of objects in their basements. They defend this practice on the grounds that the objects are kept there for protection. The “little secret” of archaeology, as it has become known, is the miniscule percentage of excavations that are studied, processed and displayed.

100. Merryman, supra note 87, at 847. Professor Merryman additionally points out that states ascribe to a view of cultural property partly depending on whether they possess cultural property within their borders. “Source nations,” which possess significant amounts of cultural property, also tend to be developing countries and advocate for reten-tive property rights, strict controls on export and trade, as well as repatriation of cultural objects. Meanwhile, “market nations” believe in cultural internationalism and more relaxed rules in the loan, sale and export of cultural objects. Id.

101. Id. at 847–50.

102. Looters, intent only on taking portable and marketable pieces from an archaeological site, routinely disregard the historical and cultural information that they destroy. Artifacts are deliberately defaced to hide their true origins, while human remains and other archaeological data are damaged in the pursuit of artifacts to sell. Lisa Borodkin, Note, The Economics of Antiquities Looting and a Proposed Legal Alternative, 95 COLUM. L. REV. 377, 382–83 (1995).
C. Treaty and International State Practice: A Mixed Picture

State consent is a prerequisite of international law. Treaties and other international agreements cannot become binding on a state absent its consent, and international law can be reconciled with state sovereignty when the state as the sovereign willingly waives a portion of its sovereign powers and becomes subject to international law.

The Convention is no exception. Despite the name, the Convention officially recognizes the primacy of the state’s sovereignty over its cultural properties. It grants great leeway for states that are parties to identify and nominate their own cultural sites for World Heritage designation. Upon inscription, the host state has the primary responsibility of designing and implementing plans for protection and preservation of the cultural site. The Convention is seen as a complement to state sovereignty by providing technical and financial assistance as needed.

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103. Anand, supra note 96, at 80.
105. The exception to the general rule that states waive a portion of state sovereignty in order to become subject to international law are those laws that have the character of jus cogens, which are recognized by the international community of states as preemptory, or permitting no derogation. Id. § 102, cmt. k.
106. Article 6 of the Convention provides:

Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage . . . is situated, and without prejudice to property right provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes world heritage for whose protection it is the duty of the international community as a whole to co-operate.

World Heritage Convention, supra note 55, art. 6 (emphasis added). This provision can be interpreted as granting some form of stewardship rights to the host state to protect World Heritage properties situated in its territory for the world’s peoples to enjoy.

107. Article 4 of the Convention provides:

Each State Party to this Convention recognizes the duty of ensuring the identification, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . situated on its territory belongs primarily to that state. It will do all it can to this end, to the utmost of its resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.

Id. art. 4 (emphasis added).
108. Article 5 of the Convention provides:

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country:
Besides the WHC, there is abundant evidence of the customary law of world heritage protection, especially in times of turmoil. Provisions for safeguarding sites and monuments of historic and cultural importance during armed conflict are found in several treaties. At least two authors

(a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes;

(b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;

(c) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural and natural heritage;

(d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and

(e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in the field.

Id. art. 5. According to one commentator, “Once a site is listed as part of the world heritage, its protection becomes the shared responsibility of the international community, which is expected to provide funds as well as technical assistance and professional training to preserve the site.” Sarah Cattan, The Imperiled Past: Appreciating our Cultural Heritage, UN CHRONICLE, Nov. 4, 2003, at 72.

109. The preamble of the Convention provides:

[In view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding value, by the granting of collective assistance, which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto.]

World Heritage Convention, supra note 55, pmbl.

have called for increased rights of intervention by the international community when world heritage is imminently imperiled in this manner.  

One reason given for increased intervention is that conservation becomes the least of priorities of a government under attack, but in the long run, safeguarding cultural property facilitates a people’s reconstruction of their lives by helping to re-establish their community and national identity.  

Another reason is that armed conflicts can intentionally involve the targeted destruction of cultural property as an attack of a peoples’ psyche. Increased rights of intervention during armed conflict are compatible with the underlying principle behind world heritage that cultural properties are unique and finite resources that ought to be protected for all the peoples of the world, not just for the peoples within the state. Some scholars also point to changing customary law as perhaps giving the international community a greater right of intervention, akin to international intervention for humanitarian purposes.

Apart from international treaties, state practice illustrates a mixed reality. On one hand, recent internal and international events reveal that international laws are not always observed by states bound by treaty and serve as a counterargument for those seeking to expand international property rights. Examples include the destruction of many historic buildings and other cultural properties during the breakup of Yugoslavia, despite the state being a signatory to the Convention, the destruction of

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111. See, e.g., Karen J. Detling, Note and Comment, Eternal Silence: The Destruction of Cultural Property in Yugoslavia, 17 Md. J. Int’l L. & Trade 41, 74 (1993) (finding support from the Netherlands and Italy’s initiative for UNESCO to have more powers to intervene to protect World Heritage properties during armed conflicts); Vernon, supra note 86, at 479 (advocating for the expansion of international law of cultural property protection to allow for “internationally approved regime of intervention”).

112. Driver, supra note 110, at 1.

113. An example is the “cultural genocide” committed by Serbian troops during the internal armed conflict in former Yugoslavia; Sarajevo’s many churches, mosques and libraries, dating back to the fourteenth and fifteenth centuries were specifically targeted as a way to intimidate and drive out the Muslim minority. Vernon, supra note 86, at 443–44.

114. World Heritage Convention, supra note 55, pmbl.


116. For a detailed description of the failure of international law to protect cultural property during the Yugoslavian civil war, see generally Detling, supra note 111 (focus-
the Bamiyan Buddhas in Afghanistan by the Taliban, despite Afghanistan being a signatory to the Convention,\footnote{Kanchana Wangkeo, Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime, 28 YALE J. INT’L L. 183, 243–64 (2003) (describing how the Taliban’s destruction of cultural property that dated back to the fifth century in response to the Taliban Supreme Ruler’s decree to destroy statues of “false idols” was met by harsh and immediate response by the international community).} the looting of Iraqi museums during the Persian Gulf War,\footnote{118. The United States especially has been criticized for failing to plan for the protection of Iraqi museums and other cultural properties which scholars predicted would become casualties of the Gulf War. Consequently, looting of priceless relics is reported to have occurred on a massive scale. Vernon, supra note 86, at 442; Martin Gottlieb, Of 2,000 Treasures Stolen in Gulf War of 1991, Only 12 Have Been Recovered, N.Y. TIMES, May 1, 2003, at A16.} and most recently, the opening of a giant discount store by the ancient city of Teotihuacán in Mexico.\footnote{James C. McKinley Jr., World Briefing Americas: Mexico: Wal-Mart Opens Near Pyramids, N.Y. TIMES, Nov. 6, 2004, at A8. Teotihuacán is an ancient city of which the cultural origins are unknown. It includes pyramids dating back 1,800 years. Id. It was inscribed on the World Heritage List in 1987. UNESCO, World Heritage List: Pre-Hispanic City of Teotihuacán, http://whc.unesco.org/en/list/414 (last visited Aug. 31, 2005).} On the other hand, enough examples also point to the observance of international obligation to protect world heritage properties in the face of the opposition by powerful domestic interests. Yellowstone National Park became the first national park to become listed on the World Heritage List, despite intense lobbying by the U.S. mining industry.\footnote{See generally Daniel L. Gebert, Note, Sovereignty Under the World Heritage Convention: A Questionable Basis for Limiting Federal Land Designation Pursuant to International Agreements, 7 S. CAL. INTERDISC. L.J. 427 (1998) (describing how the Yellowstone National Park was inscribed on the World Heritage List despite fierce opposition by mining interests and the U.S. Congress’ suspicions of the federal government’s motives).} Similarly, Australia was successful in having the Queensland rainforest region inscribed against fierce dissent by the State of Queensland government and the timber industry.\footnote{See generally Thomas H. Edmonds, Comment, The Queensland Rainforest and Wetlands Conflict: Australia’s External Affairs Power—Domestic Control and International Conservation, 20 ENVTL. L. 387 (1990) (describing the exercise of Australia’s federal powers under its constitution’s external affairs power to nominate the 3,500 square miles of Queensland rainforest for inscription onto the World Heritage List, despite the Queensland state’s vehement resistance and opposition from the timber industry).}
Professor Merryman acknowledges that both of these perspectives on cultural property have valid points and urges that neither has to be completely abandoned. These competing values of cultural internationalism and cultural nationalism are next applied in the context of cultural property management in the form of tourism. Especially in a source nation like Cambodia, with a population that is generally unskilled and requires education and training to become competitive in the global market, harnessing the market potential of its cultural property through tourism is seen as an attractive and easy source of revenue and employment. Meanwhile, the international community calls on the Cambodian government to observe its international obligations under the Convention by implementing plans for limiting tourism.

V. THE PROS AND CONS OF SUSTAINABLE TOURISM

As archaeological studies uncover more information about ancient Khmer civilization, the black market for Khmer antiquities has exploded. Stronger cultural property laws further contribute to the demand. By the same token, the de-mining of the sites and successful preservation efforts are luring tourists to Angkor in increasing numbers. The international community is increasingly worried that tourism is adversely affecting the Angkor sites. Conservation experts fear that

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122. Merryman, supra note 87, at 852–53.
123. For a definition of source nation, see supra note 100.
124. Governments look to tourism as part of their development strategies for several reasons. The tourism industry has enjoyed historical growth with the advent of increased travel. Tourists also come from developed countries and provide much-needed infusions of hard currency in the local economy. Furthermore, unlike other exports, countries generally do not place limits on overseas travel by their citizens. Finally, the labor-intensive nature of the tourism industry generates low-skilled jobs geared toward the young, while requiring relatively low economic cost, as when the attractions are naturally present, e.g., wildlife, beach properties, and cultural monuments. Carson L. Jenkins, Impacts of the Development of International Tourism in the Asian Region, in TOURISM AND ECONOMIC DEVELOPMENT IN ASIA AND AUSTRALIA, supra note 8, at 52–54.
126. See Caruthers, supra note 87, at 166 (describing how the tightening of cultural property laws has the inverse effect of stoking the black market demand of cultural property and perpetuating the cycle of looting).
127. See supra notes 48–51 for estimates of the growth of tourism in Cambodia.
tourists are straining certain temples beyond capacity. Moreover, tourists are disrespectful of visitor temple rules and restrictions and are left free to touch fragile sculptures and climb over precarious ruins.

Aesthetically, the increase in visits has begun to negatively impact the tourist experience; visitors express their dismay at busloads of tourists tending to ruin any sense of exploration and contemplation. Visitors also report the presence of rampant begging by children that is run by organized groups. Souvenir hawkers, noise, and air pollution further diminish the area’s appeal. Areas outside Angkor likewise are facing exponentially and are beginning to strain the natural resources available. Meanwhile, corrupt government officials and developers flaunt APSARA regulations and continue to build hotels within protected zones.

Although the Convention acknowledges unchecked tourism as a threat to world heritage, past international efforts toward the Angkor sites emphasized restoration of cultural properties rather than tourism man-

128. One example of overcapacity is the unregulated visits of tourists; on a busy holiday in 2001, approximately 5,000 tourists, mostly Cambodians, visited the temple of Banteay Srei, which is estimated to have a maximum safe capacity of only 500 visitors a day. Mydans, On the Verge, supra note 37, at 26.


131. Daisann McLane, Frugal Traveler; Cambodia's City of Temples is a Timeless Survivor, N.Y. TIMES, Mar. 5, 2000, at T6.

132. See Barré, supra note 49, at 129 (discussing the planned introduction of electric shuttle vehicles to make the Angkor sites “quieter and greener”); Michael Sheridan, Cambodia's Temple Idyll Faces Death by Karaoke, SUNDAY TIMES (London), July 7, 2002, at 23 (lamenting that “[w]here night used to fall to a murmuring jungle chorus, the strains of numerous karaoke bars now contend in the tropical twilight.”).

133. Besides tourism, Cambodians living around Angkor are heavily reliant on farming, fishing and the forest resources and the danger of overexploitation is exacerbated with the rise in the population. Wager, supra note 28, at 423.

134. See generally Sheridan, supra note 132 (describing how illegal development of hotels, restaurants, bars and other tourist facilities disregard the zoning regulations enacted by APSARA).

135. Tourism’s dangers are alluded to in the preamble to the Convention: “[C]ultural heritage . . . [is] increasingly threatened with destruction not only by traditional sources of decay, but also by changing social and economic conditions which aggravate the [destructive] situation with even more formidable phenomena of damage and destruction.” World Heritage Convention, supra note 55, pmbl.
agement. With the influx of both residents and tourists following successful preservation efforts, cultural internationalists would like to see Cambodia put the brakes on tourism. In particular, the ICC calls on Cambodia to implement standards of sustainable tourism.

The concept of sustainable tourism has its roots in the idea that cultural heritage is a resource that can be depleted if managed unwisely. Tourism developments have caused environmental damage around the world in different forms: water pollution, visual pollution, congestion, land-use pollution and ecological disruption. As applied to the Angkor sites, sustainability is a laudable goal. Small-scale, low-impact “cultural” tourism would best serve the long-term preservation of the sites and natural resources as well as expose tourists to a high-quality and educational cultural experience. Anathema to this is the concept of mass-market tourism where quantity, not quality, is the primary objective.

APSARA, to its credit, has largely attempted to comply with the UNESCO ideals of tourist development. Ticket sales were outsourced to a private firm and the income generated has helped APSARA meet its expenses. Its recent initiatives included establishing a tourist monitoring station, implementing plans to decrease noise and air pollution at the sites by providing for electric shuttles, and improving local infrastructure.

136. Lemaistre & Cavalier, supra note 53, at 118–19 (discussing the achievements of the international community over the past ten years in safeguarding the monuments, and the need to shift its current priorities to developing tourism).

137. Id. at 122–24.

138. See supra note 95 and accompanying text; see also supra note 8 for a definition of sustainable tourism.

139. See Jenkins, supra note 124, at 59 (furnishing examples of environmental damage caused by over-tourism in different parts of the world, as too-rapid increases of tourist visits overwhelm local infrastructures and resources).

140. See Michael Hitchcock & Victor T. King, Discourses with the Past: Tourism and Heritage in South-East Asia, 31 INDON. & MALAY WORLD 7, 8 (2003) (describing how the ICC and APSARA plan to encourage the development of high-quality tourism).

141. One critique of unfettered tourism policies is that “[m]ass tourism has often resulted in over-development, uneven development, environmental degradation, and invasion by culturally insensitive and economically disruptive foreigners . . . . it is the pattern of industrial growth, exploitation of natural resources and consumerism, in brief, the unsustainable development that characterizes contemporary Western civilization, that are to blame.” Alexander C. O’Neill, What Globalism Means for Ecotourism: Managing Globalization’s Impacts on Tourism in Developing Countries, 9 IND. J. GLOBAL LEGAL STUD. 501, 507 (2002) (internal citations omitted).

142. Barré, supra note 49, at 128. A one-day ticket costs $20, a three-day ticket costs $40 and a seven-day ticket costs $60. Id.
and tourist facilities. However, to the consternation of APSARA and the international community, the rest of the Cambodian government considers the Angkor sites to be an economic engine in terms of tourist dollars and the creation of jobs.

Angkor appears inevitably headed towards commodification as the sites are used for films and commercials; the 2000 filming of a Hollywood movie at Angkor so offended ICC officials that they threatened to have the site de-listed.

Despite the low-impact nature of sustainable tourism that is advocated by cultural internationalists, the concept suffers from some difficulties. One critique of sustainable tourism is that even tourism in limited and controlled numbers will eventually lead to mass-market tourism, as small-scale tourism serves as a springboard for mass-market tourism when “discoverers” of exotic and pristine locations spread their experi-

143. Id. at 129. Plans for the electric shuttle are on hold following protests by locals dependent on transporting tourists between the sites for their livelihood. Gittings, supra note 54, at 13.
144. Barré, supra note 49, at 129.
145. See, e.g., Tim Winter, Angkor Meets Tomb Raider: Setting the Scene, 8 INT’L J. HERITAGE STUD. 323, 332 (2002) (detailing the Royal Government’s inclination towards large-scale tourism to alleviate the country’s financial burden and make Cambodia more attractive to international aid groups).
147. The film, Tomb Raider, was the movie version of a popular video game of the same name. It involved action scenes filmed in computer-generated settings incorporating some of the Angkor temples’ details. Not only was the depiction of the temples wholly inaccurate (Khmer architecture was juxtaposed with unfamiliar elements such as hidden treasure in underground chambers and Egyptian hieroglyphics), but the Buddhist and Hindu religious influences were shown in a superficial light. Even though filming caused no actual harm to the sites, the portrayal of Angkor Wat and what the film represented may have damaged UNESCO’s goals of presenting world heritage sites as fragile sites that require protection; Tomb Raider involved gunfights and other scenes of pillage and destruction that sadly, Angkor is not unfamiliar with. Additionally, the filming of a major Hollywood film that “dispenses with any aspirations of high cultural refinement” is at odds with the plan to develop “high quality, cultural tourism.” Winter, supra note 145, at 328–36. As part of its expert and advisory mission, UNESCO is now working with APSARA in developing legislation regarding the intellectual property rights of Angkor images. Barré, supra note 49, at 129.
148. International experts envision cultural property as having a finite lifespan; unwise policies that contribute to the degradation of local resources, and straining the carrying capacities of both the cultural property at issue and the surrounding environment by over-tourism accelerate the consumption of the properties as well as diminish its attraction to later visitors. Xu Honggang, Managing Side Effects of Cultural Tourism Development—The Case of Zhouzhuang, 43 SYS. ANALYSIS MODELLING SIMULATION 175, 187 (2003).
ences to other tourists who later come in increasing numbers. Second, the “high quality” tourism promoted in Angkor is suspiciously similar to luxury tourism, which has less impact on the monuments themselves, but may have greater impacts in other ways. Economic leakage can still be quite high because of the need to import goods to satisfy the luxury market. Another description of the dangers of luxury tourism is given:

[L]uxury tourism tends to require more imports, to be more capital-intensive, to be more dependent on outside control of capital, to encourage more of a sense of conspicuous consumption, and to result in a greater sense of relative deprivation [by locals] than more modest facilities. Moreover the infrastructure for such tourists rarely is used by other than the elite of a given destination . . .

Developers, which are primarily multinational entities, also have less incentive to retain capital in the local economy if downturns develop, for instance the recent effects of 9/11 on global tourism. One report estimates that as much as half of tourism revenues of developing countries

150. This is reflected in the priorities of improving tourist infrastructure such as “tourist-quality” hotel rooms, the construction of sports and leisure facilities, developing electric shuttle services, increasing Siem Reap’s airport capacity, the addition of tourist-friendly facilities such as signs and directions, and the removal of “unsightly” activities such as begging and hawking of tourist souvenirs. See Barré, supra note 49, at 127. The theory behind “high quality” sustainable tourism is that “more affluent tourists are better for a destination, because they bring in more cash relative to the intrusiveness of their presence.” LINDA K. RICHTER, THE POLITICS OF TOURISM IN ASIA 183 (1989).
151. Economic leakage occurs when:

much of the income generated by the tourist industry “leaks” out of the local community or host country and into the hands of foreign interests or never reaches the host country to begin with. Leakage is most pronounced in developing countries and . . . occurs when there are high levels of outside ownership of plant and services; through the sale of inclusive tours, whereby a package that includes transport, accommodation, food and recreational activities is bought outside the destination from a (foreign) operator . . . and where imports (of food, equipment and machinery) are required to meet tourist demands, thus negating at least part of the balance of payments advantages provided.

Alexander O’Neill, Note, What Globalization Means for Ecotourism: Managing Globalization’s Impacts on Ecotourism In Developing Countries, 9 IND. J. GLOBAL LEGAL STUD. 501, 508 (2002). The risk of economic leakage with high-quality tourism appears great in Angkor’s case as multinational corporations compete to erect hotel complexes, and flights to Cambodia are routinely sold as part of package trips. See Gray, Tourist Development, supra note 52, at C6; McLane, supra note 131, at T6.
152. RICHTER, supra note 150, at 183.
153. Jenkins, supra note 124, at 56; see, e.g., CIA, supra note 39 (describing the devastating effect of the events of 9/11 to the tourism industry in Cambodia).
shift back to developers and business owners who are mostly from developed countries.154

There is also the question of who decides whether a particular policy is appropriate, given that in developing countries the local community is in a weak bargaining position relative to the policymakers.155 Another critique of “high quality” sustainable tourism is that it is viewed in some circles as an imposition of neocolonialism, i.e., the values reflect middle-to upper-class, and predominantly European ideals while disregarding the realities of most developing countries.156 For instance, “[t]he luxury hotel in the developing nation requires excessive monetary support, disproportionate water, energy, food, land and construction materials—all items in short supply.”157 Clearing up the “messy but likeable tourist mix”158 at Angkor not only will potentially deprive many of a viable source of income, but may also risk infringing locals’ rights to use the site.159

Yet another risk of overly restrictive tourism policies is related to ideals of sovereignty over cultural objects and cultural nationalism. Cultural nationalists champion the local control over cultural property as the property’s true significance lies not with its history, but rather how it is perceived and utilized in the present.160 Phrased another way:

[Heritage] is tradition repackaged as spectacle. The refurbished buildings at tourist sites may look splendid, and the refurbishment may even be authentic down to the last detail. But the heritage that is thereby pro-

155. See Richter, supra note 150, at 184–85 (1989) (criticizing the priorities of policymakers in developing countries in neglecting the budget traveler market while catering to elite tastes and political objectives of the ruling elite).
156. Id.
157. Id. at 185.
159. The heritage police, who are in charge of the security of the Angkor sites, are criticized for preventing locals from cultivating the park’s resin trees or grazing water buffalo around the moats and grounds of the temples. Limiting visitors may also interfere with Cambodians’ religious practices, as the temples remain to this day places of worship for Buddhists. See id. Buddhism to this day remains the major religion in Cambodia, practiced by 95 percent of the population. CIA, supra note 39.
160. See supra note 89 and accompanying text. “Museumization” of a culture is troubling because it implies that the culture is permanent and unchanging, when in fact culture is fluid and dynamic. See Richter, supra note 150, at 188. As applied to the tourist strategies at Angkor, focusing only on the historical importance of the monuments and ignoring Angkor’s real meaning to modern-day Cambodians provides a sterilized tourist experience.
tected is severed from the lifeblood of tradition, which is its connection with the experience of everyday life. 161

Moreover, packaging the Angkor sites as a wholly historic experience is likely futile since

[v]ibrant cultures are unlikely to be static but may evolve in response to internal and external stimuli. Not only may attempts to ‘freeze’ culture be doomed to failure in face of global forces of change, such approaches would frustrate the legitimate desires of resident populations to seek improvements in their well-being.162

But perhaps the most compelling argument against “high quality” sustainable tourism is the dire economic situation within Cambodia.163 Traditional value systems remain distorted because of extreme poverty; looters prey on unguarded carvings that were once considered too holy to touch.164 Sex tourism, which has been the bane of tourist policies elsewhere in Asia,165 has already gained more than a toehold in Cambodia.166 Poverty is cited as the primary reason why many families are willing to

162. Geoffrey Wall, Conclusion: Southeast Asian Tourism Connections—Status, Challenges and Opportunities, in INTERCONNECTED WORLDS: TOURISM IN SOUTHEAST ASIA 320 (Peggy Teo et al. eds., 2001). See also Jose-Roberto Perez-Salom, Sustainable Tourism: Emerging Global and Regional Regulation, 13 GEO. INT’L ENV’T’L. REV. 801, 806 (2001) (“[T]ourism development may impair the rights of local people when they are excluded from areas strictly devoted to tourism.”); Graeme Evans, Living in a World Heritage City: Stakeholders in the Dialectic of the Universal and Particular, 8 INT’L J. HERITAGE STUD. 117, 133 (2002) (providing examples of negative impacts of tourism to residents of Quebec, a designated World Heritage City).
163. See supra Part II.B.
164. See French, supra note 10, at 180; Clément, supra note 36, at 140. To its credit, APSARA has successfully reduced the plunder from the Angkor sites, but undiscovered and unguarded temples and archaeological sites continue to be looted. Snay, supra note 125, at 13.
165. See Richter, supra note 150, at 200 (detailing how “sunlust” tourism and the sex trade in several Asian countries has negative effects both in terms of its international reputation and domestic problems of disease, crime and child abuse).
166. See Kathy Marks, British Sex Tourists Turn Killing Fields of Cambodia into Paedophiles’ Playground, INDEP. SUNDAY (London), Jan. 5, 2003, at 15. HIV and AIDS are major health problems in Cambodia, affecting 2.6 percent of all adults. Population estimates given by the CIA Factbook for 2003 were also revised due to the “excess mortality” from this disease. CIA, supra note 39.
sell their young children to the sex trade. Even the pervasive corruption that is a fact of life for Cambodians can be traced to poverty.

VI. PRESCRIPTION: CULTURAL NATIONALISM AND THE GREATER INVOLVEMENT OF THE LOCAL COMMUNITY

The rich countries may look upon development as the cause of environmental destruction, but to us [developing countries], it is one of the primary means of improving the environment of living, of providing food, water, sanitation and shelter, of making the deserts green and the mountains habitable. . . . [The] [e]nvironment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology.

The requirements of “high quality” cultural tourism to the Angkor management plan are an external imposition by the international community. This is understandable given the failed tourism policies of other countries that resulted in environmental degradation and diminished allure to international visitors. However, because of the difficulties of sustainable tourism discussed in Part V, this Note advocates that the international community should have a more deferential approach to a state’s tourism management policies, i.e., that greater weight be afforded to cultural nationalism in developing countries like Cambodia.

First, the principles of internal sovereignty dictate that the Cambodian government’s priorities should lie with its people, despite its obligations under the Convention. The government expects tourism to serve as an

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167. See Marks, supra note 166.
168. See, e.g., French, supra note 10, at 184–85 (mentioning how most temple guards of Cambodia are so poorly paid that they take bribes to supplement their income); Looters Strip Cambodia of its Art, supra note 125 (describing how Cambodian soldiers themselves work alongside looters in decimating unguarded temples and transporting artifacts outside of Cambodia).
169. Anand, supra note 96, at 159–60 (citing India’s Prime Minister, Indira Gandhi, in a speech given to the UN Conference on Human Environment in Stockholm on June 14, 1972).
170. See Winter, supra note 145, at 332 (naming the WTO and UNESCO as the primary forces behind the push for cultural tourism, as opposed to mass tourism, for the Angkor sites).
171. See supra notes 130–34.
172. The notion of internal sovereignty is such that individuals consent to the governance of the sovereign state when the state purports to act on behalf of the people’s welfare. As Brand explains:

In order to escape from the resulting “miserable condition of war,” a sovereign is established through our mutual covenant; and we confer upon the sovereign
important revenue source, in an environment where human and economic capital has yet to fully recover from the losses suffered from internal strife and economic isolation for most of the last century. This Note proposes that the government’s prerogatives in addressing domestic concerns, so long as consented to by its subjects, be given great weight by the international community. Assent by Cambodians is evidenced here by public approval of the government’s initiatives of developing Angkor as a mass-tourist destination. International publicity of the Angkor sites, through filming and commercials, also obtained popular support as locals not only welcomed the added source of income, but also the opportunity to present Cambodia to the world as moving beyond the horrors of the Khmer Rouge. Harnessing tourism in this capacity, to promote the welfare of its citizens, comports with the expectation that the sovereign act in the best interests of the party from whom it obtains its authority from—its citizens.

The second reason in favor of emphasizing cultural nationalism in the management of world heritage sites is that the Convention explicitly respects the sovereignty of the state over properties within its borders. Even though the Convention appears to espouse an internationalist perspective in defining what properties constitute world heritage and how their protection becomes the collective responsibility of the states parties, this is insufficient to justify the dictation of international ideals. Treaty interpretation similarly contains a presumption favoring state sovereignty.

Critics contend that interpreting the Convention to give greater deference to values of cultural nationalism essentially reduces it to a treaty “without teeth” and renders it ineffective in carrying out its objectives.

“all our power and strength,” and “submit [our] wills, every one to his will, and [our] judgments, to his judgments,” so that “he may use the strength and means of [us] all as he shall think expedient, for [our] peace and common defense.”


173. See Winter, supra note 145, at 331.

174. Id. at 331.

175. See supra Part III, IV.C for the relevant provisions of the treaty concerning the retention of state sovereignty over world heritage properties within its territories.

176. See supra note 105.

177. See Anand, supra note 96, at 81–82 for examples of how treaty interpretation principles provide that between two possible interpretations, the presumption is always that of the lesser infringement on state authority.

178. Vernon especially contends that increased intervention rights are necessary, as leaving the impetus to protect World Heritage properties solely on the host state ensures that domestic interests will continue to take priority over cultural preservation:
This is perhaps too harsh of a view as the Convention is intended to serve as a complement to state action.\(^{179}\) States decide which properties it wants to designate for inscription and following that, how they intend to promote the sites’ protection and conservation.\(^{180}\) The WHC thus needs to promote, and not contest, APSARA’s authority over the Angkor sites.

Third, international law in this area has not ripened to the point that the protection of cultural property is prioritized ahead of domestic concerns in all situations. One author’s analysis is that state practice and \textit{opinio juris} indicate that the destruction of cultural property is preferable, or at least acceptable, in certain situations when there is a clear economic benefit that will extend to the greatest number of people and the least harmful measures are taken.\(^{181}\) Another exception to the general rule of

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The assistance provisions need to be expanded to include the right for any State, not just the one where the cultural heritage is situated, to invoke the help and finding of [the World Heritage] Committee. The assistance guaranteed by the committee under the [Convention] cannot be truly protective of common property rights without such recognized intervention provisions.

Vernon, supra note 86, at 469–71. \textit{Cf.} Michael J. Kelly, \textit{Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possession Animo Ferundi/Lucrandi}, 14 \textsc{Dick. J. Int’l L} 31, 44 (1995) (describing how the 1970 UNESCO Convention, which has a provision identical to the World Heritage Convention’s provision that specifically allows states that are parties to define “cultural property” within their territories that is deserving of protection, remains weak and unenforceable because of the great deference given to the state).

179. Article 7 of the Convention provides:

\begin{quote}
For the purpose of this convention, international protection of the world cultural and natural heritage shall be understood to mean the establishment of a system of international co-operation and assistance designed to support States Parties to the Convention in their efforts to conserve and identify that heritage.
\end{quote}

\textit{World Heritage Convention, supra note 55, art. 7} (emphasis added).

180. \textit{See supra} note 74.

181. As an example, Wangkeo points to Egypt’s construction of the Aswan High Dam in the 1950s. The Aswan Dam was expected to provide a major boost to local agriculture by ensuring a more stable water supply—instead of the traditional reliance on the annual flooding of the Nile River—for the irrigation of crops. Construction of the dam meant that countless monuments and artifacts would be lost, including the temples of Abu Simbel and Philae Island, both of which were unique and irreplaceable. Besides this great loss of cultural property, tens of thousands of Nubians also risked displacement. Egypt appealed to the international community to explore and excavate artifacts in the water’s path, and bestowed in its gratitude temples and other artifacts to states that helped. There was no real outcry over the destruction of temples and artifacts as the international community perceived the economic necessity for the Aswan High Dam as genuine, and that Egypt undertook great efforts to save as much of the cultural property as it possibly could. Wangkeo, \textit{supra} note 117, at 202–15.
the preservation of cultural property is granted for military necessity.\(^\text{182}\) On the other hand, intentional destruction of cultural property is almost universally rejected when it is undertaken because of iconoclasm\(^\text{183}\) or as a way to subjugate a people.\(^\text{184}\) For Cambodians, the harsh reality is that poverty makes high quality cultural tourism a luxury they likely cannot afford.\(^\text{185}\) As one critic notes, “privileging cultural heritage over progress and prosperity is feasible only after a minimum level of affluence has been achieved.”\(^\text{186}\) Thus, until the standard of living of Cambodians as a whole reaches this threshold, strong moral imperatives exist to prioritize human needs over cultural protection.

Although it may seem counterintuitive, cultural nationalism applied in Cambodia’s case actually dovetails with a different aspect of international law, which is the respect for human rights. The Angkor sites embody not only a shared cultural identity of a defined group,\(^\text{187}\) but are also part of the religious identity of the Cambodian people.\(^\text{188}\) As such, collective ownership of the sites exists among Cambodians, and these rights bestow on them a voice in its management. Human rights agreements provide for the protection of these cultural and religious rights.\(^\text{189}\) Moreover, international law supporting human rights remains more established than cultural internationalism,\(^\text{190}\) and provides support for the

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182. See Detling, supra note 111, at 73.
183. See Wangkeo, supra note 117 and accompanying text.
184. See, e.g., Detling, supra note 111, at 74–75 (calling on increased intervention rights for cultural properties endangered in internal armed conflicts when parties intentionally damage these properties to psychologically affect their adversaries). See also Wangkeo, supra note 117, at 215–20 (describing the international outcry following the destruction of Bucharest and many other Romanian villages to implement Marxist policies. States saw through the “systemization” land reform policies of the Ceausescu government, and decried the real political motive behind the government’s actions: to punish those who resisted Communism in Romania).
185. See supra Part II.B.
187. The Khmers, the culture that gave rise to the Angkor sites, make up 90 percent of the current Cambodian population. CIA, supra note 39.
188. Buddhism was one of the religious influences of the classic Khmer period and to this day remains the predominant religion of the Cambodian people, claiming 95 percent of the population as practitioners. Id.
190. See, e.g., Delbruck, supra note 115, at 713–14 (documenting several shifts in international law, including the growing acceptance of fundamental human rights, following the Cold War).
proposition that states, and not the international community, retain sovereignty over religious cultural properties.

Finding that cultural nationalism prevails over cultural internationalism does not necessarily imply the erosion of the concept of world heritage. The ideals of world heritage and the need to protect them are real indeed. In this way, the WHC’s achievements cannot be overstated. The WHC has and continues to provide financial and technical support for world heritage protection to states that otherwise do not have the means nor the wherewithal to do so.\textsuperscript{191} Besides direct support, WHC provides needed publicity to sites that otherwise would be neglected.\textsuperscript{192} The WHC, in its capacity, should continue in its position to provide assistance instead of levying unrealistic expectations of preservation that may work at the expense of local communities.

The WHC needs to design a better framework to guide international intervention for world heritage protection, which recognizes the legitimate claims of the international community while keeping in mind that indigenous peoples have the first claim to their cultural heritage.\textsuperscript{193} It is unfounded at best, and patronizing at worst, to say that the indigenous people’s superior claim jeopardizes world heritage ideology, as these peoples are more interested in preservation rather than ownership.\textsuperscript{194} However, protectionism must be allowed to give way when real domestic necessity requires some sacrifice of cultural property.\textsuperscript{195}

\begin{footnotesize}
\begin{enumerate}
\item See supra notes 59–60.
\item Kunich aptly describes this particular effect of World Heritage Site designation:

\textit{An international legal instrument such as the [World Heritage Convention], buttressed by numerous signatories the world over, has the elusive if not unique capability to confer upon [natural and cultural properties] the imprimatur of official recognition as a World Heritage resource in danger. Indeed, this is one of the chief virtues of international law—the capacity to apotheosize a previously obscure cause, transforming it into a \textit{cause celebre}. It is this aura of official status and legitimacy, coupled with ready access to news media, that vests the [Convention] with the power to transform the collective will of the people, more so than most books, articles, speeches, paid advertisements, or television programs.}


\item See Guruswamy, Roberts & Drywater, supra note 92, at 741 (advocating for treating indigenous peoples, who are the owners of cultural properties, as stewards of the international community).

\item \textit{Id.}

\item One proposal is given by Wangkeo: “In all situations, parties should incorporate three principles into their decision making [on the destruction of cultural property during peacetime]: (1) there should be a presumption against destroying relics; (2) actors should
\end{enumerate}
\end{footnotesize}
Another criticism of upholding the state’s sovereignty over cultural sites is that this may lead to the perception that governments acquire the benefits of inscription, but on the other hand also grant a free license for exploitation of the sites. This does not necessarily follow as long as the local community retains a voice in the management plans of cultural property.

To wit, proponents of sovereign control over cultural sites call for more local involvement in the shaping of tourism policies beyond just being a cheap source of labor for the industry. Cambodians, because of their involvement with the Angkor sites at many levels—culturally, spiritually and financially—understand that they need to have sound management policies in place and should be trusted to make wise choices in Angkor’s tourist policies. One example is the encouragement of locals’ participation in the Nepal park system’s development, where input from the community is used in “resource decisions, recoupment and local distribution of revenues from tourism, and linkages between preservation and sustainable community development opportunities.”

APSARA’s priorities in the employment of locals both for short-term, low-skilled projects, as well as for medium-range positions involving stable jobs in public works, reforestation and tourist services are the correct approach in involving the community. Long-term projects should focus on empowering the Cambodians to take over preservation efforts after the inevitable withdrawal of the ICC. “High quality” standards only focus on properties of worldwide significance; and (3) the needs of living people should always come first.” Wangkeo, supra note 117, at 273–74 (emphasis added).

196. Richter offers this prescription for responsible tourism policies:

> [H]osts and guest populations need to not only be considered in the planning for their successful co-existence, they must come to positively value each other if tourism is to be a stable and long-term component of the economy. . . . Too often only the tourist is considered and then only in terms of comforts most already enjoy in abundance at home. The local population is seen only narrowly as a source of labor supply.

Richter, supra note 150, at 181.

197. See Brian Goodall & Mike Stabler, Sustainable Tourism and the Community, in TOURISM AND SUSTAINABLE COMMUNITY DEVELOPMENT 79 (Derek Hall & Greg Richards eds., 2000) (suggesting that the potential exists for community-based approaches to reduce tourism’s impact on the natural, social and cultural environment).


200. One example of this is the training of handpicked locals for restoration work by the archaeological team from Sophia University in Japan. After on-site training work,
should apply not only to tourists, but to the diversity of opportunities available to Cambodians as well.201

APSARA must not abandon its role as a regulatory agency202 and as a liaison between the Cambodians and the international community.203 The interdisciplinary approach to tourism is a wise policy as it attempts to include local concerns as much as possible.204 Community education on the principles of sustainability is essential for Cambodians in making smart choices for Angkor’s future.205

VII. CONCLUSION

A decade of successful preservation efforts of the Angkor sites by Cambodia and the international community has yielded a dilemma between competing tourist policies. Seeking to continue protection of the sites, the international community expects Cambodia to adopt high-quality, sustainable tourism. Meanwhile, domestic pressures exist for the government to encourage mass tourism. In light of extenuating economic conditions, the government’s responsibilities to its people should remain paramount over protectionist ideals and the community’s voice should not be disregarded in the international community’s quest to protect world heritage.

Maria Aurora Fe Candelaria

some of the students earned scholarships and pursued graduate courses in Japan. Upon their return they are given directorship positions in site management. Yoshiaki Ishizawa, Human Resources and Cultural Development: A Case Study of the Angkor Monuments, 54 MUSEUM INT’L 50, 53 (2002).

201. See Richter, supra note 150, at 191–92 for a poignant account by Cecil Rajendra illustrating how community dissatisfaction and resentment proliferate when poorly planned tourism policies relegate locals to low-paying service jobs with no room for advancement.

202. Jenkins, supra note 124, at 63.

203. Barre, supra note 49, at 129.

204. Lemaistre & Cavalier, supra note 53, at 123.

205. Id.

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RECOVERING IRAQ’S CULTURAL PROPERTY: WHAT CAN BE DONE TO PREVENT ILLICIT TRAFFICKING

I. INTRODUCTION

After the fall of Saddam Hussein’s regime in Iraq in April 2003, Iraqi citizens engaged in widespread looting. The lawlessness in the aftermath led looters to raid government buildings, libraries, schools, thousands of archaeological sites, and even burn down the National Library. The most publicized and controversial looting occurred at the Iraqi National Museum. United States forces were unable to secure the Museum until April 16, when tanks finally arrived. While initial reports

3. The looting created controversy because many critics of Coalition military planning argued that the protection of the Oil Ministry appeared to take priority at the time. See Catherine Phuong, The Protection of Iraqi Cultural Property, 53 INT’L & COMP. L.Q. 985, 985 (2004). Such charges of neglect even prompted the Chairman of the President’s Advisory Committee on Cultural Property, Martin E. Sullivan, to resign. Sullivan stated in his resignation: “While our military forces have displayed extraordinary precision and restraint in deploying arms—and apparently in securing the Oil Ministry and oil field—they have been nothing short of impotent in failing to attend to the protection of [Iraq’s] cultural heritage.” Paul Richard, Bush Panel Members Quit Over Looting; Cultural Advisors Say U.S. Military Could Have Prevented Museum Losses, WASH. POST, Apr. 17, 2003, at C1. The United States military responded by arguing that given the history of the previous Gulf War, in which Saddam Hussein ordered the burning of oil fields, the protection of the Oil Ministry and the oil fields was a high priority. Additionally, the military claims that it was unable to secure the Museum because enemy fire was coming from the vicinity. Yaraslov Trofimov, Iraq After Hussein: Officials Say Iraq Looting Wasn’t as Bad as First Feared, WALL ST. J., Apr. 17, 2003, at A8.

[The military] couldn’t move into the museum compound and protect it from looters last week because . . . soldiers were taking fire from the building and were determined not to respond. There is an Iraqi army trench in the Museum’s front lawn, and Lt. Col. Schwartz said his troops found many Iraqi Army uniforms inside. “If there is any dirty trick in the book,” he said, “they sure used it.”

Id.
estimated that over 170,000 pieces were missing from the Museum, this figure was later shown to be mistaken. Museum directors had taken it upon themselves to secure and hide most of the Museum items. However, looters did make off with over 13,000 items. Priceless ancient artifacts such as the Warka Vase were stolen from the Museum. An amnesty program initiated by the United States military proved to be somewhat successful and, by September 2003, over 3,000 pieces had been recovered including the Warka Vase. Through the efforts of a broad coalition of international organizations and countries, including the United Nations Educational, Scientific and Cultural Organization, the International Criminal Police Organization, and the United States, as of June 2004, roughly 5,200 items had been recovered in six different coun-

5. Over 170,000 artifacts were mistakenly reported missing after Saddam Hussein's downfall. The estimate was so high because Western journalists arrived at the museum to find it virtually empty. Later on it was discovered that the museum staff had moved most of the artifacts into storage in anticipation of the looting. Roger Atwood, Stop Thieves! Recovering Iraq’s Looted Treasures, WASH. POST, Oct. 3, 2004, at B2.


7. According to the Bogdanos Investigation, the Warka Vase is “an exquisite white limestone votive vase dating from approximately 3200 B.C.E. and arguably the most significant artifact possessed by the museum.” Id.

8. Almost half of these recovered items were returned by Iraqis under the amnesty program. Id. The amnesty program was created by Col. Bogdanos and his team. They met with local imams and community leaders to help them explain to Iraqis the extent of the amnesty program. The team initially struggled with the perception among the Iraqi people of the Museum’s connection to the former Hussein regime and a lack of trust in the “no questions asked” policy. Bogdanos reports that eventually the program proved to be successful and Iraqis desired to return items to the U.S. forces for safekeeping until a new Iraqi government was installed. Id.


10. The International Criminal Police Organization (Interpol), created in 1923, is the world’s largest international police organization with 182 member countries. It facilitates cross-border police cooperation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat international crime. Introduction to Interpol, http://www.interpol.net/Public/Icpo/introduction.asp.
tries.\textsuperscript{11} Despite these efforts, widespread instances of looting are still plaguing Iraq, particularly at archaeological sites throughout the south.\textsuperscript{12}

The efforts of UNESCO, Interpol, and the many participating nations should be applauded and may be successful in the short term. However, the long-term aspiration should be for more countries to join and enforce the existing treaties and conventions established to protect cultural property during armed conflicts and prevent the illegal distribution of stolen cultural items. There are three such international agreements in place: The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,\textsuperscript{13} the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,\textsuperscript{14} and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.\textsuperscript{16} By increasing the number of State Parties to these agreements, it may be easier to stop illicit trafficking of stolen goods by having a uniform customs and borders system. However, these Conventions have been virtually ineffective in dealing with the current crisis in Iraq.

\begin{thebibliography}{16}
\bibitem{Italy} For example, Italy has confiscated more than three hundred pieces looted from the Museum. Jordan, which has worked the hardest among Middle Eastern countries to prevent itself from being used as a transshipment point, had seized 1,054 pieces by June 2004. Atwood, \textit{supra} note 5.
\bibitem{Iraq} Charlotte Eagar writes about the ongoing problem of looting archaeological sites throughout Iraq:

The real scandal is not theft from institutions, which are under 24-hour guard, but the plundering of Iraq’s most ancient archaeological sites. Freelance excavators are hunting not for grand artifacts, but instead seals, inscriptions and earthenware—Iraqi treasures which still lie, undiscovered in the earth.

\bibitem{UNIDROIT} The International Institute for the Unification of Private Law (UNIDROIT) is an independent, intergovernmental organization based in Rome. The Institute was established in 1926 by the League of Nations. Following the demise of the League, UNIDROIT was reestablished in 1940, on the basis of a multilateral agreement. About Unidroit, \url{http://www.unidroit.org/english/presentation/main.htm} (last visited Sept. 28, 2005).
\bibitem{UNIDROIT} UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1330 [hereinafter UNIDROIT Convention].
\end{thebibliography}
This Note will demonstrate that the Conventions and treaties established for the protection of cultural property do little to remedy the crisis in Iraq. It will argue that the most effective way to curb illicit trafficking of cultural property is for States to not only join existing treaties but to implement stringent domestic legislation to eliminate a burgeoning market for such goods. 17 Furthermore, this Note will argue that because of the potential of further military intervention by the United States and the United Kingdom, it is necessary for these countries to join the 1954 Hague Convention and its Protocols in order to prevent future disasters to cultural property. Part II of this Note will discuss the history of protecting cultural property, particularly in times of armed conflict. It will discuss the creation of UNESCO and examine the three existing Conventions established to protect cultural property in times of both peace and war. Part III of this Note provides background on the history of looting and destruction of cultural property in the Middle East and then focuses on the widespread damage done throughout Iraq in the aftermath of the fall of Saddam Hussein. Part III will also examine the immediate international response and its effectiveness. Part IV analyzes effectiveness of the three existing conventions and their applicability to the situation in Iraq. Part V discusses the United Nations Security Council Resolution requiring member states to implement legislation to prevent the illicit trafficking of Iraqi cultural property. 18 It will argue that this is an effective technique and that strong domestic legislation is a useful remedy.

II. BACKGROUND

A. Historical Background of Protection of Cultural Property

The first legal reference to the protection of cultural property during armed conflict can be found in the Instruction for the Government of Armies of the United States in the Field, 19 also known as the “Lieber

17. The United States has two bills currently proposed in both the House of Representatives and the Senate. The Iraq Cultural Heritage Protection Act was introduced on May 7, 2003 in the House, and the Senate proposed the Emergency Protection for Iraqi Cultural Antiquities Act of 2003 on June 19, 2003. The United Kingdom adopted the Iraq Order 2003 on June 12, 2003. See infra Part V.

18. The United Nations Security Council passed Resolution 1483 on May 22, 2003. The Resolution required all Member States to take action to facilitate the return of Iraqi cultural property by enacting a ban on the transfer of such items. See infra Part V.

Article 34 of the Lieber Code states that cultural property should be treated as private property unless used for a military purpose. Artwork and other more traditional aspects of cultural property are protected under Article 35 of the Lieber Code. The Lieber Code is significant in that it places the duty to protect cultural property on both the attacker and the defender, and lays the foundation for subsequent international treaties.

Concern over protecting private property during armed conflict gave rise to the first international treaties providing protection for cultural property, the 1899 and 1907 Hague Conventions which produced a codified rule of war. Both Conventions prohibit invading armies from pillaging and require them to respect the civil laws of the conquered territory. Article 27 of the 1907 Convention provides that protection must be given to all religious, scientific, and historic monuments.

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20. The code was prepared by Francis Lieber. Lieber was a German-American political philosopher who, during the Civil War, authored the Instructions for the Government of Armies of the United States in the Field. The Columbia Encyclopedia (6th ed. 2001–2005).

21. Lieber Code art. 34 (“As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of fine arts, or of a scientific character—such property is not to be considered public property.”).

22. Lieber Code art. 35 (“Classical works of art, libraries, scientific collections, or precious instruments . . . as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”).


26. Andrea Cunning, The Safeguarding of Cultural Property in Times of War and Peace, 11 Tulsa J. Comp. & Int’l L. 211, 215 (2003) (“The concern over protecting private property became more of an international concern as a nation’s capability to conduct war was increased by many of the effects of the industrial revolution and warfare became more violent and destructive.”).

27. Id.

28. 1907 Hague Convention on Laws and Customs of War on Land art. 37 (“In sieges and bombardments, all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments,
buildings or monuments are to be marked by visible signs.\(^{29}\) Aside from protection of military strikes against cultural property, Article 56 of the 1907 Hague Convention also expressly forbids the seizure, destruction or willful damage of such property, and even provides for legal proceedings in case of a violation.\(^{30}\) Together, Articles 27 and 56 were designed to protect both the buildings and the cultural property within them.

Although the 1899 and 1907 Hague Conventions failed to protect cultural property during World War I, they were significant with respect to reparations. The Treaty of Versailles provided for the enforcement of the two Hague Conventions by requiring Germany to return to France all artwork and other cultural objects stolen during the course of the war.\(^{31}\) Although there were no prosecutions for damaging cultural property after World War I, the acts of plunder and destruction were condemned as violations of international law.\(^{32}\) This condemnation, combined with restitution procedures after the conflict, represented significant steps toward a clearer vision of international protection of cultural property. Unfortunately, wide-scale destruction and pillaging of cultural property occurred once again throughout World War II, further highlighting the need for more authoritative measures.\(^{33}\)

\(^{29}\) “It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.”

\(^{30}\) 1907 Hague Convention art. 56 (“All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”).

\(^{31}\) Peace Treaty of Versailles art. 245, June 28, 1919 (“The German Government must restore to the French Government the trophies, archives, historical souvenirs or works of art carried away from France by the German Authorities in the course of the war of 1870–1871 and during this last war . . . .”)

\(^{32}\) These acts were condemned as violations of international law in the sense that they were violations of the 1899 and 1907 Hague Conventions. The spirit of these two conventions was incorporated into the Treaty of Versailles. “The principle of protection from the Hague Relations of 1899 and 1907 was given practical effect in the Treaty of Versailles, and the restitution of cultural property . . . represents an important advancement.” Keane, supra note 23, at 8. Additionally, the 1907 Convention was explicitly recognized as customary international law in 1946 by the International Military Tribunal at Nuremberg. Adam Roberts & Richard Guelff, Documents of the Laws of War 43 (2d ed. 1989).

\(^{33}\) Cunning, supra note 26, at 220.
B. History of UNESCO

The United Nations Educational Scientific and Cultural Organization (UNESCO) was founded on November 16, 1945. Since its inception, UNESCO has worked diligently to protect the natural and cultural heritage of humanity and prevent the illicit trafficking of cultural artifacts. UNESCO conducted its first international campaign in 1959 when it helped the Egyptian government safeguard the Abu Simbel temples in the Nile Valley from flooding. UNESCO has built a legal foundation for its cultural action, beginning with the creation of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict in 1954, followed by the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property in 1970. UNESCO also helped create the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects in 1995. UNESCO responded almost immediately to the antiquities crisis in Iraq.

34. Constitution of the United Nations Educational, Scientific and Cultural Organization art. 1, Nov. 16, 1945, http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html (“The purpose of the organization is to contribute peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.”).

35. Sarah Cattan, The Imperiled Past: Appreciating Our Cultural Heritage, UN CHRONICLE, Dec. 2003/Feb. 2004, at 7–12; see also UNESCO Constitution art. 1 § 2(c) (“By assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions.”).

36. Cattan discusses UNESCO’s first effort at preserving cultural property in Egypt:

These treasures of ancient Egyptian civilization were threatened by flooding caused by the destruction of the Aswan High Dam. With some fifty countries donating half of the $80 million necessary for the rescue, the campaign was an unexpected success. The temples were dismantled, moved to dry ground, reassembled and eventually saved. This demonstrated that the conservation of the world’s common heritage concerned all countries and encouraged UNESCO to give legal support to the global movement.

Cattan, supra note 35, at 7.


38. UNESCO Convention, supra note 14.

39. UNIDROIT Convention, supra note 16.
by working together with the United States, Interpol, and many other organizations to restore Iraq’s cultural heritage.40

**C. 1954 Hague Convention**

The large-scale destruction and looting during World War II41 prompted a need for a protective treaty for the tangible remains of both ancient and modern cultures.42 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was implemented by UNESCO in 1954 to protect cultural heritage in war-torn countries.43 The express purpose of the Hague Convention was to prevent the types of destruction and theft of cultural material that have become common in modern warfare.44 The Hague Convention was based on the premise that cultural property is significant to all human kind and is therefore deserving of appreciation and protection.45 The Hague Convention was unique in that it was the first international document to define the term “cultural property.”46

41. See Keane, *supra* note 23, at 8–12 (discussing the “system of organized plunder of both public and private property throughout the invaded countries of Europe during World War II.” The Nazis stole more than 21,000 art objects from museums, libraries, and private homes).
43. Cattan, *supra* note 35.
44. Neil Brodie, *Focus on Iraq: Spoils of War, Archaeology*, July/August 2003. Mr. Brodie believes that this is a “strong piece of legislation” that, if acceded to, would circumvent many looting problems created by warfare.
45. Lehman, *supra* note 42, at 532. See also Hague Convention, *supra* note 13, pmbl. (“Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the world.”).
46. Hague Convention, *supra* note 13, art. 1, defines cultural property as:

a. movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical, or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

b. buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges in-
The Hague Convention imposes upon states a minimum standard of respect for cultural property both in their territory and the territory of others. The main obligation imposed on parties is to prohibit and prevent any form of theft, pillage, vandalism, or misappropriation of cultural property. The most significant part of the Hague Convention concerns the responsibility of armed forces to protect the cultural property of other territories. An occupying power’s duty to protect cultural property and prevent illicit trade applies whether or not the occupied country has signed the convention. Furthermore, even if an occupied country has failed to protect its own cultural property as required under Article 3, the occupier must still take all necessary measures to protect that property. This obligation emphasizes the global responsibility for cultural property, not just the relation between a certain state and its property.

Although the Convention effectively promotes awareness and respect for cultural property during military conflicts, it does not adequately address the illicit trafficking of such items during peacetime nor does it provide any remedies for their return. Another problem is the lack of any true enforcement measures. This is illustrated by the fact that State Parties, while called on to prosecute and impose penal sanctions on violators, are left to create their own laws and punishments. This leads to an inconsistency of domestic laws and systems that prosecute the damag-
ing and trafficking of cultural property. Subsequent treaties have attempted to solve these deficiencies. Although the Hague Convention currently has 114 State Parties, the United States and the United Kingdom are both conspicuously absent. The United States and United Kingdom have both refused to ratify the convention since 1954 because the Hague Convention would limit their capacity to use nuclear weapons. Even without the United States and the United Kingdom, the Hague Convention draws a significant following throughout the world with the help of UNESCO and other world organizations.

In response to barbaric acts against cultural property that occurred during armed conflicts in the late 1980s and early 1990s, UNESCO initiated negotiations for a new convention. The initiative for the Second Protocol came largely out of the destruction of cultural property during the conflict in the former Yugoslavia. Keane argues that the 1954 Hague Convention was proved to be inadequate by the conflict in the former Yugoslavia. Yugoslavia was a High Contracting Party of the 1954 Hague Convention. Under Article 19 of the Hague Convention, a High Contracting Party is bound to the provisions of the Convention that respect cultural property. Keane writes:

Indeed, it is clear that cultural property was the subject of deliberate attack throughout the conflict. In response to charges of deliberate destruction of cultural property, the Yugoslav federal government claimed its attacks were justified under military necessity. Similarly, the Serbs cited the defense of imperative military necessity for the shelling of Dubrovnik. They claimed that Croats were using buildings in the city center for military purposes. Such use is prohibited by the 1954 Hague Convention under the requirement of respect for cultural property contained in Article 4.

Id. at 22. Additional damage was done to religious sites, which are not protected under the 1954 Hague Convention. Thirty percent of the city of Dubrovnik’s historic center was destroyed in attacks on December 6, 1991. The practice of targeting religious institutions and cultural property was part of an “ethnic cleansing” campaign conducted by the Serbs. After hostilities ceased, the United Nations established a war crimes tribunal, the Statute of the International Tribunal for the Former Yugoslavia (ICTY), which recognized the destruction of cultural property as a violation of international law. The ICTY handed
ated a review of the Hague Convention to improve its perceived deficiencies. This review began in 1991 in order to create a new agreement to improve the Hague Convention by taking into account the experience gained from conflicts and the development of cultural property law since 1945. The result was the Second Protocol to the Hague Convention, adopted at a Diplomatic Conference held at The Hague in 1999. The Second Protocol elaborates the goals of the Hague Convention and makes attempts to further protect cultural property. More specifically, the Second Protocol creates a new form of “enhanced protection” for cultural property. The system of enhanced protection in the Second Protocol removes the geographical restrictions of the 1954 Hague Convention by allowing for protection of cultural property located near industrial centers. The Second Protocol also establishes a common fund
down two indictments for the destruction of cultural property against two high ranking Serbian officials, Radovan Karadzic and Ratko Mladic.

Five areas were identified by UNESCO to be addressed in the Second Protocol: (1) the institutional aspects, (2) the precautionary measures taken in peace time, (3) the “military necessity” exception, (4) the system of special protection, and (5) individual criminal responsibility. Id. at 27.


Id.


Cultural property achieves enhanced protection if it is vital to humankind, is protected by domestic law, and is not used for military purposes. Id. Second Protocol, supra note 63, art. 10 states:

Cultural property may be placed under enhanced protection provided that it meets the following three conditions:

a. it is cultural heritage of the greatest importance to humanity;

b. it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection;

c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.

The restrictions are articulated in the Hague Convention, supra note 13, art. 8(1)(a):
to provide financial assistance to State Parties for the protection of cultural property during both times of peace and armed conflicts. This provision has enormous potential to combat the destruction of cultural heritage because many poor nations that lack the financial resources to protect their cultural property can draw upon the fund established by the Second Protocol.

The Second Protocol also specifies what constitutes serious violations of the Protocol and defines the conditions under which individual criminal responsibility shall apply. The Second Protocol imposes on its State Parties the obligation to adopt necessary measures to establish these violations as criminal offenses under domestic law. However, signifi-

That there may be placed under special protection a limited number of refuges intended to shelter movable cultural property in the event of armed conflict provided that they are situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, a broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication.

66. Second Protocol, supra note 63, art. 29. This fund is managed by the Committee for the Protection of Cultural Property in the Event of Armed Conflict established in Article 24 of the Second Protocol. This Committee is composed of twelve experts who are qualified in the field of cultural heritage and are elected by the State Parties. The functions of the Committee, set forth in Article 27, include developing guidelines for the implementation of this Protocol, suspending or canceling enhanced protection for cultural property, and receiving and considering requests for international assistance.

67. Cunning, supra note 26, at 237.

68. Second Protocol, supra note 63, art. 15(1):

Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

a. Making cultural property under enhanced protection the object of attack;
b. Using cultural property under enhanced protection or its immediate surroundings in support of military action;
c. Extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
d. Making cultural property protected under the Convention and this Protocol the object of attack;
e. Theft, pillage, or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.

69. Second Protocol, supra note 63, art. 15(2):
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cantly, it still fails to make any uniform laws regarding the illicit trafficking of cultural property, instead requiring States to create their own such laws.\textsuperscript{70} Thus, there is still no uniform enforcement measure. Therefore, the Second Protocol, although an overall improvement, remains ineffective as a means to prevent and stop the illicit trafficking of cultural property. The Second Protocol has also struggled with ratification.\textsuperscript{71} To date, only twenty countries have ratified the Second Protocol, with Spain being the only Western European country, and the United States yet to even sign it.\textsuperscript{72}

D. UNESCO Convention

UNESCO instituted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property in 1970 in response to a rash of antiquities thefts.\textsuperscript{73} The UNESCO Convention provides a framework for nations to cooperate to reduce the incentive for pillage of archaeological and cultural material.\textsuperscript{74} As of March 2005, 107 countries have signed the Convention.\textsuperscript{75}

Each party shall adopt such measures as may be necessary to establish as criminal offenses under its domestic law the offenses set forth in this Article and to make such offenses punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

\textsuperscript{70} The Second Protocol requires:

\begin{itemize}
  \item[a.] any use of cultural property in violation of the Convention or this Protocol;
  \item[b.] any illicit export, other removal, or transfer of ownership of cultural property in violation of the Convention or this Protocol.
\end{itemize}

\textit{Id.} art. 21.


\textsuperscript{72} Id.

\textsuperscript{73} Lehman, \textit{supra} note 42, at 538.

\textsuperscript{74} Id.

\textsuperscript{75} List of states that are parties to the UNESCO Convention, http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha (last visited Sept. 29, 2005).
national treasures and is the major international treaty for the protection of cultural property. The long term purposes of the UNESCO Convention are to protect the knowledge that can be derived from archaeological material that is scientifically excavated and to preserve ethnographic material that remains in its societal context. The overall benefit of the international cooperation within the Convention is a greater understanding of our common heritage. Thus it is similar to the Hague Convention in recognizing the importance of cultural property and heritage. Both Conventions also require that parties list the items which they believe fall under the definition of cultural property. The Hague Convention strictly defines the forms of cultural property that may receive enhanced protection. The UNESCO Convention, however, is much more open-ended, leaving it within the discretion of the parties to determine what property falls within the definition of cultural property. Unlike the Hague Convention, however, which focuses primarily on armed conflict, the UNESCO Convention deals almost entirely with private conduct, mostly during peacetime. The two Conventions overlap at times, particularly at the conclusion of an armed conflict.

76. Lehman, supra note 42, at 538.
77. UNESCO Convention, supra note 14, pmbl. (“The interchange of cultural property among nations for its scientific, cultural, and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.”).
78. Lehman, supra note 42, at 540.
80. See UNESCO Convention, supra note 14, art. 1; see also Hague Convention, supra note 13, art. 8.
81. Hague Convention, supra note 13, art. 8.
82. See UNESCO Convention, supra note 14, art. 1.
84. Andrea Cunning discusses the relationship between the two conventions: The UNESCO Convention is complimentary to the 1954 Hague Convention in that the two documents work together to protect cultural property in time of peace and in the event of armed conflict. Often the two agreements overlap due to the fact that most claims for repatriation of cultural property are brought in times of peace at the conclusion of an armed conflict and many countries that have not provided implementing legislation for the 1954 Hague Convention may have implemented the UNESCO Convention regarding the return of stolen cultural property.

Cunning, supra note 26, at 226.
The UNESCO Convention takes significant measures to prevent the illicit trafficking of cultural property. The Convention explicitly prohibits the importation of cultural property illegally exported or stolen from a foreign nation.85 Free-market nations are somewhat reluctant to join the Convention because they believe that it lacks adequate protection for good faith purchasers.86 The UNESCO Convention has specific obligations with regards to exporting and importing cultural objects.87 The Convention imposes upon exporting states the obligation to issue authorized certificates to show that the exported property was fully sanctioned.88 Along with this certification process, the UNESCO Convention requires State Parties to ensure that museums within their territory do not acquire cultural property illegally exported from another State Party.89 Perhaps most importantly, Article 7(b) of the Convention prohibits the importation of cultural property stolen from museums and other public monuments and institutions in another State Party, provided that such cultural property is documented as belonging to that particular institution.90

85. UNESCO Convention, supra note 14, art. 3.
86. Only recently did France, the United Kingdom, and Japan become State Parties. Borke, supra note 83, at 409. Borke explains that market nations have been slow to accede to the UNESCO Convention out of reluctance to restrict their art markets. Id.
87. UNESCO Convention, supra note 14, arts. 6–7.
88. The State Parties to the UNESCO Convention undertake:
   a. to introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations;
   b. to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned expert certificate;
   c. to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property.

Id. art. 6.
89. The State Parties to the UNESCO Convention agree:
   To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after entry into force of this Convention in both States.

Id. art. 7(a).
90. Id. art. 7(b)(i).
Archaeological materials are dealt with separately in Article 9. However, Article 9 only envisages enhanced cooperation between State Parties should a State Party’s archaeological materials be in danger of being pillaged. If an agreement is not reached, the property may not be protected under the Convention. Therefore, if cultural property is not fully documented as a museum or institutional piece, the UNESCO Convention does not provide an adequate mechanism to compel restitution.

Although the UNESCO Convention represents a significant attempt to curtail illicit trafficking of cultural property, it falls short in its overall effectiveness because of a lack of uniformity in legal recourse. As with the Hague Convention, it allows states to apply their own substantive law regarding cultural property. This lack of uniform structure renders the UNESCO Convention ineffective as a means of solving the problem of illicit trafficking.

E. UNIDROIT Convention

The third primarily international agreement in this area, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 aims to establish common legal rules for the restitution and return of cultural objects between State Parties to the Convention. The

91. Id. art. 9 (“Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other State Parties who are affected. The State Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irretrievable injury to the cultural heritage of the requesting State.”).

92. Phuong, supra note 3, at 990.

93. The UNESCO Convention requires states to “take necessary measures, consistent with national legislation.” UNESCO Convention, supra note 14, art. 7. Article 8 of the Convention requires States to impose sanctions on persons who deal with stolen cultural property, but does not require States to criminalize such conduct. By allowing States to impose their own laws, an inconsistency is created which makes combating illicit trade very difficult. See id. art. 8.

94. Lehman, supra note 42, at 541.

95. UNIDROIT’s purpose is to study means and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States. See “Purpose” of UNIDROIT, http://www.unidroit.org/english/presentation/main.htm. See also UNIDROIT Convention, supra note 16, pmbl. (“Determined to contribute effectively to the fight against illicit trade in cultural objects by taking the important step of establishing common, minimum legal rules for the restitution
fundamental tenet of the UNIDROIT Convention is that the possessor of stolen property should return it to the original private owner. 96 The UNIDROIT Convention seeks to correct the failings of the UNESCO Convention by shifting the focus onto recipients in wealthy nations rather than counting on developing countries to police their own borders. 97 It does this by creating a single harmonized source of law which requires any form of artifact deemed a piece of cultural property to be returned even if theft cannot be proven. 98 Additionally, the UNIDROIT Convention enables private claims to be pursued in national legal systems. 99 Whereas the UNESCO Convention allows only State Parties to request restitution of stolen or illegally exported objects, the UNIDROIT Convention allows private individuals to initiate restitution procedures. 100

96. UNIDROIT Convention, supra note 16, art. 1:

This Convention applies to claims of an international character for:

a. the restitution of stolen cultural objects;

b. the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of promoting its cultural heritage.

97. Lehman, supra note 42, at 543. See also Phuong, supra note 3, at 992 (“Since the 1970 UNESCO Convention was criticized for not being sufficiently specific, UNESCO requested the UNIDROIT to work on a supplementary convention on stolen or illegally exported cultural objects.”).

98. UNIDROIT Convention, supra note 16, ch. III. This provision allows a Contracting State to merely claim that the object was illegally exported in order to demand its return. Theft need not be proven.

99. Under the UNIDROIT Convention:

(1) A claim under Chapter II and a request under Chapter III may be brought before the courts or other competent authorities of the Contracting State where the cultural object is located, in addition to the courts or other competent authorities otherwise having jurisdiction under the rules in force in Contracting States.

(2) The parties may agree to submit the dispute to any court or other competent authority for arbitration.

(3) Resort may be held to the provisional, including protective, measures available under the law of the Contracting State where the object is located even where the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State.

Id. art. 8.

100. Id. arts. 2, 8.
Another area covered by the UNIDROIT Convention which improves upon the UNESCO Convention concerns the trafficking of archaeological artifacts.\textsuperscript{101} The UNIDROIT Convention covers unlawfully excavated, or lawfully excavated but unlawfully retained cultural objects.\textsuperscript{102} Unlike the UNESCO Convention, it does not require museum certification from the country of origin. Moreover, the convention provides that a bona fide purchaser of stolen items does not receive good title.\textsuperscript{103} Instead, the Convention requires that the purchaser return it, and upon return is entitled to “payment of fair and reasonable compensation,” provided that he had no knowledge of it being stolen and he exercised due diligence upon acquiring the object.\textsuperscript{104} Thus, there is a good faith requirement in purchasing cultural property. It is argued that this requirement of good faith will ultimately deter illicit trafficking of cultural property because without an act of good faith the possessor will not be compensated when he is required to return it.\textsuperscript{105} Therefore, the UNIDROIT Convention could be the most effective means of curtailing illicit trafficking because it establishes a common set of legal rules and extends its reach to pri-

\textsuperscript{101} Id. art. 3.

\textsuperscript{102} The UNIDROIT Convention requires:

(1) The possessor of a cultural object which has been stolen shall return it.

(2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

(3) Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft.

(4) However, a claim for restitution of a cultural object forming an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor.

\textsuperscript{103} Id. art. 4(5) (“The possessor shall not be in a more favorable position than the person from whom it acquired the cultural object by inheritance or otherwise gratuitously.”).

\textsuperscript{104} Id. art. 4(1).

\textsuperscript{105} See Lehman, supra note 42, at 547.
vately owned property. Unfortunately, however, only about twenty states have ratified this Convention.\textsuperscript{106}

\section*{III. LOOTING IN IRAQ}

Iraq, long considered the “cradle of civilization,”\textsuperscript{107} was home to many ancient cultures. Ancient Mesopotamia, the fertile valley of land between the Tigris and Euphrates Rivers, was inhabited by the Sumerians, Babylonians, and Assyrians.\textsuperscript{108} The historical and biblical significance of the land and its artifacts is universal to virtually all people and religions.\textsuperscript{109} There are over ten thousand officially registered archaeological sites throughout Iraq and like the National Museum, many of these sites were looted and pillaged, as well.\textsuperscript{110}

There is an unfortunate history of looting and destruction of cultural property in the Middle East. For example, after the Soviet withdrawal from Afghanistan, there was substantial looting in Kabul in 1988 at Afghanistan’s National Museum.\textsuperscript{111} Virtually all that remained was subse-

\begin{footnotesize}
\begin{enumerate}
\item List of countries that are Parties to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, www.unidroit.org/english/implement/i-95.htm.
\item Cattan, \textit{supra} note 35 (“The Tigris-Euphrates Valley is the cradle of a number of major civilizations, starting from the fifth millennium B.C.E., and the scene of events sacred to Jews, Christians and Muslims alike.”). \textit{See also} John Malcolm Russell,\textit{ Why Should We Care?}, \textit{ART JOURNAL}, Winter 2003, at 22–29 (“In Iraq are preserved the traces of the first hunter-gatherer families that roamed the Cradle of Civilization; the first villagers who invented farming and herding so they could live in one place, and the irrigation so they could live almost any place; the first city dwellers who developed royalty, writing, and religion in order to manage their environment; the first citizens of states with all the complex responsibilities that citizenship entails. The ideas of city, citizen, civic duty, civic architecture, civilization: all these arose first in Iraq. They discovered the civilization that we live today.”).
\item Rose, \textit{supra} note 40, at 87. For a more detailed description of the ancient Mesopotamian Cultures, see Andrew Lawler,\textit{ Saving Iraq’s Treasures}, \textit{SMITHSONIAN}, June 2000, at 42–46, 49–55 (discussing the history of Uruk, Ashur, Babylon, Hatra, and Summarra and the archeological significance of each city).
\item Irene J. Winter, \textit{What Can be Done to Recover Iraq’s Art?}, \textit{WASH. POST}, Apr. 27, 2003, at B3 (writing that the looted artifacts “represent ‘our’ heritage, to the extent that civilization as we know it began in the Tigris-Euphrates Valley, and to the extent that events recorded in the Old Testament, sacred to Jews, Christians and Muslims alike, are deeply rooted in Mesopotamia.”).
\item Brodie, \textit{supra} note 44 (“In the fighting that followed the Soviet withdrawal from Kabul in 1988, Afghanistan’s National Museum was ransacked. By 1996, 70 percent of the museum’s collections were missing and archaeological sites throughout Afghanistan were being devastated in the search for saleable material.”).
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quently destroyed by the Taliban in 2001. \footnote{112} Ironically, when the Iraqis occupied Kuwait in 1990, they quickly set up protections for museums and antiquities in order to steal for themselves. \footnote{113} The aftermath of the Gulf War created a thriving international market for Iraqi antiquities. The sanctions imposed on Iraq after the Gulf War \footnote{114} made resources scarce and left museums and archaeological sites open to theft. \footnote{115} Despite warnings by many international cultural experts to heed the lessons learned from previous incidents, \footnote{116} large-scale looting occurred at major museums, libraries, archives and other archaeological centers when the United States invaded Baghdad in April 2003. \footnote{117} A prominent warning was issued by the Archaeological Institute of America, urging the government

\footnote{112}{Cunning details the damage inflicted by the Taliban regime:

First, human figures in pictures were painted over. Then . . . the authorities ordered the destruction of all statues and non-Islamic shrines. The dynamiting of the huge Buddhas at Bamiyan seized most of the world’s attention. But Taliban officials also vandalized the museum, smashing the remains of the collection with hammers and axes.

Cunning, supra note 26, at 233.}

\footnote{113}{Brodie, supra note 44.}

\footnote{114}{S.C. Res. 661, U.N. Doc. S/RES/660 (Aug. 6, 1990). See John Daniszewski, Antiquities Theft in Iraq Threatens Legacy to World, L.A. TIMES, Dec. 30, 1996, at A1 (discussing how sanctions in Iraq let left the Iraqi economy in a “downward spiral, and Iraqis are selling whatever they own just to survive . . . jewelry, rugs and furniture, along with antiquities and artwork, have flooded bazaars and been taken out of the country in huge quantities.”).}

\footnote{115}{Phuong, supra note 3, at 989.}

\footnote{116}{Guy Gugliotta, Pentagon Was Told Of Risk to Museums; US Urged to Save Iraq’s Historic Artifacts, WASH. POST, Apr. 14, 2003, at A19. Gugliotta discusses the effect of the first Gulf War on looting in Iraq:

[Scholars] were especially concerned because of the example provided by the 1991 Gulf War. Allied forces had scrupulously avoided targeting Iraqi cultural sites during the bombing of Baghdad twelve years ago—one attack put only a shrapnel dent in the National Museum’s front door even as it leveled a telecommunications facility across the street. The end of that war kicked off a looting rampage, and eventually allowed systematic smuggling to develop. Artifacts from inadequately guarded sites were dug up and hauled away during the twelve years between the wars.

Id.}

\footnote{117}{Id. Baghdad fell to Coalition forces on April 9, 2003. The majority of the looting at the National Museum occurred during April 10–11. Cattan, supra note 35 (describing looting at the National Museum in Baghdad, as well as many other homes of cultural heritage, such as the National Archives, the Manuscripts Centre, and the Baghdad library).}
to “observe international treaties on cultural property, to work to mini-
mize damage to archaeological sites and artifacts, to prevent looting, and
to facilitate the preservation of Iraqi Cultural Heritage in the wake of any
conflict.” The United States, however, did little during the invasion to
protect cultural property in Iraq.  

The National Museum in Baghdad, an archaeological museum, was for
eighty years a depository for thousands of artifacts and manuscripts. Many archeological objects were kept in five storerooms in the Museum,
three of which were subject to significant looting. The items in these
rooms are among those missing, and because they were not previously
catalogued, it is extremely difficult to know exactly what has been

118. Borke, supra note 83, at 399. Additionally, there was also a warning given by
members of the United States Presidential Advisory Committee on Cultural Property.
Phuong, supra note 3, at 985 (“US army news briefing held a few days before the looting
took place indicates that US forces knew perfectly well that the Iraqi National Museum
would be a prime target for looters.”). The Archaeological Institute of America repeated
their pleas for the coalition forces to protect the museum and the archaeological sites the
day before the looting began in an April 9, 2003 letter. The letter reads:

We therefore call upon Coalition forces to provide immediate security, where
necessary, for museums and major archaeological sites; to make public state-
ments condemning the looting of sites and museums and warning that cultural
objects removed from Iraq are stolen property; and, where necessary, to make
appropriate shows of force to stop looting.

See Letter from Archaeological Institute to Officials in the Department of State, the De-
partment of Defense, the White House, and the Military (Apr. 9, 2003), available at

119. The Iraqis, however, did take precautions, particularly at the National Museum in
Baghdad. Prior to the war, the museum staff moved many of the most valuable pieces
into bank vaults and other hidden safe locations. The only items that remained in the
gallery were those that were too large or too fragile to remove or were permanently at-
tached to a display. John Malcolm Russell, We’re Still Missing the Looting Picture,
WASH. POST, June 15, 2003, at B05.

120. Lawler, supra note 108, at 42. John Malcolm Russell provides a description of the
importance of the Museum:

The Iraq Museum is a national archaeological museum, which means every-
ingthing excavated in Iraq goes there. Many of these objects, found in houses,
temples, palaces, graves, farms, towns and cities, and left behind by people
long dead who survive only in these traces, were of equal importance to those
on display.

Russell, supra note 119, at B5.

121. Russell, supra note 119, at B5.
lost. The more high profile objects that were stolen from the Museum were the Warka Vase, a sacred limestone piece from Uruk, a marble head of Poseidon, and an Assyrian ivory carving. The Warka Vase and the accompanying marble face of a woman were subsequently returned. The looting was described by United Nations Secretary General Kofi Annan as “a wound inflicted to all mankind.” The United States’ first response was to issue an amnesty program which allowed the return of any items looted, no questions asked. The amnesty program was a success from the start. By September 2003, the United States military reported that 3,411 items were recovered, 1,700 of which were returned under the amnesty program. However, 10,000 items were still missing.

Although it was later discovered that initial figures of looted objects from the National Museum were inflated, an even greater tragedy occurred in southern Iraq, where countless archaeological sites were pillaged. This looting continues today, as there are many recently reported incidents of unsanctioned excavations where thieves are stealing priceless artifacts. Regardless of the success of recovering stolen mu-

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122. This problem will be discussed in detail below. The UNESCO Convention does little to protect artifacts and other cultural property that is not certified by the State from which they came.

123. Lawler, supra note 108.

124. Rose, supra note 40, at 86 (“The Warka Vase was returned on June 12 after three unidentified Iraqis drove up to the museum and pulled it out, wrapped in a blanket, from the trunk of their car. The men, who were not interrogated, were thanked and allowed to leave.”). The Lady of Warka sculpture was returned after having circulated among five potential Iraqi sellers. Atwood, supra note 5, at B2 (writing that the last would-be Iraqi seller was “frustrated at his inability to find a buyer, buried it in an orchard, where it was retrieved after American investigators received a tip-off.”).

125. Cattan, supra note 35, at 71.

126. Id.

127. Bogdanos Investigation, supra note 6 (describing how the program has been “enormously successful”).


129. Atwood, supra note 5.

130. Russell, supra note 119, at B5 (arguing that, “[B]y far the greatest cultural disaster occurred in Southern Iraq, where looters plundered major archaeological sites.”).

131. Russell discusses the extent of the looting occurring throughout Iraq:

Ambassador Pietro Cordone, whom the Americans have appointed senior advisor to the Iraqi Ministry of Culture, took a helicopter tour throughout the south that revealed the extent of the destruction. At site after site, he observed dozens, and sometimes hundreds, of illegal diggers systematically turning the ground inside out, recovering objects favored by the export market, discarding every-
seum pieces, the pillaging of these archaeological sites represents a tragedy of enormous proportions. The United States’ and its allies’ continuing failure to protect these sites from looters has also been compounded by accusations of damage inflicted by coalition military equipment. The United States’ and its allies’ continuing failure to protect these sites from looters has also been compounded by accusations of damage inflicted by coalition military equipment. The China Daily proclaimed: “It is immoral for the United States to destroy Iraq’s culture while trying to rebuild the country economically and politically. The self-proclaimed ‘liberators’ cannot escape worldwide criticism at a time when UNESCO is launching a strong campaign across the world to protect endangered cultural heritages.”

Claims that the archaeological and cultural property was better protected under Saddam Hussein’s regime were also made. Even if the archaeological items were to be recovered, a concern is that looters destroy the thing else. In the process, everything of real value about these objects, is destroyed, their stories lost forever.

Id. Atwood also describes the widespread looting at archaeological sites he witnessed:

Every ancient site I saw in Iraq last year was under assault. At the biblical city of Nimrud, I saw where professional looters had chiseled out carvings decorating the imposing stone walls of the palace of King Ashurnasirpal II. Those pieces have disappeared, sold into the illicit antiquities market and presumably now sitting in some collector’s room.

Atwood, supra note 5.

132. Id. (“Reports suggest the pillaging has since grown much worse. The buried remains of the 4,000 year old Sumerian City of Isin have been turned upside down by hundreds of illegal diggers.”).

133. An article from Australia, Iraq’s Invaders Accused of Crimes Against Antiquities, WEEKEND AUSTRALIAN, Aug. 7, 2004, at 25, details complaints made by Iraqi officials:

Interim cultural minister Mofeed al-Jazeeri, fed up with Polish forces stationed at Babylon . . . renewed accusations that they were causing irreparable harm to valuable sites and urged them to leave . . . . “We have received information that damage has been done to several archaeological sites . . . . Just their presence, with their heavy equipment, is harmful in and of itself.”

134. Id.

135. Id. (quoting Al-Jazeera: “Large parts of [ancient Babylon] were reconstructed and restored to its former glory by Iraq’s former president Saddam Hussein in an attempt to restore ancient historical sites preserving Iraq’s rich and diverse history.”). See also Eagar, supra note 12 (quoting Sarah Collins, a curator with the Ancient Near East Department of the British Museum who worked with the Baghdad Museum for several months during the amnesty program, “Looting wasn’t a problem under Saddam. He beheaded a couple of looters and that put a stop to it.”). But see Daniszewski, supra note 114 (describing widespread looting and plundering throughout Iraq after the Gulf War and the inability of the government to control such pillaging).
ability of scientists to gain contextualized archaeological information.\textsuperscript{136} Iraq’s oldest cities—Nineveh, Uruk, Isin—are being robbed, and, unlike catalogued items at the National Museum, there are no inventories to determine what priceless treasures have been stolen.\textsuperscript{137}

IV. UNESCO AND INTERPOL RESPOND TO THE LOOTING

Immediately after the major looting occurred in April 2003, UNESCO, Interpol, and the United States took action to prevent the illicit trafficking of the stolen goods and to prevent further looting.\textsuperscript{138} The plan included embargoing sales of Iraqi artifacts, encouraging their return, creating an inventory of lost artifacts, locating the stolen objects and attempting to repair the damaged ones.\textsuperscript{139} A significant impediment to the recovery and return of stolen Iraqi cultural property is the uncertainty about what was stolen and what remains.\textsuperscript{140} Realizing this, the United States, UNESCO, and other international organizations began creating an inventory of the artifacts at the museum.\textsuperscript{141} However, because a great deal of the artifacts which were stolen were not previously catalogued, it is virtually impossible to make a definitive list.\textsuperscript{142} Of course, this problem does not take into account the massive looting that occurred, and continues to occur, at countless archaeological sites through Iraq, where artifacts are also not catalogued.

\textsuperscript{136} Borke, \textit{supra} note 83, at 403.
\textsuperscript{137} Eagar, \textit{supra} note 12, at 4.
\textsuperscript{138} Rose, \textit{supra} note 40 (“Scholars, curators, UNESCO, Interpol and U.S. investigators, among others, immediately scrambled to launch perhaps the largest treasure hunt the world has ever known.”).
\textsuperscript{139} Lawler, \textit{supra} note 108.
\textsuperscript{140} The Bogdanos Investigation discusses the importance of addressing this difficulty:

\begin{quote}
Foremost among the challenges has been identifying exactly what is missing. In part, this is because of the sheer size of the museum’s collection and because the museum’s storage rooms contained not only catalogued items, but also items from various excavation sites that had not yet been catalogued.
\end{quote}

\textsuperscript{142} Bogdanos Investigation, \textit{supra} note 6.
UNESCO also attempted to implement immediate legislation that would help recover stolen cultural property from Iraq.  

Realizing that there are many countries that are not parties to the UNESCO Convention, it pressed the Secretary General and the Security Council to pass a resolution binding all states to its provisions. On May 22, 2003, the United Nations Security Council passed Resolution 1483. Since the Resolution was adopted under Chapter VII of the United Nations Charter, it is binding on all member states. There are two significant aspects of Resolution 1483. The first is that it extends to all objects stolen from Iraq since 1990, not only those stolen during 2003. The second is that Resolution 1483 calls upon member states to establish a prohibition not just on stolen items, but also those that are reasonably suspected of being stolen.

UNESCO has also sent missions to Iraq to assess the situation and has created the International Coordination Committee for the Safeguarding of the Cultural Heritage in Iraq (ICC). The ICC met over a two day

143. Phuong, supra note 3, at 992.
144. Id. Phuong translates a speech by Mounir Bachenaki, the Assistant Director-General for Culture of UNESCO:

There are many countries that are not parties to the 1970 Convention and this is the reason why we thought that, even for a temporary period, a decision that is taken for all States, even those that have not signed the 1970 Convention, would allow us to fight more efficiently against the import of objects from Iraq.

Id.

145. S.C. Res. 1483, ¶ 7, U.N. Doc. S/RES/1483 (May 22, 2003) (“All Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of Resolution 661 (1990), including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon UNESCO, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.”).

146. This was done to cast a wider net in catching all artifacts looted from Iraq and to stifle trade even further.


period in late May of 2004, and issued a series of seven recommendations.149 The most important of these recommendations was to “coordinate international action and channel international aid—both bilateral and multilateral—with a view to ensure the implementation of the strategy for the safeguarding of the cultural heritage in Iraq and assess its overall monitoring.”150

Interpol has also made significant efforts to recover cultural property looted from Iraq. Interpol has created the Interpol Tracking Task Force to Fight Illicit Trafficking in Cultural Property Stolen in Iraq (ITTF).151 The ITTF’s main focus is on the dissemination and centralization of information relating to the Iraqi cultural property crisis in order to more effectively pursue law enforcement.152 Interpol has also held a Regional Meeting to Fight the Illicit Trafficking of Cultural Property Stolen From Iraq in Amman, Jordan on June 1–2, 2004.153 The meeting was well attended by delegates from the Middle East, Europe, and the United States.154 The Regional Meeting proposed a series of recommendations, perhaps the most important of which was the recommendation that countries that have not yet signed the UNESCO Convention and the UNIDROIT Convention should do so as soon as possible.155

Progress toward recovering stolen Iraqi cultural property has been made. At a conference in June 2004, Iraq’s General of Museums, Donny George, stated that through coordinated efforts by government and law enforcement agencies in the sixteen months following the looting of the National Museum some 5,200 pieces out of 13,000 had been recovered in six countries.156 In Iraq itself, more than 3,000 objects have been seized or returned to the museum.157 Additionally, in the United States,
roughly 600 antiquities known or suspected of being from Iraq have been recovered in airports.\textsuperscript{158}

V. ANALYSIS OF CURRENT CONVENTIONS AND THEIR APPLICABILITY TO IRAQ

A. 1954 Hague Convention and Iraq

Immediately following the looting of the Iraqi National Museum, the United States forces were heavily criticized for failing to prevent the incident.\textsuperscript{159} Warnings had been given to the U.S. military and past experiences indicated that such looting was likely.\textsuperscript{160} To what extent, however, can the United States be held legally responsible for the wide-scale looting? What were its obligations under international law to prevent the looting of the Museum and the subsequent looting of archeological sites throughout Iraq?

The United States is a party to the 1907 Hague Convention which provides that damage to cultural or historical property should be avoided during military campaigns.\textsuperscript{161} Since the United States did not damage any of the Museums directly, it cannot be held responsible under this convention.\textsuperscript{162} The 1954 Hague Convention, the most significant treaty relating to cultural property during an armed conflict, is also inapplicable to the present conflict. Unfortunately, the United States, along with the United Kingdom, are not parties to the Convention.\textsuperscript{163} Some scholars argue, however, that the 1954 Hague Convention has become a part of international customary law.\textsuperscript{164} One commentator argues that Article 4(3) of the 1954 Hague Convention has reached customary status because it is “es-

\textsuperscript{158} Id.


\textsuperscript{160} Many museums and archaeological sites were extensively looted during the first Gulf War. Id. Richard Moe, president of the National Trust for Historic Preservation wrote to Secretary of State Colin. L. Powell to urge the United States to safeguard the collections at the Iraqi National Museum. Id.

\textsuperscript{161} See List of 114 State Parties to the Hague Convention, supra note 56.

\textsuperscript{162} There have been no claims to date that the United States military, or any member of its Coalition, has directly damaged any museums in Iraq.

\textsuperscript{163} See List of 114 State Parties to the Hague Convention, supra note 56. The United Kingdom, however, is taking steps to become a party to the Convention. Phuong, supra note 3, at 988 (“The Secretary of State for Culture, Media and Sport recently announced to the House of Commons Select Committee on Culture, Media and Sport that the UK intends to become a party to the Convention and its second Protocol.”).

\textsuperscript{164} See Phuong, supra note 3, at 987; see also Keane, supra note 23, at 21–22.
sentially an elaboration of the general obligation under international law for an occupying force to maintain law and order in the territory it occupies, as provided in Article 43 of the 1907 Hague Regulations.\textsuperscript{165} Additionally, the United States itself, during the 1991 Gulf War, acted in accordance with the general principles of the 1954 Hague Convention when they avoided attacking any cultural sites.\textsuperscript{166} The most significant indicator that at least part of the 1954 Hague Convention may be a part of customary international law came out of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which explicitly ruled that Article 19 of the 1954 Hague Convention had been incorporated into the customary law of war.\textsuperscript{167}

The United States, however, would not be in violation of international law regardless of whether the 1954 Hague Convention has attained customary status. Colonel Bogdanos\textsuperscript{168} report reveals that United States

\textsuperscript{165} Phuong, supra note 3, at 987.

\textsuperscript{166} Cunning describes how the United States, through its actions, complied with the 1954 Hague Convention:

In the Gulf War, the United States and Coalition forces were faced with the decision of whether to attack an Iraqi military target which was intentionally situated by the Sumerian temple, a historic building. The decision was made that the target should only be attacked if it was an absolute necessity so the temple would not suffer any collateral damage. Although the Coalition forces were not bound by the obligations of the 1954 Hague Convention, they acted in accordance with it, and they recognized the Convention as “an advisory document.”

\textsuperscript{167} 1954 Hague Convention, supra note 13, art. 19 (“In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.”); Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 98 (Oct. 2, 1995) (“The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and that of treaty law. Two bodies of rules have thus crystallized, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Convention, as was authoritatively held by the International Court of Justice (Nicaragua Case, at 218), but also applies to Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954.”).

\textsuperscript{168} Colonel Matthew Bogdanos was the head of a fourteen man task force to investigate the looting at the Iraq Museum in April 2003. Paul Sullivan, \textit{Lunch with FT, Fin. Times}, Nov. 27, 2004, at 14.
forces were unable to secure the Museum because these forces “became engaged in intense combat with Iraqi forces fighting from the museum grounds and from a nearby Special Republican Guard compound.”\textsuperscript{169} That U.S. forces were under fire from the Museum vicinity justifies their alleged inaction with regard to the prevention of looting. Additionally, since Iraq is a party to the 1954 Hague Convention, its military was under an obligation not to use the Museum or any other culturally significant site for military purposes.\textsuperscript{170}

The United States, as well as the United Kingdom and other allies, should sign and become parties to the 1954 Hague Convention and its Second Protocol. Although it is clear from past actions that United States military forces generally follow the provisions of the Convention,\textsuperscript{171} it will still be beneficial to both the United States and the world if the United States was to ratify it. Unfortunately, it is unlikely that the invasion of Iraq will be the last military intervention exercised by the United State and its allies. The United States may bring further military action in the Middle East, where virtually all nations have a large amount of ancient cultural property. Ratifying the 1954 Hague Convention and complying with its provisions will go a long way in preventing future incidents of damage to cultural property and help the United States win popular support for its actions.

**B. UNESCO Convention, UNIDROIT Convention and Iraq**

The UNESCO Convention, providing for the restitution of stolen cultural property not only during armed conflict but also during times of peace,\textsuperscript{172} would be the most applicable instrument for the recovery of the stolen Iraqi items. Many countries and organizations cite the UNESCO Convention as a means of recovering the cultural property from Iraq.\textsuperscript{173}

The need for more states to join the UNESCO Convention is based on

\textsuperscript{169} See Bogdanos Investigation, supra note 6; see also Trofimov, supra note 3 (reporting that U.S. forces were unable to secure the Museum until April 16 because there was an Iraqi army trench in the Museum’s front lawn).

\textsuperscript{170} See Hague Convention, supra note 13, art. 4(1) (“The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.”).

\textsuperscript{171} See Cunning, supra note 26, at 228.

\textsuperscript{172} UNESCO Convention, supra note 14, pmbl.

\textsuperscript{173} See Regional Meeting to Fight the Illicit Trafficking of Cultural Property Stolen from Iraq, supra note 153.
the premise that restitution of cultural property is not considered to be a part of customary international law. Western nations have been reluctant to incorporate such restitution into customary law because these states have removed many items from countries which they have colonized or occupied and do not want to return them. Therefore, the only way to require states to participate in the restitution process is if they are State Parties to the UNESCO Convention.

The United States, United Kingdom, and Iraq are all parties to the UNESCO Convention. After initial reservations, the United States became a State Party to the UNESCO Convention in 1983 with the adoption of the Convention on Cultural Property Implementation Act (CPIA). The United Kingdom became a State Party only recently in 2002. The late ratification allowed the United Kingdom to become a very attractive place for smugglers to sell stolen art items because there was no requirement for a British art dealer to see a valid exportation certificate. Iraq, however, became a State Party very early on, ratifying the UNESCO Convention in 1973.

174. Because the restitution of cultural property is not recognized under customary international law, the only way for such restitution to be enforced is through the creation and enforcement of treaties.

175. Phuong discusses the reluctance of Western nations to join the UNESCO Convention:

There is no general obligation of restitution of cultural property in customary international law, mainly because Western countries have removed a high number of items from the countries which they had colonized and/or temporarily occupied and do not wish to return them. Instead, international obligations to return cultural property can be found in treaties which often cover only certain items and are subject to some conditions.

Phuong, supra note 3, at 989.

176. List of states that are parties to the UNESCO Convention, supra note 75.

177. Borke, supra note 83, at 407–08 (“The United States has historically resisted international pressure to broaden restrictions on the importation of art from foreign countries.” After lobbying for a change in language from the original 1969 draft of the Convention, “[t]he Senate approved the revised UNESCO Convention. . . . The United States ratified [it] in 1972 and formally implemented it through legislation in 1983, becoming the first market nation to do so.”). The legislation that implemented the Convention was the Convention on Cultural Property Implementation Act (CPIA) signed on January 12, 1983. The Act codified Articles 7(b) and 9 of the UNESCO Convention into U.S. law. Id. at 410.

178. List of states that are parties to the UNESCO Convention, supra note 75.

179. Phuong, supra note 3, at 991.

180. List of states that are parties to the UNESCO Convention, supra note 75.
Unfortunately, regardless of membership, the UNESCO Convention is inadequate to properly deal with the current crisis in Iraq. The Convention may have been helpful considering Iraq is a State party. However, there is confusion over whether the Coalition Provisional Authority had power to act under that capacity or whether the newly installed Iraqi government is still able to act as a State Party.\(^{181}\) A determination of the new government’s status with relation to international treaties and conventions must be made. Even assuming that the Iraqi government could act as a State Party to the Convention, there are limits and glaring deficiencies within the Convention itself that make its application here problematic. The most significant problem involves the identification of the items that were stolen from the National Museum,\(^{182}\) and the further difficulties of identifying those unmarked items taken from countless archaeological sites. Article 7(b) of the UNESCO Convention provides that State Parties must prohibit the importation of cultural property stolen from museums in other State Parties provided that such cultural property is documented as belonging to that institution.\(^{183}\) Therefore, it will be difficult to recover the thousands of undocumented items that were stolen from the storage rooms at the Museum, and virtually impossible to recover the cultural property taken from the archaeological sites. Additionally, there are enormous procedural steps that are imposed by the Convention that will be difficult for the new government in Iraq to implement.\(^{184}\)

The UNIDROIT Convention, created to address some of the shortcomings of the UNESCO Convention,\(^{185}\) is unfortunately inapplicable to the present situation. Neither Iraq, the United Kingdom, the United States,  

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181. If Iraq is not considered to be a State Party to the Convention then it will be unable to seek restitution of stolen cultural items in the United States. Without a formal government, Iraq is unable to meet the first requirement of the CPIA, that the government of a State Party must make a formal request for the imposition of import restrictions. See Borke, supra note 83, at 426. Borke also writes that “[i]t is also debatable whether Iraq, absent a formal government, legally remains a State Party to the Convention. Furthermore, Iraq will not be able to satisfy the CPIA requirement that it ‘has taken measures consistent with the Convention to protect its cultural property.’” Id.

182. See Bogdanos Investigation, supra note 6 (“Foremost among the challenges has been identifying exactly what has been missing.”).

183. UNESCO Convention, supra note 14, art. 7(b).

184. Phuong, supra note 3, at 991 (“The Convention itself has some shortcomings because it mainly relies on cumbersome procedures which require the setting up of new administrative structures in order, for instance, to implement the certification system.”).

185. Lehman, supra note 42, at 543.
nor any other Western free-market nation is a party to the UNIDROIT Convention.186

V. RESOLUTION 1483 AND DOMESTIC LEGISLATIVE RESPONSES

The United Nations Security Council Resolution 1483, passed on May 22, 2003,187 may be the most hopeful prospect for the restitution of Iraqi cultural property. The Resolution states that “all Member States shall take appropriate steps to facilitate the safe return . . . of Iraqi cultural property” which includes “establishing a prohibition on trade in or transfer of such items.”188 Resolution 1483 essentially requires all Member States to implement legislation in order to curb the illicit trade of stolen cultural property from Iraq.189

In the United Kingdom, the Iraq Order 2003, adopted to implement Resolution 1483, prohibits the import or export of any item illegally removed from Iraq.190 Switzerland, notoriously known as a market for illicit sales of artifacts,191 feeling pressured by Resolution 1483, finally ratified the UNESCO Convention in October 2003.192 The United States has proposed legislation in an attempt to close loopholes and remedy inadequacies in its domestic law even before the Security Council passed Resolution 1483.193 The Iraq Cultural Heritage Protection Act was intro-

186. List of countries that are parties to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, supra note 106.
188. Id. para. 7.
189. Id.
190. Phuong describes how the Iraq Order 2003 operates:

It creates two offenses with regard to stolen Iraqi cultural property. First, anyone who holds or controls a stolen Iraqi cultural item must transfer it to the police. If he does not, he is guilty of an offense of omission under Article 8(2). Secondly, anyone dealing with a stolen Iraqi item is also guilty of an offense under Article 8(3).

Phuong, supra note 3, at 993. See also Atwood, supra note 5 (“[The British] enacted legislation, that for the first time, made it a crime to buy or sell illegally excavated or removed antiquities in that country, whatever the origin. Officials in [the United Kingdom] had talked about these changes for years, but the “Baghdad disaster proved the impetus” to making them a reality.”).
191. The civil laws in Switzerland, which favor innocent purchasers, have created a legal loophole, allowing for the “laundering” of large quantities of stolen cultural property. Borke, supra note 83, at 390 (“Switzerland, in particular has a thriving market in cultural material and objects bought there can be sold legitimately in the U.K. or U.S.”).
192. Atwood, supra note 5.
193. See Borke, supra note 83.
duced on May 7, 2003, in the House of Representatives. The bill proposes to “provide for the recovery, restitution, and protection of the cultural heritage of Iraq” by imposing a restriction on all “archaeological” and “cultural” material removed from Iraq after August 2, 1990. The Senate proposed its own piece of legislation on June 19, 2003, the Emergency Protection for Iraqi Cultural Antiquities Act of 2003, allowing the President to impose importation restrictions on all archaeological and cultural property from Iraq without Iraq having to make a formal request. Thus, the bill circumvents the problem of whether Iraq has retained its rights and capabilities under the UNESCO Convention and the CPIA. Additionally, the bill defines the materials that may be protected more broadly than the CPIA does, and includes all materials of “archaeological, historical, cultural, rare scientific or religious importance.” The House and Senate eventually passed a bill, the Emergency Protection for Iraqi Cultural Antiquities Act of 2004, on November 19, 2004 and it was signed into law by President George W. Bush. The passage of this bill will undoubtedly make it easier to stop trafficking of illegally seized cultural property from Iraq by heightening the standards at the borders and allowing for the CPIA to be enacted without a formal Iraqi request. More States must recognize the importance of passing new legislation that allows them to tighten borders and waive certain stringent requirements of the UNESCO Convention.

195. Id.
197. Id.
198. By waiving the requirement that Iraq make a formal request before the President can impose import restrictions pursuant to his authority under section 2603 of the CPIA, the proposed legislation effectively eliminates the question of whether Iraq has a functioning recognizable government for the purposes of international interaction.
199. S. 1291, supra note 196.
VI. CONCLUSION

Cultural heritage is the hallmark of humanity, the identity of civilizations, and the one thing common to all peoples. The continued looting and destruction of cultural property in Iraq is an all too common tragedy. Although the effects of armed conflict have destroyed cultural property for centuries, the international community has not been successful in preventing such incidents.

The current conventions in place to protect cultural property are inadequate to deal with the situation in Iraq. This inadequacy stems from a lack of commitment from States to become part of these agreements and make serious efforts to protect cultural property. Countries such as the United States and United Kingdom should sign and become State Parties to the 1954 Hague Convention because they are, unfortunately, likely to engage in future military interventions. These military operations may occur in the Middle East where, similar to Iraq, many nations are rich in cultural property. The realities of armed conflict, however, require military commanders to place a premium on lives above property. Minimum standards can still be observed during armed conflict; ratifying the 1954 Hague Convention and acting within its provisions will help to ensure that future incidents do not occur. Showing the world that they are serious about the protection of cultural property and sensitive to cultural heritage overall will help the United States and United Kingdom gain much needed global support.

The end of looting in Iraq and the return of pillaged goods will take time. Fortunately, UNESCO, Interpol, and most countries throughout the world have recognized the problem and are doing all they can to return the items and develop ways to prevent future incidents.202 The most important thing that must be done is to ensure that all States have implemented the necessary domestic legislation to comply with Security Council Resolution 1483. The problem of illicit trafficking can best be addressed at the domestic level, particularly at the borders. There has

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202. The United Nations announced on October 27, 2004, the creation of a new rapid reaction task force to step in wherever cultural property is threatened during times of armed conflict and national disaster. The group, called “the cultural blue berets,” will initially be formed entirely of Italians, because of their artistic expertise. Under the terms of the plan, the government of the affected country will first contact UNESCO. If officials in Paris judge the case to be sufficiently serious and urgent, they will then contact Rome who will set up an ad-hoc team to be dispatched to the location. John Hooper, UNESCO’s ‘Blue Berets’ to Rescue Cultural Treasures, GUARDIAN (London), Oct. 28, 2004.
already been a great deal of success, particularly in the United States, where roughly six hundred antiquities known or suspected of being smuggled from Iraq have been recovered. The media attention and worldwide outrage over the looting at the National Museum in Baghdad provides an unprecedented opportunity for the nations of the world to address the problem in a constructive manner. Hopefully, the world can learn from the tragedy in Iraq and strive to promote respect and protection for the cultural heritage of all mankind.

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203. Atwood, supra note 5 (“[G]overnments have adopted the kinds of measures that advocates of cultural patrimony have been urging for years—and they got results. Italy has confiscated on its soil more than 300 pieces looted from the Baghdad museum. Syria has confiscated 200.”). Jordan has also confiscated a large number of pieces. Id.

204. One high profile case involving an American expert on Iraq’s postwar reconstruction, Joseph Braude, settled in U.S. District Court in New York on November 22, 2004. Braude was sentenced to six months for trying to smuggle into the United States 4,000-year-old artifacts stolen from Iraq’s National Museum. (Scholar sentenced in Artifact Smuggling, CIT. TRIB., Nov. 23, 2004, at 9.)

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